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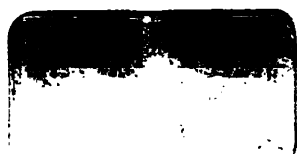
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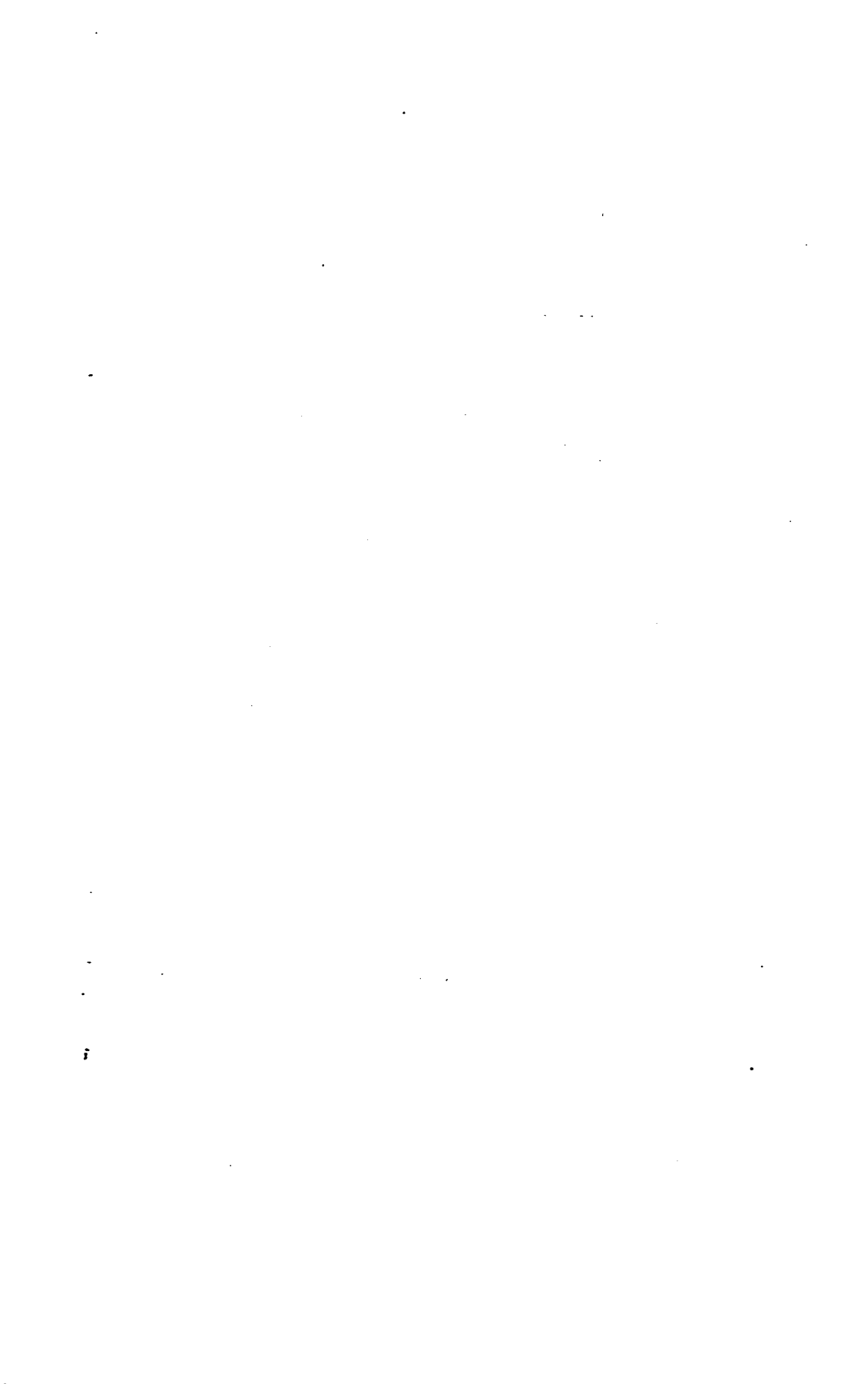
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# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

**SPELLING**—(See also INDICTMENT, vol. 10, p. 548; NAME, vol. 16, p. 122).—The formation of words by letters; orthography.

Incorrect spelling does not vitiate a written instrument, if the intention clearly appears.<sup>1</sup> This rule applies with full force to the written verdict of a jury, it having been frequently held that when the sense is clear, neither bad spelling nor ungrammatical findings avoid the verdict.<sup>2</sup>

1. Black's L. Dict.; Bouv. L. Dict.; State v. Hedge, 6 Ind. 330.

**Incorrect Spelling Disregarded.**—Incorrect spelling was disregarded in the following cases: "Octagenta," "Septemgentia," "Sewtene Pounds," cited James Osborn's Case, 10 Rep. 133a; "quadrans," Cromwell v. Grunsden, Salk. 462; 1 Ld. Ray. 335; 5 Mod. 278; "Tenerie and Obligarie," Dodson v. Kayes, Yelv. 193; "nobules" for "nobilibus," Matthew v. Purchins, Cro. Jac. 203; "threty-two ponds," for thirty-two pounds, Hulbert v. Long, Cro. Jac. 607; "Joaem," without any dash over it, for "Johannem," "quin-ginta," Downs v. Hathwaite, Cro. Car. 418; "Terdecem," Hopehill v. Searle, Cro. Car. 386; "Septuagintis" for "Septingentis," Walter v. Pigot, Moore 645; see also Cro. El. 896; "Octogessim," Moore 864; see other cases collected, 2 Rolle Abr., p. 146 *et seq.*, tit. "Obligation."

In Hogans v. Carruth, 19 Fla. 90, the court, by Westcott, J., said: "As to the mistake in spelling the word presence, it is entirely immaterial. . . . The law fortunately is far from being strict in requiring any great accuracy or precision in respect to what is written, so far as the rules of grammar or orthography are concerned, or as to the chirography or evenness of the page or the straightness of the lines."

In Watters v. Bredin, 70 Pa. St. 237,

after reciting a deed the court said: "I have omitted the inaccuracies in spelling, for *mala grammatica non vitiat chartam.*"

**Cases Where the Badly Spelled Word Was Held to Avoid the Deed.**—"Teneri in terengentate liberis," Hills v. Cooper, Cro. Jac. 603; "Octigent," Fitzhughe's Case, Hob. 19; "Quim-quagant," Parry v. Dale, Yelv. 95.

See as to the effect of bad spelling, whereby it is doubtful what is meant, Fielder v. Troy, Sty. 257.

2. Snyder v. U. S., 112 U. S. 216; Koontz v. State, 41 Tex. 570; Haney v. State, 2 Tex. App. 504; Krebs v. State, 3 Tex. App. 349; Taylor v. State, 5 Tex. App. 569; McCoy v. State, 7 Tex. App. 379; Pepper v. Harris, 78 N. Car. 71.

Thus in Hoy v. State, 11 Tex. App. 32, where a verdict of guilty was found, the jury assessed the defendant's punishment at "two years in the State penitenilery." The court, by White, J., said: "As to the verdict, the misspelling of the word 'penitentiary' is upon a par with the spelling of the same word in the verdict in the case of McMillan v. State, 7 Tex. App. 100, in which it was held that misspelling does not vitiate a verdict, when no doubt can be entertained as to the words intended, or as to their meaning."

In McCoy v. State, 7 Tex. App. 379, the verdict assessed the prisoner's

The rule of *idem sonans* has received exhaustive treatment in another article.<sup>1</sup> In addition to the numerous cases there cited as illustrative of the doctrine, the following lists are appended.<sup>2</sup>

punishment at "a five years in the State prison." This was held a sufficient verdict.

In *Wooldridge v. State*, 13 Tex. App. 443; 44 Am. Rep. 708, it was held that a verdict in a murder case which read, "We the jury find the defendant guilty of murder in the first degree," was insufficient, illegal, and would not support a judgment of conviction. The case has been much criticised. See 27 Alb. Law J., pp. 341, 381, 422; 16 Cent. L. J. 361, 378, 415.

In *Walker v. State*, 13 Tex. App. 618, the court held the verdict of "guilty of mrder in the first degree" to be valid. The court recalls this decision with its decision in the case just cited as follows: "By the ninth assignment of error the sufficiency of the verdict as returned into court, and upon which the judgment of conviction is based, is called in question. This verdict as we copy it from the judgment entry, the original not having been sent up with the record, reads as follows: 'We the jurors finde the defendant guilty and of mrder in the first degree, and assess his confinement in the penitentiary for life.' It is objected to this verdict, (1) that it finds defendant guilty of no offense known to the law; and (2) that it does not assess the punishment as required by law. It will be perceived that in the verdict the defendant is found guilty of 'mrder,' the letter 'u' being left out of the word which the jury evidently intended to use. In the *Wooldridge* case, decided by this court at the present term, ante, 443, the rules governing verdicts in murder cases were elaborately discussed, and it is unnecessary for us to reiterate them. In that case the word 'fist' was used in the verdict, instead of the word 'first,' in finding the degree of the murder. It was held that these two words were well known and commonly used words, having entirely different meanings, and not sounding alike, and that the one could not be substituted for the other, or construed to mean the other, and that the verdict was insufficient. It was, however, expressly stated in the opinion in that case, that as the word 'fist' used in the verdict did not have the sound of the word 'first,' which should have been used,

the question of *idem sonans* was eliminated from the case, and was not considered. In the case before us the question of *idem sonans* does arise, and directly affects the verdict. If the word 'mrder' used in the verdict is not *idem sonans* with the word 'murder,' then manifestly this verdict is insufficient and must be set aside. But if the words are *idem sonans*, then the verdict must be sustained, notwithstanding the bad spelling of the word in the verdict, for it is well settled that incorrect orthography or ungrammatical language will not vitiate a verdict. *Taylor v. State*, 5 Tex. App. 569; *Koontz v. State*, 41 Tex. 570; *McMillan v. State*, 7 Tex. App. 100; *Curry v. State*, 7 Tex. App. 91. In applying the doctrine of *idem sonans*, the rule is that if the words may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the words are *idem sonans*, and the variance is immaterial. *Henry v. State*, 7 Tex. App. 388; *Ward v. State*, 28 Ala. 53; *Gresham v. Walker*, 10 Ala. 370; *Gahan v. People*, 58 Ill. 160. Applying this rule to the word 'mrder,' used in the verdict, we hold it to be *idem sonans* with the word 'murder,' as properly spelled, and that the variance in the orthography of the two is not a material one, but that their sound is so nearly the same, when pronounced, that there is scarcely, if in fact, any difference. They are not different words correctly spelled and not sounding alike, as in the *Wooldridge* case, before referred to, but are in fact the same word differently spelled, but sounding alike. We think also that the doctrine of *idem sonans* applies to and governs verdicts in the same manner, and to the same extent, that it does in other matters. *Haney v. State*, 2 Tex. App. 504; *Taylor v. State*, 5 Tex. App. 569; *Huffman v. Com.*, 6 Rand. (Va.) 685; *Williams v. State*, 5 Tex. App. 226; *State v. Smith*, 33 La. Ann. 1414." See also *NAME*, vol. 16, p. 122.

**Indictments.**—The effect of misspelling in an indictment is fully treated under the title *INDICTMENT*, vol. 10, p. 548.

1. See *NAME*, vol. 16, p. 122.

2. *Idem Sonans*.—*Abbotsan and Abbasan, Cotton's Case*, Cro. Eliz. 258;

- Adderson and Anderson, Van Pelt v. Pugh, 1 Dev. & B. (N. Car.) 210; Augustine and Augustina, Com. v. Desmarteau, 16 Gray (Mass.) 15; Aramanti and Amaranti, Musquez v. State, 41 Tex. 226; Bagswell and Bagwell, Case v. Bartholow, 21 Kan. 300; Baswell and Basil, Hyde v. Watson, 1 Den. (N. Y.) 670; Berry and Barry, Rateree v. State, 53 Ga. 570; Beton and Belton, Belton v. Fisher, 44 Ill. 32; Biddulph and Puthuff, Pillsbury v. Dugan, 9 Ohio 120; 34 Am. Dec. 427; Blackman and Blackburn, Miller v. State, 53 Miss. 403; Boswell and Roswell, Brookings v. Dearmond, 27 Ga. 58; Braddy and Brady, Dickerson v. Brady, 23 Ga. 161; Buter and Butler, Reeves v. State, 20 Ala. 33; Byles and Bayless, Hoagland v. Culvert, Spenc. 288; Byrne and Burns, State v. Burns, 8 Nev. 251; Cahew and Cahill, State v. Thompson, 20 N. H. 250; Corrigan and Corgan, Prince v. McLean, 17 U. C. Q. B. 463; Coonrod and Conrad, Carpenter v. State, 8 Mo. 291; Currier and Kiah, Tibbets v. Kiah, 2 N. H. 557; Daniel and David, Jackson v. Stanley, 10 Johns. (N. Y.) 133; David and David, Com. v. Riggs, 14 Gray (Mass.) 376; 77 Am. Dec. 333; Davies v. Pratt, 16 C. B. 586; 81 E. C. L. 586; and Davids, Taylor v. Com., 20 Davis (Va.) 825; Danden and Darden, v. Turner, 25 La. Ann. 573; De and De Hurst, Mortimer v. Oger, Eliz. 258; Domick and Domeck, v. Com., 5 Bush (Ky.) 376; Douglas and Dugald, Barnes v. People, 18 Ill. 52; Edward Charles and Charles Edward, Hands v. Clement, 11 M. & W. 816; Edward E. T. and E. E. T., Union Bank v. Tillard, 26 Md. 446; Edward and Edwin, Mann v. Birchard, 40 Vt. 326; Grant v. Clapp, 106 Mass. 453; Elbertson and Elbertson, Elbertson v. Richards, 42 N. J. L. 70; Ellen and Helen, Taylor v. Com., 20 Gratt. (Va.) 829; Erlin and Erlwin, Cromwell v. Grundsen, Salk. 462; Farely and Farley, Leonard v. Wilson, 2 C. & M. 589; Flory and Florez, State v. Florez, 5 La. Ann. 429; Foster and Forster, Rutland v. Forster, Cro. Jac. 77; Franciscus and Francis, Griffith v. Middleton, Cro. Jac. 425; Garret and Jared, Graham v. Roberts, 1 Head (Tenn.) 56; Gigger and Jiger, Com. v. Jennings, 121 Mass. 47; 23 Am. Rep. 249; Gardiner and Gardner, and Gravaier and Gravier, Rector v. Taylor, 12 Ark. 128; Harman and Herman, Kahn v. Herman, 3 Ga. 266; Hopper and Harper, Jester v. Hopper, 13 Ark. 43; Harris and Harrison, State v. France, 1 Overt. (Tenn.) 434; Henderson and Henry, Henry v. Curry, 1 Abb. Adm. 433; Hubble and Hubbles, Cotton v. State, 4 Tex. 260; Hudson and Hutson, Chapman v. State, 18 Ga. 736; Hutchinson and Hutcheson, State v. Stedman, 7 Port. (Ala.) 495; Janes and James, Janes v. Whitbread, 11 C. B. 406; 73 E. C. L. 406; Jna. and Jno., U. S. v. Hinman, Baldw. (U. S.) 292; Joan and Jane, Griffith v. Middleton, Cro. Jac. 425; Keeland and Kneeland, Hammond v. Reddin, Dudley (Ga.) 177; Land and Lance, Davenport v. State, 38 Ga. 184; Lington and Lincoln, Armstrong v. Colby, 47 Vt. 359; Litherbarrow and Letherbarrow, Letherbarrow v. Ward, 5 Jur. 388; Little and Lytle, Lytle v. People, 47 Ill. 422; Littlemore and Lidamore, Parker v. People, 97 Ill. 32; Loyons and Lyons, Roe v. Doe, 32 Ga. 39; Lutle and Little, O'Neil v. State, 48 Ga. 66; McConnellsbury and Connelsburg, Gibson v. Gibson, 20 Pa. St. 9; Margaret N. and Margaret Ann, Dilts v. Kinney, 15 N. J. L. 130; Malay and Mealy, Com. v. Donovan, 13 Allen (Mass.) 571; May and Mayo, Mayo v. State, 7 Tex. App. 342; Mawre and Moore, Countess of Rutland's Case, 5 Co. 42; Montague and Montague, State v. Montague, 2 McCord (S. Car.) 257; Mordern and Modern, Langdale v. People, 100 Ill. 263; Moss and Morse, Litchfield v. Farmington, 7 Conn. 108; Ogilbee and Ogilbee, Hamilton v. Langley, 1 McMull. (S. Car.) 498; O'Mara and O'Meara, O'Meara v. North America Min. Co., 2 Nev. 112; Palus Cheal and Paulus Cheale, Codwell's Case, 5 Co. 42; Peirs and Peter, Griffith v. Middleton, Cro. Jac. 425; Peregran and Peregrine, Dunn v. Clements, 7 Jones (N. Car.) 58; Pettis and Pittis, Hutto v. State, 7 Tex. App. 44; Pillsby and Pillsbury, Pillsbury v. Dugan, 9 Ohio 117; 34 Am. Dec. 427; Redus and Reder, Hunter v. State, 8 Tex. App. 75; Robert Rodger Strang and Robert Roger Strong, *In re* Smith, 10 C. B. N. S. 344; 100 E. C. L. 342; Roffenberg and Rifenberg, Whitaker v. Wheeler, 44 Ill. 440; Samul and Samuel, Fenn v. Alston, 11 Mod. 284; Seam and Couture, Augur v. Couture, 68 Me. 427; Sarmin and Sarmin, Cull v. Sarmin, 3 Lev. 66; Seden and Soden, Wyatt v. Barwell, 19 Ves. 435; Shipcott and Shapcott, Bowen v. Shapcott, 1 East 542; Sin Groon and Lin Goon, People v. McNealy, 17 Cal.

332; Spangle and Spangler, *In re* Spangler, 11 Mich. 298; Stoydell and Stogdell, Dyer v. People, 84 Ill. 624; Stormer and Stermer, Sample v. Robb, 16 Pa. St. 305; Symons and Symonds, Allen v. Symonds, 4 Mod. 347; Townsen and Townsend, Townsend v. Ratcliff, 50 Tex. 148; Watford and Watford, Hayes v. State, 58 Ga. 35; West Route and Western Route, Huddleson v. Reynolds, 8 Gill (Md.) 332; 1 Am. Dec. 702; Westley and Wesley, Proudfoot v. Lount, 9 Grant's Ch. 70; Weston and Wason, Symmers v. Wason, 1 B. & P. 105; Whatson and Watson, Toole v. Peterson, 9 Ired. (N. Car.) 180; William and Wendelin, Hommel v. Devinney, 39 Mich. 522; William Hamilton M. and William Henry M., Newton v. Maxwell, 2 C. & J. 215; Witter and Witte, Witte v. Meyer, 11 Wis. 295.

*Not Idem Sonans.*—Asher and Ashley, Bates v. State Bank, 7 Ark. 394; 46 Am. Dec. 293; Agnes and Anne, 2 Roll. Abr. 135; Adderley and Adderby, Adderby v. Bouthby, Mo. 407; Alvers and Albers, Albers v. Whitney, 1 Story (U. S.) 319; Aaron and Lamson, Barnes v. Simms, 5 Ired. Eq. (N. Car.) 392; 49 Am. Dec. 435; Absolem Baxter and Absalom Backus, Final v. Backus, 18 Mich. 218; Alexander and Andrew, Henderson v. Ballantine, 4 Cow. (N. Y.) 549; Ammon and Amann, Amann v. State, 76 Ill. 188; Ap Pell and Ap Bell, Floyd v. Bethell, Danv. Abr. 331; Barent and Barnard, Duncommun v. Hysingen, 14 Ill. 249; Barham and Barnham, Kirk v. Suttle, 6 Ala. 681; Baskervill and Baskerfield, Macduncon v. Stafford, 2 Roll. Abr. 168; Bernard and Berend, Wilks v. Lorck, 2 Taunt. 399; Bill and Bull, Bull v. Traynham, 3 Rich. (S. Car.) 433; Bolling and Bowling, Com. v. Kearns, 1 Va. Cas. 109; Brow and Brown, Brown v. Marqueze, 30 Tex. 77; Byrly and Byerly, U. S. v. Wilson, Baldw. (U. S.) 83; Carlton and Colton, Colton v. Stanwood, 67 Me. 25; Carrigan and Kerriken, Kerriken v. Copeland, 3 Kerr 567; Cocker and Cocken, Finch v. Cocken, 2 C. M. & R. 196; Cousin and Cozen, Mariot v. Mascoll, And. 212; Crouch and Couch, Whitwell v. Bennett, 3 B. & P. 559; Dunlair and Dunbar, Breyfogle v. Beckley, 16 S. & R. (Pa.) 264; Ebenezer and Edward, Slasson v. Brown, 20 Pick. (Mass.) 416; Edward and Edmund, Watkins v. Oliver, Cro. Jac. 558; Latham's Case, 1 P. R.

(Can.) 91; but see Flood v. Randall, 72 Me. 439; Middleton v. Findla, 25 Cal. 76; Elisha and Ezra, Doughty v. Conover, 42 N. J. L. 197; Elisha Davidson and Elijah B. Davison, Mead v. State, 26 Ohio St. 505; Emeline and Evelina, Scott v. Ely, 4 Wend. (N. Y.) 557; Elizabeth and Isabel, 1 And. 212; Farrow and Farrar, Farrar v. Fairbanks, 53 Me. 143; Favers and Faver, Faver v. Robinson, 46 Tex. 204; Flory and Fleurer, Imhoff v. Fleurer, 2 Phila. (Pa.) 35; Frances and Francis, Anonymous, 1 Moore 126; Gabriel Carter and Carter Gabriel, Collins v. State, 43 Tex. 577; see Reg. v. James, 2 Cox C. C. 227; Goodwright and Goodnight, Cherry v. Fergeson, 2 McMull. (S. Car.) 15; Grimanda and Grimalda, Hayney v. State, 5 Ark. 72; Hudgins and Hudgson, McClellan v. State, 32 Ark. 609; Hudson and Jones, and Hudson and James, Gayle v. Hudson, 10 Ala. 116; Humphreys and Humphrey, Humphrey v. Whitten, 17 Ala. 30; Johua and Joshua, Boren v. State Bank, 8 Ark. 500; Jonathan McCraver and John McCravey, McCravey v. Cox, 24 Ark. 574; J. Sheppherd Diggs and James Shepard Diggs, Diggs v. State, 49 Ala. 311; John Thomas and James Thomas, Coles v. Gum, 8 Moore 526; see Garner v. Weller, 11 Moore 457; John Henry Oviatt and John Hilder Oviatt, Thompson v. Oviatt, 2 Allen (N. B.) 118; Josias and Josiah, Johnson v. Cooper, 5 Moore 472; King and Ring, Anonymous, 1 East. 180 n.; Lemuel and Samuel, State v. Moffit, 5 Ohio 358; Jennings v. Wood, 20 Ohio 261; McGlenn and Glenn, Martin v. State, 16 Tex. 240; McMickle and Mickle, Fenton v. Perkins, 3 Mo. 144; McKee and McRee, McRee v. Brown, 45 Tex. 503; Mayo and Mayhew, Merrick v. Mayhue, 40 Mich. 196; Melvil and Melvin, Melvin v. Fisher, 8 N. H. 406; Michael and Mitchell, McGuire v. State, 35 Miss. 366; Pike and Pite, Barnes v. Simms, 5 Ired. Eq. (N. Car.) 392; 49 Am. Dec. 435; Prison and Brison, State v. Huffman, Add. (Pa.) 141; Quartus and Gerardus, Mann v. Carley, 4 Cow. (N. Y.) 148; Richard James and James Richard, Jones v. Macquillin, 5 T. R. 195; see *In re* Crawford, 1 M. & C. 240; Robert and Robinson, Dulany v. Norwood, 4 Har. & M. (Md.) 496; Rodgers and Rodger, McDonald v. Rodger, 9 Grant's Ch. 75; Rufus and Russell, Pitts v. Brown 49 Vt. 86; 24 Am.

**SPENDTHRIFT TRUSTS.**—(See also CONFLICT OF LAWS, vol. 3, p. 518; TRUSTS.)

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**I. DEFINITION.**—Spendthrift trust is the term commonly applied to those trusts that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection. Provisions against alienation of the trust fund by the voluntary act of the beneficiary, or in *invitum*, by his creditors, are the usual incidents of such trusts.<sup>1</sup>

**II. JURISDICTIONS ALLOWING.**—There is authority in the United States for the doctrine that the power of alienation is not an essential incident to an equitable estate for life, and that the owner of property, in the free exercise of his will in disposing of it, may do so in such a manner as to secure its enjoyment to the beneficiary without making it alienable by him, or chargeable with his debts, and that when this clearly appears to be the intention of the author of the trust, it must be effectuated by the courts.<sup>2</sup> And, generally speaking, such intent need not be

Rep. 114; Samuel and Stephen, *People v. Hughes*, 41 Cal. 234; Samuel S. G. and Daniel S. G., *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456; see *Roe v. Derys*, Cro. Car. 563; *Semons and Semon, Semon v. Hill*, 7 Ark. 70; *Seymour and Seigmund, Scholes v. Ackerland*, 13 Ill. 650; *Sophia Sherr and Albertine Scheer, Scheer v. Keown*, 29 Wis. 586; *Sylvius and Sylvanus, Butterfield v. Johnson*, 46 Ill. 68; *Thomas B. Han and Thomas B. Hanly, Hanly v. Campbell*, 4 Ark. 562; *Uterburgh and Hudiburgh, Uterburgh v. State*, 8 Blackf. (Ind.) 202; *Yoest and Joest, Heil's Appeal*, 40 Pa. St. 453; *Gdema Carty and Gustave de ma Carty, Moulton v. de ma Carty*, 6 Robt. (N. Y.) 470.

1. *Stambaugh's Appeal*, 135 Pa. St. 586.

2. **Federal Courts**—*U. S. Supreme Court.*—In *Nichol v. Levy*, 5 Wall. (U. S.) 441, Mr. Justice Swayne, delivering the opinion of the court, used language which indicated clearly that the views of that court on the subject of spendthrift trusts were in accord with those of the English

courts. He said: "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go."

In *Nichols v. Eaton*, 91 U. S. 725, it was held that a devise of the income of a fund is not invalid as being against public policy or against the policy of the law of bankruptcy, although on condition that if the devisee become bankrupt the trustees shall pay it to his wife and children, if he have any, otherwise invest, or, at their absolute discretion, transfer to the devisee any por-

tion of the fund not exceeding half. While that part of the opinion of the court in this case which is the main reliance of the supporters of spendthrift trusts, was *obiter*, yet it is in such unmistakable terms, as to leave no room for doubt of the unqualified dissent of that tribunal from the rule of the English courts, and the observation of Mr. Justice Swaine just quoted. Indeed, in *Hyde v. Woods*, 94 U. S. 523, the court expresses its continued approval of *Nichols v. Eaton*, 91 U. S. 725, and decides that a stock board may make membership therein subject to the rule that if a member becomes insolvent his seat may be sold for the benefit of his creditors among the other members of the board, and the payment of the proceeds of such sale to the members is not void under the bankrupt law. See also *Spindle v. Shreve*, 111 U. S. 542.

*U. S. Circuit Courts.*—In *Sanford v. Lackland*, 2 Dill. (U. S.) 6, it is held that the testator cannot give the beneficial interest and annex thereto the inconsistent condition that it shall not be liable for the debts of the devisee. But in *Spindle v. Shreve*, 9 Biss. (U. S.) 199, the *dicta* in *Nichols v. Eaton*, 91 U. S. 725, are followed.

*State Courts—Illinois.*—In *Steib v. Whitehead*, 111 Ill. 247, a testator devised all his lands to trustees in trust for his daughter, declaring it to be their duty to keep such lands well rented, make reasonable repairs, pay taxes, etc., and to pay over all remaining rents and income in cash into the hands of his daughter in person, and not upon any written or verbal order, nor upon any assignment or transfer by her, the trust to cease at her death, and the estate to vest in her heirs. It was held that the intention was to place the net income of the property beyond the control of the daughter and her creditors while in the hands of the trustees, and that such income was not liable to garnishment for her debts.

*Maryland.*—In *Warner v. Rice*, 66 Md. 440, it is held to be wholly against the policy of the law to permit property, whether legal or equitable, to be fettered by restraints upon alienation, and generally, whenever property is subject to alienation by the owner, it is subject to his debts. But in *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398, it was held that where a testator devises real estate in trust, the trustee to collect the rents and profits, and to

pay the same to testator's son, "into his own hands and not into another, whether claiming by his authority or otherwise," the intention of the testator is that the income shall be paid into the hands of his son to the exclusion of all other persons, whether claiming as alienees or creditors, and such rents and profits while in the hands of the trustee cannot be reached by the creditors of the *cestui que trust* by any proceeding either at law or in equity.

And where the testatrix declared that no part of the land devised should in any event be liable for the debts or contracts of the devisees, it was held that the crops growing on the land were likewise exempt from liability. *Maryland Grange Agency v. Lee*, 72 Md. 161. But under a bequest "in trust for the benefit of L during her life, receiving her annual interest and income therefrom, the said share to be securely invested as soon as declared, and after her death to be equally divided between her children," it was held that there was no limitation on the power of the life tenant to assign the income, and it was therefore subject to garnishment by her creditors. *Baker v. Keiser* (Md. 1892), 23 Atl. Rep. 735.

*Missouri.*—The *dicta* in the earlier cases of *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295; *Lackland v. Smith*, 5 Mo. App. 153, were opposed to the doctrine of spendthrift trusts. *Contra*, in *Montague v. Crane*, 12 Mo. App. 582. In *Pickens v. Dorris*, 20 Mo. App. 1, there is a strong *dictum* in favor of such trusts.

The question was not finally settled until 1888 in *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358, which decided that where a testator devised lands to a trustee for the use of his three sons "with power in my three sons to use and enjoy equally the rents, issues, and profits thereof during their natural lives," the object being "to secure to my children a certain annual income beyond the accident of fortune and bad management on their part; and with this end in view to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts," there was vested in the devisees an interest in the income of the realty which was inalienable by them or either of them. And in *Partridge v. Cavender*, 96 Mo.

452. it was held, under a devise of property in trust for the testator's son for life, with a direction to trustees to pay the income semi-annually "on his personal receipt, without his son having any power to sell, assign, or pledge the same previous to the payment thereof to him," which receipt should be the trustee's acquittance, that neither the accrued income in the possession of the trustees, nor the accruing income, could be reached by the son's creditors or be assigned by him.

But a husband who releases his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, will be regarded as a purchaser of such income and not a mere recipient of his wife's bounty, and the income will be subject to the claims of his creditors, notwithstanding the provisions of the will exempt it from such claims. *Bank of Commerce v. Chambers*, 96 Mo. 459, the court, by *Sherwood, J.*, making the following distinction: "That decision (namely in *Lampert v. Haydel*, 96 Mo. 439; 3 Am. St. Rep. 358), and the class to which it belongs, rest in a large part upon the distinct ground that a creditor is not defrauded, and therefore has no cause of complaint, because the owner of property in the free exercise of his will so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support. In the case at bar the beneficiary did part with something in return. But for his compliance with the express condition in the will by the surrender of his curtesy in his wife's estate by deed, as the petition recites, duly recorded, the income provided for his use would never have become his. This stands confessed by the demurrer. He therefore occupies the attitude of a purchaser of that income, as much so as does a wife who receives a conveyance of land in consideration of the relinquishment of her dower in other property of her husband. . . . Regarding then the defendant in the light of a purchaser of the income bestowed upon him by the will of his wife, and not as the mere recipient of her bounty, it must be ruled that such income is subject to the claims of his creditors, and subject in this proceeding."

*Virginia*.—In the following cases the trusts were held to be blended and no one beneficiary had an interest

separable from that of the others, and therefore no interest that could be alienated voluntarily or involuntarily. *Perkins v. Dickinson*, 3 Gratt. (Va.) 335; *Nickell v. Handly*, 10 Gratt. (Va.) 336; *Johnston v. Zane*, 11 Gratt. (Va.) 552; *Markham v. Guerrant*, 4 Leigh (Va.) 279; *Doswell v. Anderson*, 1 P. & H. (Va.) 185.

In *Nixon v. Rose*, 12 Gratt. (Va.) 485, it is simply decided that a married woman may be restrained from anticipation.

In *Armstrong v. Pitts*, 13 Gratt. (Va.) 235, it was decided that a creditor of the *cestui que trust* could not proceed against the trust fund without first getting judgment. Whether judgment creditors could have any remedy was expressly left undecided.

In *Camp v. Cleary*, 76 Va. 140, the question was raised, but the court expressly declined to pass upon it, as it was not involved in the case.

The precise question whether interests of the character under consideration may be deprived of the incidents of alienability and liability for the debts of the owner, was not decided until the recent case of *Garland v. Garland*, 87 Va. 758; 24 Am. St. Rep. 682, where it was held that if a testator sets apart property in the hands of his executor to be held by him in trust for the testator's brother, declaring that "the profits are set apart under the superintendence of the executor for his brother's use, but neither the estate nor profits shall be bound for his past debts or future debts or liabilities other than a decent and comfortable support, and at his death all the said property to pass to a trustee in trust for" certain other persons named, the beneficiary does not take an absolute property in the profits of the estate which he might assign or alien, nor can such profits be reached by a creditor's bill against him.

*Pennsylvania*.—Mr. Gray has shown in his work on Restraints on Alienation, §§ 214-235, that the doctrine of spendthrift trusts in *Pennsylvania* has been built up entirely on *obiter dicta*, and he thinks that it is doubtless, owing to the very great importance of the bench and bar of this State, that this doctrine spread to other jurisdictions. And in 3 *Lewin on Trusts*, § 124, it is said that "the only case where the purely abstract doctrine of spendthrift trusts has been strictly employed is *Overman's Appeal*, 88 Pa. St. 276, with

probably the exception of Shankland's Appeal, 47 Pa. St. 113, where the supreme court of *Pennsylvania* for the first time made an actual decision in favor of this class of trusts." That it is now the well-settled law in that State is undoubted. *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Holdship v. Patterson*, 7 Watts (Pa.) 547; *Ashhurst v. Given*, 5 W. & S. (Pa.) 323; *Vaux v. Parke*, 7 W. & S. (Pa.) 10; *Norris v. Johnston*, 5 Pa. St. 287; *Eyrick v. Hetrick*, 13 Pa. St. 491; *Brown v. Williamson*, 36 Pa. St. 338; *Shankland's Appeal*, 47 Pa. St. 113; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Keyser v. Mitchell*, 67 Pa. St. 473; *Huber's Appeal*, 80 Pa. St. 357; *Overman's Appeal*, 88 Pa. St. 276; *Patterson v. Caldwell*, 124 Pa. St. 454; *Mannerback's Estate*, 133 Pa. St. 342; *Merriman v. Munson*, 134 Pa. St. 114; *Hibb's Estate*, 143 Pa. St. 217; *In re Plank's Estate* (Pa. Orph. Ct.), 9 Lanc. L. Rev. 249; *In re Root's Estate* (Pa. Orph. Ct.), 8 Lanc. L. Rev. 153.

A provision that G. "shall act as committee for I. to take charge of all his money and pay him the interest and so much of the principal as will give him a comfortable support" was held to create a spendthrift trust. *Smith v. Savage*, 4 Penny (Pa.) 320. So, a direction to pay to the son or such persons as he may direct, does not enable him to transfer his right to another or dispose of the income by anticipation. *Mehaffey's Estate*, 27 W. N. C. (Pa.) 191. See *Decker v. Poor Directors*, 120 Pa. St. 272. But when nothing is said in the instrument about creditors or involuntary alienation, the income may be attached in the hands of the trustees. *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485. And a prohibition against the payment of any part of the income to the collateral relations of the *cestui que trust* and against their entering the testator's house, is not sufficient to create a spendthrift trust. *King's Estate*, 29 W. N. C. (Pa.) 426.

A spendthrift trust may be created for a term of years with the remainder to the *cestui que trust* in fee. *Ward's Estate*, 13 W. N. C. (Pa.) 282. So a trust in favor of a daughter during the widow's life, not to be liable for the daughter's debts, the principal to be paid to the daughter after the widow's death, is a good spendthrift trust. *Wayne's Estate*, 47 L. J. 465; 9 Pa. Co. Ct. Rep. 124. But inalienable equitable

fees are not allowed. *Keyser's Appeal*, 57 Pa. St. 236.

The creation of a spendthrift trust in due and legal form will exempt the income of the beneficiary in the hands of the trustee from attachment to enforce the payment of alimony, decreed against the beneficiary in divorce proceedings. *Thackara v. Mintzer*, 100 Pa. St. 151.

Where a legacy is given with direction that it cannot be "seized upon or levied upon for any debt or claim whatever" against the legatee, it cannot be attached in the hands of the executor. *Monongahela Nat. Bank's Appeal*, 146 Pa. St. 431; *Beck's Estate*, 133 Pa. St. 51; 19 Am. St. Rep. 623.

*Vermont*. — Where a testator bequeathed a sum of money to his son "for the support of himself and family and for no other purpose," and the testator's executors paid this legacy to the son's attorney, it was held that this money constituted a trust fund for the purposes set forth in the will, and that it could not be attached for the son's debts while in the attorney's hands. *White v. White*, 30 Vt. 338.

Where a testatrix devised her estate in trust for B., who was then insolvent, he to have "the use and occupation" thereof during his life, and at his death "the said estate to be conveyed by" the trustee "to whom and in the manner the said" B. "shall direct," and B. appointed the estate to his wife, and it was conveyed to her on his death, it was held that the estate was not liable to the claims of his creditors who were such before the creation of the power. *Wales v. Bowdish*, 61 Vt. 23.

In *Barnes v. Dow*, 59 Vt. 530, the substance of a will was as follows: "Second: I give, devise, and dispose to my nephew L., and his heirs, all my effects, estate, both personal and real, except the support of my sister H. during her lifetime; and I give my estate in trust to my executor." "Third: I give to my sister H., her support during her natural life out of my estate." And it was held that this language imported an unmistakable intention of a permanent and indefeasible provision for a life support for H. out of the estate, which was not subject to alienation on her part.

*Texas*. — Land, the legal title to which is in a trustee, whose duty it is to apply its income for the use and benefit of the *cestui que trust*, the terms of the trust expressly declaring



declared in express terms, but it will be sufficient, if it may be gathered from the instrument, when construed in the light of contemporaneous circumstances.<sup>1</sup> It has been held that one

that the trust estate should not be subject to debts of the latter, cannot be attached on execution against him. *Wallace v. Campbell*, 53 Tex. 229.

**Maine.**—In *Roberts v. Stevens*, 84 Me. 325, it is held that a testator may so give to his son for life the annual income of a trust estate that the life tenant cannot alienate or his creditors reach it.

**Massachusetts.**—Until quite recently the question had not been directly adjudged in this commonwealth, though the tendency of the decisions had been in favor of such a power in the author of the trust. *Braman v. Stiles*, 2 Pick. (Mass.) 460; 13 Am. Dec. 445; *Perkins v. Hays*, 3 Gray (Mass.) 405; *Russell v. Grinnell*, 105 Mass. 425; *Hall v. Williams*, 120 Mass. 344; *Sparhawk v. Cloon*, 125 Mass. 263.

**Broadway Nat. Bank v. Adams, 133 Mass. 170; 43 Am. Rep. 504, decides that a trust may be created for life inalienable and free from interference on the part of the creditors of the *cestui que trust*, and the court considers that the only ground upon which such a trust could be claimed to be violative of public policy is that the creditors of the beneficiary may be defrauded, and answers this objection by saying that creditors have no right to rely upon property thus held, and that by the exercise of diligence they can ascertain from the public records the nature and extent of the estate.**

But where a testator by his will gave to his wife during her life the income of all his estate "to be for her comfort and support," expressing a wish that she provide for an unmarried daughter, and that a "house and grounds" be kept "as a home for them," it was held that after the daughter's death the wife had the absolute disposal of the income during her life and that it might be reached by her creditors. *Maynard v. Cleaves*, 149 Mass. 307.

And so a gift of the entire beneficial interest without any limitation of the power of alienation or of the power to seize it under execution being directly expressed or necessarily implied, the interest of the beneficiary is absolute and subject to alienation either by the voluntary act of himself or

in invitum by his creditors. *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320.

**Tennessee.**—In *Jouralman v. Massingill*, 86 Tenn. 81, the court, following *Nichols v. Eaton*, 91 U. S. 716, held that trusts of the character under consideration are not contrary to public policy, violate no law of property and are approved by justice and humanity. Thus overruling *Turley v. Massingill*, 7 Lea (Tenn.) 353, and *Hooberry v. Harding*, 10 Lea (Tenn.) 392, in which they were adjudged void because contrary to sound public policy.

1. Thus, where property was given to the daughters of the testatrix, subject to the condition that they support their father during his life, the latter has no interest that can be reached by his creditors. *Baker v. Brown*, 146 Mass. 369. And where a testator by his will gave certain stocks in trust, the income to be paid to his son during his life, and at his death the principal to go "to his child or children who shall survive him, provided that if my son shall leave his wife surviving him, then his said wife shall be entitled to her support out of the same so long as she shall remain his widow," and the son died leaving a widow, who did not marry again, and a son, to whom the trustees paid over the trust fund; it was held that the widow had no interest under the will which a creditor could reach by a bill in equity under the *Massachusetts Pub. Stats.*, ch. 151, § 1, cl. 11. *Slattery v. Wason*, 151 Mass. 266; 21 Am. St. Rep. 448. See also *Foster v. Foster*, 133 Mass. 179. And when the intent is so gathered, the court will not allow it to be defeated because not clearly expressed by the scrivener, at least as between the trustee and *cestui que trust*. *Stambaugh's Estate*, 135 Pa. St. 585.

But in *Pickens v. Doris*, 20 Mo. App. 1, it was decided that a devisors intention to withdraw his gift from the devisee's creditors will not be presumed from surrounding circumstances of which the creditors have no record notice, where such intention is not expressed in, nor necessarily implied from, the terms of the instrument creating the trust.

cannot settle his property in trust for his own benefit or support so as to prevent his creditors from attaching it.<sup>1</sup>

**III. JURISDICTIONS DISALLOWING**—1. **Generally.**—In England,<sup>2</sup> and in some of the United States,<sup>3</sup> trusts may not be created with

1. *Mackason's Appeal*, 42 Pa. St. 330; *Ghormley v. Smith*, 139 Pa. St. 584; 23 Am. St. Rep. 215. See also *Pacific Nat. Bank v. Windram*, 133 Mass. 175. Chancellor Kent, in vol. 4, p. 311 of his Commentaries, states the law of such an attempt thus: "The policy of the law will not permit property to be so limited as to remain in the grantor for life free from the incidents of property and not subject to his debts."

2. *Brandon v. Robinson*, 18 Ves. 329; *In re Dugdale*, 38 Ch. Div. 176; *In re Mabbett* (1891), 1 Ch. Div. 707; *In re Wolstenholme*, 29 W. R. 414.

Thus a trust for a person's "support, clothing and maintenance," *Younghusband v. Gisborne*, 1 Coll. 400; or to pay the interest of a fund to one for life "at such times and in such manner as the trustees may think proper," *Green v. Spicer*, 1 R. & M. 395; or "from time to time as and when it shall become due and payable," *Graves v. Dolphin*, 1 Sim. 66; or "in such smaller or larger portions, at such times immediate or remote, and in such way and manner as the trustees shall think best," *Piercy v. Roberts*, 1 Myl. & K. 4; may be exercised according to the discretion of the trustees until the bankruptcy of the *cestui que trust*, but upon that occurrence the discretion of the trustees is determined, and the entire interest passes to the assignees.

And even where the trustees were directed to pay the interest of a fund to a person "for life, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise," so that the *cestui que trust* should not have any right, title, claim, or demand, other than the trustees should think proper; and after the *cestui que trust's* decease to pay the interest to his widow for her life, and after her death to assign the principal and "all savings and accumulations of interest, if any," to the children, the court thought that, taking the whole instrument together, the trustees had no power to withhold and accumulate any part of the interest during the life of the *cestui que trust*, and therefore

upon his bankruptcy the assignees became absolutely entitled. *Snowdon v. Dales*, 6 Sim. 524.

3. *Alabama*.—*Rugely v. Robinson*, 10 Ala. 702; *Robertson v. Johnston*, 36 Ala. 197; *Smith v. Moore*, 37 Ala. 327; *Taylor v. Harwell*, 65 Ala. 1; *Jones v. Reese*, 65 Ala. 134. In this case *Hill v. McRea*, 27 Ala. 175, was distinguished on the ground that the interest of the debtor in that case was not separable from that of the other beneficiaries of the trust.

*Georgia*.—*Kempton v. Hallowell*, 24 Ga. 52; 71 Am. Dec. 112; *Bailie v. McWhorter*, 56 Ga. 183. See also *Kupferman v. McGehee*, 63 Ga. 257; *Hatcher v. Massey*, 71 Ga. 793; *Wingfield v. Rhea*, 73 Ga. 477; *Matthews v. Paradise*, 74 Ga. 523; *Cruger v. Coleman*, 75 Ga. 695; *Patterson v. Lawrence*, 83 Ga. 703.

*North Carolina*.—*Dick v. Pitchford*, 1 Dev. & B. Eq. (N. Car.) 480; *Mebane v. Mebane*, 4 Ired. Eq. (N. Car.) 131; 44 Am. Dec. 102; *Forbes v. Smith*, 8 Ired. (N. Car.) 30; *Pace v. Pace*, 73 N. Car. 119.

*Rhode Island*.—In *Tillinghast v. Bradford*, 5 R. I. 205, there was a devise in trust to pay the income for life, the payments to be made from time to time, not in the way of anticipation, nor to be for the sole and separate use of the beneficiary, and the latter assigned all his estate for the benefit of creditors. It was held that the assignee was entitled to have the income paid him during the beneficiary's life. The court, by Ames, C. J., said: "This has been the settled doctrine of a court of chancery at least since *Brandon v. Robinson*, 18 Ves. 429, and in application to such a case as this is so honest and just that we would not change it if we could. Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should also be amenable to the demands of justice."

*South Carolina*.—It was held in *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46; 55 Am. Dec. 654, that where property was conveyed in trust to pay the

a proviso that the estate of the *cestui que trust* shall not be alienated or subject to the claims of creditors, except in the case of separate estates for married women; and if it is ascertained that the *cestui que trust* has a vested interest, the mode in which, or the time when, he is to reap the benefit is altogether immaterial, and the entire interest may either be disposed of by his own act, or may inure for the benefit of his creditors by operation of law, in the event of his bankruptcy. The test to be applied in these cases is: Would the executor of the *cestui que trust* have a right to call upon the trustee for arrears;—if he would, then the creditors would be entitled to call for the future interest or income.<sup>1</sup> It is contended by the courts opposed to the foregoing view that the only objection that can be taken to the inalienability and non-liability for debts, of equitable life estates, is that the creditors of the beneficiary may be defrauded, and attempts are made, with more or less success, to show that they are not defrauded.<sup>2</sup> But the real ground upon which such estates have been declared alienable and liable for debts is, that inalienable rights of property are opposed to the fundamental principles of the common law, and that it is against public policy that a man should have an estate to live on, but not an estate to pay his debts with,—should have the benefits of wealth without the responsibilities.<sup>3</sup>

2. **For the Benefit of Several.**—Where there are several *cestuis que trustent*, creditors of any one of them can take only so much as was intended for that particular beneficiary;<sup>4</sup> and if the interests of the several are inseparable, nothing can be reached.<sup>5</sup>

3. **Arbitrary Power of Application in Trustees.**—If the trustees have an arbitrary power of applying or not applying a fund for the benefit of the beneficiary, or of applying the fund in the alternative either for his benefit or that of another person, nothing will pass to his assignees, nor can anything be subjected to the

net income "for the better support and maintenance" of the beneficiary, the latter's interest was liable in equity for his debts.

*Ohio.*—Wallace v. Smith, 2 Handy (Ohio) 78; Hobbs v. Smith, 15 Ohio St. 419. In this case it was held that a provision that a term of ninety-nine years should not be liable for the lessee's debts was void.

1. *In re Sanderson's Trust*, 3 K. & J. 497.

2. *Nichols v. Eaton*, 91 U.S. 725, and cases cited under *Jurisdictions Allow-*

ing.  
3. *Gray's Restraints on Alienation*, § 358, and cases cited under *Jurisdictions Disallowing*.

4. *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare 185.

5. *Godden v. Crowhurst*, 10 Sim. 642. In this case there was a devise to trustees in trust to apply the income for the support and maintenance of A. and any wife and child or children he might have, and for the education of such issue, or any of them, as the trustees in their discretion should think fit; and on the death of A. and his wife, then over. A. was adjudged a bankrupt. *Shadwell, V. G.*, held that the assignees in bankruptcy took nothing.

To the same effect are *Holmes v. Penny*, 3 K. & J. 90; *In re Landon's Trusts*, 40 L. J., Ch. 370. See also the cases cited under *Jurisdictions Allow-*ing, note 2, *Virginia, supra*, this title; and those cited under *Jurisdictions in which the Status is Undetermined*, note 1, *Connecticut, infra*, this title.

claims of his creditors.<sup>1</sup> But if the power is not arbitrary, but imperative to apply for the benefit of the bankrupt and another, and the trustees refuse to exercise the power, so that a simple trust arises, the creditors will take a moiety, and if by the death of the other person the bankrupt becomes the only object of the power, the creditors will take the whole.<sup>2</sup>

**IV. JURISDICTIONS IN WHICH STATUTORY REGULATIONS EXIST.**—In some of the States the validity of spendthrift trusts is sanctioned by express legislation. Thus, in *New York*, there is a statute which excludes from proceedings in equity to reach beneficial interests, all cases of trusts for maintenance and support, where the trust has been created by, or the trust fund has proceeded from, some person other than the debtor, but makes available to the creditor any surplus beyond what may be necessary for the maintenance, support, etc., of the beneficiary.<sup>3</sup> This legislation

1. Thus, where a fund was given to trustees upon trust, to apply the whole or such part of the income as they should think fit, during the life of A., for his support and maintenance, and for no other purpose, it was held that nothing passed to the assignees. *Two-penny v. Peyton*, 10 Sim. 487.

And in *Chambers v. Smith*, L. R., 3 App. Cas. 795, Lord O'Hagan observed: "If the debtor have a vested property and an absolute claim, they will, of course, pass from him. But if the property and the claim are subject to conditions liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfillment of the condition or deny the effect of that exercise of the discretion which would have bound the debtor."

Where freehold and leasehold property was vested in trustees upon trust for A. B. for life, but if he became bankrupt or insolvent, the trustees were during his life to apply the annual produce "in and towards the maintenance, clothing, lodging, and support of A. B. and his then present or any future wife, and his children, or any of them, as the trustees should at their discretion think proper," and A. B. became insolvent, having a wife and children, it was argued that the power in the trustees was destroyed by the insolvency and that the life estate vested in the assignee. But Vice-Chancellor Knight Bruce held that the trustees had a right under the power to appoint in favor of the insolvent, his wife and children, or any of them, in exclusion of any other of them, but that any benefit the insolvent might

take would belong to the assignee. *Lord v. Bunn*, 2 Y. & C. C. C. 98.

See also 1 *Lewin on Trusts*, p. 189; *In re Sanderson's Trust*, 3 K. & J. 497; *Holmes v. Penney*, 3 K. & J. 90; *Keyser v. Mitchell*, 67 Pa. St. 473; *Hall v. Williams*, 120 Mass. 344; *Davidson v. Kemper*, 79 Ky. 5; *Leavitt v. Beirne*, 21 Conn. 9; *Banfield v. Wiggins*, 58 N. H. 155.

2. *Rippon v. Norton*, 2 Beav. 63; *Wallace v. Anderson*, 16 Beav. 533.

3. *New York*.—*Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79; *Graff v. Bonnett*, 31 N. Y. 9; 88 Am Dec. 236; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Tolles v. Wood*, 16 Abb. N. Cas. (N. Y.) 1; *McEvoy v. Appleby*, 27 Hun (N. Y.) 44; *Williams v. Thorn*, 70 N. Y. 270.

The creditor of such a beneficiary acquires a lien upon the accrued and unexpended surplus income, or that subsequently arising from such fund, superior to the claims of the general creditors or assignee of the *cestui que trust* by the commencement of an action in equity to reach and appropriate it to the satisfaction of his judgment. *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 16 Abb. N. Cas. (N. Y.) 1; 99 N. Y. 618.

The court in determining what is the proper amount to be allowed for the expenditures of the *cestui que trust*, will consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property. *Kilroy v. Wood*, 42 Hun (N. Y.) 636. As to other considerations which enter into fixing the amount, see *Tolles v. Wood*, 16 Abb.

has been copied in whole or in part, by other States, in some of which, however, there have been no decisions thereunder.<sup>1</sup>

But, by the statutes of some States one cannot vest property or funds in trustees for the use of another without subjecting it to the debts of the *cestui que trust*.<sup>2</sup>

N. Cas. (N. Y.) 1; 99 N. Y. 618; Genet v. Beekman, 45 Barb. (N. Y.) 382; Clute v. Bool, 8 Paige (N. Y.) 83; Scott v. Nevins, 6 Duer (N. Y.) 672; Campbell v. Foster, 35 N. Y. 361; Moulton v. De Macarty, 6 Robt. (N. Y.) 533; Hann v. Van Voorhise, 1 Month. L. Bull. 56; Sillick v. Mason, 2 Barb. Ch. (N. Y.) 79.

An allegation by the creditor of the fact of such a surplus existing, made merely upon information and belief without setting forth the facts on which the conclusion is based, is not sufficient. Stowe v. Chapin, 51 Hun (N. Y.) 640. The creditors must show the existence of a surplus. Graff v. Bonnett, 31 N. Y. 9; 88 Am. Dec. 236.

Whether, under the statute, an annuity is alienable and liable for debts, or whether it is inalienable and not liable for debts, is left so very doubtful on the authorities, that a mere reference to the cases in which the question is involved is made: Hawley v. James, 16 Wend. (N. Y.) 61; 5 Paige (N. Y.) 318; Degrau v. Clason, 11 Paige (N. Y.) 136; Gott v. Cook, 7 Paige (N. Y.) 521; Clute v. Bool, 8 Paige (N. Y.) 83; Rider v. Mason, 4 Sandf. Ch. (N. Y.) 351; Stewart v. McMartin, 5 Barb. (N. Y.) 438; Lang v. Ropke, 5 Sandf. (N. Y.) 363; Griffin v. Ford, 1 Bosw. (N. Y.) 123. See also ANNUITY, vol. 1, p. 596.

Prior to the Revised Statutes the decisions in this commonwealth were in harmony with the English doctrine. Bryan v. Knickerhacker, 1 Barb. Ch. (N. Y.) 409; Hallett v. Thompson, 5 Paige (N. Y.) 583. See also the dicta in Havens v. Healy, 15 Barb. (N. Y.) 296; Bramhall v. Ferris, 14 N. Y. 44; 67 Am. Dec. 113; Rome Exchange Bank v. Eames, 4 Abb. App. Dec. (N. Y.) 99. Compare Campbell v. Foster, 35 N. Y. 361.

For a general review of the New York decisions on this subject, see note to Tolles v. Wood, 16 Abb. N. Cas. (N. Y.) 1; Gray's Restraints on Alienation, §§ 180-181, 280-295.

1. New Jersey. — Hunterdon Co. Freeholders v. Henry, 41 N. J. Eq. 388; Halstead v. Westervelt, 41 N. J.

Eq. 100; Lippincott v. Evens, 35 N. J. Eq. 553.

In Hardenburgh v. Blair, 30 N. J. Eq. 42, property was given by will to executors in trust to pay to B. the income during his life "in such manner and in such amounts as the executors should deem most prudent," and the chancellor held that the statute did not apply to the case, and that upon general principles B.'s interest could be reached by his judgment creditors. The opinion of the chancellor was, that, apart from the statute, the English rule was in force in New Jersey. But upon appeal it was held that the statute was applicable to the case, though the general question was not considered. Hardenburgh v. Blair, 30 N. J. Eq. 645.

Minnesota Gen. Stats. (1891), §§ 4019, 4020. As to restraints on power of alienation, see Atwater v. Russell (Minn. 1892), 51 N. W. Rep. 629; Simpson v. Cook, 24 Minn. 180.

California Civ. Code (1885), §§ 859, 867.

How. Stats. (Mich.), §§ 5575, 5581, 6614. See Cummings v. Corey, 58 Mich. 494. See also the opinion in Mandelbaum v. McDonell, 29 Mich. 78; 18 Am. Rep. 61.

Wisconsin Rev. Stats., §§ 2083, 2089, 3029. See Bridge v. Ward, 35 Wis. 687; Arzbacher v. Mayer, 53 Wis. 380.

2. By Kentucky Gen. Stats., § 21, art. 1, ch. 63, it is provided: "Estates of every kind held or possessed in trust shall be subject to the debts or charges of the person to whose use or for whose benefit they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof." The following cases have arisen under this statute: Anderson v. Briscoe, 12 Bush (Ky.) 344; Cosby v. Ferguson, 3 J. J. Marsh. (Ky.) 264; Jones v. Langhorne, 3 Bibb (Ky.) 453; Eastland v. Jordan, 3 Bibb (Ky.) 186; Flournoy v. Johnson, 7 B. Mon. (Ky.) 693; Samuel v. Ellis, 12 B. Mon. (Ky.) 479; Samuel v. Salter, 3 Metc. (Ky.) 259; Knefler v. Shreve, 78

**V. JURISDICTIONS IN WHICH THE STATUS IS UNDETERMINED.**—In several of the States there has been no direct decision upon the validity of spendthrift trusts, though there are dicta inclining to one side or the other, and consequently in these jurisdictions the status of such trusts may be said to be undetermined.<sup>1</sup>

**VI. RESTRAINT ON ALIENATION, HOW FAR ALLOWABLE—PRINCIPLES GOVERNING.**—However the authorities may differ upon the question of one's power to put a restraint upon alienation, or exclude the rights of creditors, it is well established that one may settle property upon another in such a way as not to be alienated, or available to his creditors or assignees. But in such a case the

Ky. 297; *Parsons v. Spencer*, 83 Ky. 306; *Rudd v. Hagan*, 86 Ky. 159; *Marshall v. Rash*, 87 Ky. 116; *Dickison v. Ogden*, 89 Ky. 162; *Bull v. Kentucky Nat. Bank* (Tex. 1890), 14 S. W. Rep. 425; *Bland v. Bland* (Ky. 1890), 14 S. W. Rep. 423.

In *Pope v. Elliott*, 8 B. Mon. (Ky.) 56, it was held that the bequest in that case was, by the terms of the will, different from a devise of property or money for the use and benefit of an individual, and from a devise of specific property in trust, to apply the proceeds or profits to his support, and, therefore, only such interest on the fund as had accumulated and was in the hands of the trustee could be subjected.

In *White v. Thomas*, 8 Bush (Ky.) 661, it was held that a dwelling house and land devised were not liable by reason of a proviso in the will that the property should not be subject to alienation or sale by the *cestui que trust* or to her debts, and any attempt to do so should terminate her right to use and enjoy the property.

In *Kean v. Kean* (Ky. 1892), 18 S. W. Rep. 1032, a limited restriction on the power of alienation was upheld.

1. *Connecticut*.—In *Leavitt v. Beirne*, 21 Conn. 1, there is a *dictum* in favor of the validity of spendthrift trusts, but in *Easterly v. Keney*, 36 Conn. 18, there is a *dictum* to the contrary. In *Tolland Co. Mut. F. Ins. Co. v. Underwood*, 50 Conn. 493, the testator left his wife all the income of his estate, and so much of the principal as might be necessary for her support and the maintenance and education of his daughters, during her natural life, and it was held that she took a life estate in trust, and that her interest being inseparable from that of her daughters, and all the property being needed for her and their support, could not be

taken upon a judgment against her. The court, by Carpenter, J., said: "The general rule is that all one's property is liable for his debts, but to that rule there are many exceptions. All property exempt by statute is within the exception, so is ordinary trust property designed to secure a maintenance for some unfortunate debtor, so also the income of trust property where it is payable to the beneficiary at the discretion of the trustee. The exceptions indicate unmistakably that it is the policy of the law not to take from the debtor his means of subsistence—not to take from him his necessary daily food and clothing. . . . We are therefore disposed to approve the principle enunciated in *Ontario Bank v. Root*, 3 Paige (N. Y.) 482, so far at least as to apply it to a case in which the trust fund is as small as it is in the present case, that 'the interest of a judgment debtor in a trust created partly for his benefit and partly for the benefit of another, cannot be taken on execution.'"

*Arkansas*.—There has been no direct decision on the point, but it was said in *Lindsay v. Harrison*, 8 Ark. 302: "It is impossible to tie up the use and enjoyment of a personal chattel so as to create in the donee an unlimited estate which he may not alien. Even a life estate cannot be so limited and restricted. . . . Such fetters may be imposed upon the estates of married females, or estates settled on females in contemplation of marriage, during coverture, but they cease upon the determination of the coverture."

*Indiana*.—The question has been raised but not decided. *Martin v. Davis*, 82 Ind. 38; *Caldwell v. Boyd*, 109 Ind. 447.

*New Hampshire*.—There has been no direct decision on the point in question, though the general principle that

beneficiary will lose the use of the property, upon the happening of the event upon which it is limited. Thus one may settle property upon A. until alienation, insolvency, or bankruptcy, with a limitation over to B. on the happening of any one of those events; or one may give real or personal estate to A. for life, with a *proviso* that on alienation, insolvency, or bankruptcy, it shall shift over to B.<sup>1</sup> But no one can settle property on himself with such a limitation.<sup>2</sup>

**SPILE.**—See note 3.

**SPIRITS; SPIRITUOUS.**—See FERMENTED, vol. 7, p. 940; INTOXICATING LIQUORS, vol. 11, p. 570; SEARCHES AND SEIZURES, vol. 21, p. 955.

**SPIRITUALISM.**—(See also FALSE PRETENCES, vol. 7, p. 716; TESTAMENTARY CAPACITY; UNDUE INFLUENCE.)

**SPLITTING A CAUSE OF ACTION.**—See ACTIONS, vol. 1, p. 178; JUSTICE OF THE PEACE, vol. 12, p. 428.

**SPOILIATION.**—See ALTERATION, vol. 1, p. 497.

**SPRING.**—(See SUBTERRANEAN WATERS; WATERCOURSES).—A spring of water is a place where water by natural forces usually issues from the ground.<sup>4</sup>

where the trustee has discretion to expend the sum bequeathed in such a manner and at such times as he shall deem proper for the benefit of A., the creditors of A. cannot attach such sum in an action against the trustee—has been asserted. *Banfield v. Wigin*, 58 N. H. 155.

1. *Lewin on Trusts* 190; *Lockyer v. Savage*, 2 Stra. 947; *Ex parte Hinton*, 14 Ves. 598; *Hatton v. May*, 3 Ch. Div. 148; *Joel v. Mills*, 3 K. & J. 458; *Shee v. Hale*, 13 Ves. 404; *In re Bedson's Trusts*, 28 Ch. Div. 523; *McKinstee v. Smith*, 27 Conn. 628; *Bridge v. Ward*, 35 Wis. 687; *Stewart v. Brady*, 3 Bush (Ky.) 623; *Tillinghast v. Bradford*, 5 R. I. 212; *Camp v. Cleary*, 76 Va. 140. And a trust to pay the income to a son until he became bankrupt, etc., and in that case to "pay to him or apply for his benefit during the remainder of his life," either the whole or so much of the income as the trustees should think fit, was held valid though the discretionary trust did not extend to benefiting any wife or children of the *cestui que trust*. *In re Bullock*, 64 L. T. N. S. 736.

2. *Higginbotham v. Holme*, 19 Ves. 88; *Ex parte Stephens*, 3 Ch. Div. 807. Though a person on marriage may do this with limitation to his wife and children, as they are purchasers for

value. *Ex parte Cooke*, 8 Ves. 353; *In re Callan's Estate*, L. R., 7 Ir. 102; *Knight v. Browne*, 7 Jur. N. S. 894; *In re Detmold*, 40 Ch. Div. 585.

3. "In *The Chase*, Young Adm. Dec. 113, this word is used, as is common in America, in the sense of stake or post. The decree was affirmed by the privy council, and of this the American Law Review said: 'Their lordships were good enough to say in their opinion, "Nothing need be said about the word spile. It may be the word used there. It means a post." There is an undefinable charm in this supercilious reflection upon colonial etymology. We find that Worcester speaks respectfully enough of the word; and if we thought as much of the matter as did the judicial committee, we would examine other dictionaries, which we venture to believe they did not.' Webster also speaks 'respectfully of it.'" *Bro. Jud. Intrep.*, p. 435.

4. *Magoon v. Harris*, 46 Vt. 264. And in that case it was held that the grant of the privilege of taking water from "springs" in a certain locality conveyed no right to take it where it does not thus issue from the ground.

But in *Proprietors of Mills, etc. v. Baintree Water Supply Co.*, 149 Mass. 478, it was said: "'Springs,' as the word is generally used, means the

**SPRINGING USE.**—See USES.

**SPURIOUS.**—See note 1.

**SQUARE.**—(See also PARKS AND PUBLIC SQUARES, vol. 17, p. 407).—The terms "square" and "block" are convertible, and are used synonymously.<sup>2</sup>

**SQUATTER.**—A squatter may be defined to be a person who settles or locates on land without obtaining a legal title.<sup>3</sup>

source of supply issuing from the earth, or found therein by digging, or otherwise opening it."

"A spring of water, both in law and ordinary language, is, as I understand it, a definite source of water. When we talk of a spring of water we mean a source of water of a definite or nearly definite area, the word 'spring' coming from the water springing or bubbling up. It may be an underground spring which supplies a well, and we say that water 'wells up.' It may be the ordinary spring from which a small stream or rivulet runs above the ground. But those are definite things. A spring of water means a natural source of water of a definite and well-marked extent." Taylor v. Corporation of St. Helens, 6 Ch. Div. 272; 22 Moak's Rep. 272.

1. **Spurious Bill.**—"A spurious bill may be a legitimate impression from the genuine plate, but it must have the signatures of persons not the officers of the bank whence it purports to have issued, or else the names of fictitious persons. A spurious bill, also, may be an illegitimate impression from the genuine plate, or an impression from a counterfeit plate, but it must have such signatures or names as we have just indicated." Kirby v. State, 1 Ohio St. 187. See generally COUNTERFEITING, vol. 4, p. 333.

2. *State v. Deffes* (La. 1892), 10 So. Rep. 597; *State v. Natal*, 2 La. Ann. 612; *Olsson v. Topeka*, 42 Kan. 713. In the latter case the court, by Holt, C., said: "In the case of *Ottawa v. Barney*, 10 Kan. 270, Judge Brewer, in rendering the opinion of the court, says: 'A block is defined by Webster as "a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots." It is a portion of ground surrounded by streets.' We are well satisfied with the definition, and taking it as our guide in this decision, it follows as a matter of course that the word square, used by plaintiffs, is synonymous with block."

"Square" as used in a city charter

providing that street improvements shall be made "at the exclusive cost of the owners of the lots in each fourth of a square," means each subdivision of territory bounded on all sides by principal streets. *Caldwell v. Rupert*, 10 Bush (Ky.) 179.

An *English* statute imposed a duty on all cast-plate glass which was to be "squared into plates of a superficies not less than 1.485 inches." In *Atorney Gen'l v. Cast-Plate Glass Co.*, Anstr. 39, the court, by Eyre, C. B., said of the term, as used in this statute: "I have no doubt in saying, that the legislature used the word 'square' not in the strict, but in the common acceptance, confining it to rectangular, but not to equilateral figures." And in *Robinson v. Day*, 5 App. Cas. 63, it was held that the terms "one square mile" and "five miles square," as used in a public-land statute, meant areas of those dimensions, and not land geometrically square.

**Square Yard.**—A contract stipulating for the payment of a certain rate "per square yard" for the removal of dirt, means cubic yard. *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177.

A *Louisiana* Statute provides that "no private market shall be established within a walking distance of six blocks from any public market; the said distance to be interpreted as meaning that represented by six blocks in a walk from the public market to a private market." It was held that the words "six blocks" in this act have the same meaning as "six squares" in the former act of 1878; and that they mean standard squares or blocks of 300 feet each, with the addition of 50 feet for each intervening street, making 2,100 feet by the nearest walking route, regardless of the number of actual squares short or long. *State v. Deffes* (La. 1892), 10 So. Rep. 597. See also *State v. Berard*, 40 La. Ann. 172; *State v. Barthe*, 41 La. Ann. 46; *State v. Schmidt*, 41 La. Ann. 27; *State v. Natal*, 42 La. Ann. 612.

3. *McAdams Land & T.*, § 283, *fol.*



**SQUIRE.**—See **ESQUIRE**, vol. 6, p. 872.

**STAB.**—The word “stab” imports a wound made with a pointed instrument.<sup>1</sup>

**STABLE.**—(See also **LIVERY STABLE KEEPERS**, vol. 13, p. 935).—See note 2.

**STACK.**—(See also **SHOCK**, vol. 22, p. 777).—See note 3.

**STAGE.**—See **THEATERS**.

**STAGE COACH.**—(See also **CARRIAGE**, vol. 2, p. 735; **COACH**, vol. 3, p. 287, n.).—A stage coach or stage wagon is defined to be a coach or other carriage running regularly from one place to another for the conveyance of passengers.<sup>4</sup>

lowed in *O'Donnell v. McIntyre*, 16 Abb. N. Cas. (N. Y.) 86.

A better definition, perhaps, is a person who settles or locates on land, without any claim or color of title. See *Sykes v. Hayes*, 5 Biss. (U. S.) 530.

1. *State v. Patza*, 3 La. Ann. 514; *State v. Lowry*, 33 La. Ann. 1224. See also *Ruby v. State*, 7 Mo. 206.

To constitute stabbing, the knife need not enter any further than to penetrate the skin and draw blood—certainly half an inch or even one-eighth of an inch, would be deep enough. *Ward v. State*, 56 Ga. 408.

**Distinguished from Cut.**—“Stab” differs from “cut,” the latter word importing a wound made with an instrument having an edge. *State v. Patza*, 3 La. Ann. 514; *Cut*, vol. 4, p. 970.

2. A stable has been held a “building” within a statute against burglary. See *BURGLARY*, vol. 2, p. 676.

So it has been held an “outhouse” within statutes against arson. See *ARSON*, vol. 1, p. 766 *et seq.*

**Feed Stable.**—See **LIVERY STABLE KEEPERS**, vol. 13, p. 935.

As to when a stable is a nuisance, see **NUISANCES**, vol. 16, p. 954.

3. A cock of hay differs from a stack of hay. The former is a small conical heap into which hay is formed temporarily in the field to protect it from the rain; the latter, on the contrary, means a large heap of hay saved and made up and protected from the weather. “Webster defines a cock of hay to be a ‘small conical pile, so shaped for shedding the rain, and called in England a cop; whilst a stack is a large conical pile sometimes covered with thatch.’” *Reg. v. McKeever*, Ir. R., 5 C. L. 90.

A quantity of straw packed on a

lorry (a small cart or wagon), in course of transmission to market, and left for the night in the yard of an inn is not a stack of straw. *Reg. v. Satchwell*, L. R., 2 C. C. 21. A stack is not necessarily something erected out of doors. *Reg. v. Munson*, 2 Cox C. C. 186.

4. *Talcott Mountain Turnpike Co. v. Marshall*, 11 Conn. 199.

“A stage is any carriage that travels by set stages.” *Middlesex Turnpike Co. v. Wentworth*, 9 Conn. 374.

A street railway franchise was granted on condition of the payment of “the annual license fee for each car now allowed by law.” An old ordinance at that time required license fees for each “accommodation coach” or “stage coach.” It was held that under this stipulation the city was entitled to the same license fee on a car as was fixed by the old ordinance on a stage coach. The defendants contended that as the word car was not mentioned in the old ordinance, it did not apply to their cars. The court, by Danforth, J., said: “But the contention of the defendant is that it enumerates as its subjects ‘a stage,’ ‘an accommodation coach,’ ‘a stage coach,’ and is altogether silent as to ‘railroad car,’ or even ‘car.’ We are unable to see the force of the observation. In definition, a ‘car’ or ‘coach’ or ‘stage’ or a ‘stage coach’ is the same. They are vehicles that turn, or that run by turning on wheels. Place boards over or between wheels, and we have a platform car, adapted to freight; place benches or chairs upon the platform, and we still have a car, but adapted to passengers, and then easily termed ‘a carriage.’ Instead of benches or chairs, put on the platform the body of a ‘stage

**Definition. STAKEHOLDER—STANDING ASIDE. Definition.**

**STAKEHOLDER**—(See also GAMBLING CONTRACTS, vol. 8, p. 999).—A stakeholder is a depository for both parties of the money advanced by them, respectively, with a naked authority to deliver it over upon the proposed contingency. He is not regarded as a party to the illegal contract.<sup>1</sup>

**STALE DEMAND**—(See also LACHES, vol. 12, p. 533).—A demand which, owing to the lapse of time and the laches of the complainant, a court of equity or admiralty will not entertain.

**STALL**.—See MARKETS, vol. 14, p. 465.

**STAMPS**—(See also REVENUE LAWS, vol. 20, p. 242).—Under former *United States* revenue laws, requiring bank checks, drafts, and other documents to be stamped, many interesting questions arose as to the validity, admissibility in evidence, etc., of such documents when not stamped as provided by law. These statutes having all been repealed, it has not been thought necessary to treat here this branch of the law.<sup>2</sup>

**STAND, STANDING**.—See note 3.

**STANDING ASIDE**.—See JURY and JURY TRIAL, vol. 12, p. 348.

coach,' and we have such a 'railroad car' as served at the inauguration of the earliest railroad in our state. It is plain that by adaptation and improvement 'the modern railway car has been evolved from the old-fashioned stage coach.' The American Railway, p. 231. In common language a railroad carriage designed for passengers is called indifferently a 'coach' or 'car.' In every collection of words arranged according to the ideas which they express, these, and others with them, will be found classed together as having the same signification. Neither the word 'coach,' 'stage,' nor 'car' can be said to be words of art, or to have any legal or fixed meaning distinguishing one from the other, or any one of them from several other terms implying a vehicle or conveyance." Mayor, etc., of N. Y. v. Third Avenue R. Co., 117 N. Y. 404.

**Stage Driver**.—See DRIVE, vol. 6, p. 31; EMBEZZLEMENT, vol. 6, p. 462.

1. Fisher v. Hildreth, 117 Mass. 562.

2. **As to Postage Stamps**.—See MAIL, vol. 13, p. 1200; POSTAL LAWS, vol. 18, p. 843.

3. In Bon v. Railway Passenger Ins. Co., 56 Iowa 666; 41 Am. Rep. 127, it was held that one who passes from one car to another does not "stand" on the platform. See also Sawtelle v. Railway Pass. Assur. Co.,

15 Blatchf. (U. S.) 216; Buel v. New York Cent. R. Co., 31 N. Y. 314; 88 Am. Dec. 271.

An ordinance of the city of Boston provided that no hack driver should "stand with such carriage to solicit passengers in any street." Held, that a driver who left his carriage standing in the street, and solicited passengers inside a railroad station out of sight of the carriage, was within the ordinance. Com. v. Matthews, 122 Mass. 62.

**Standing Timber, Trees, Wood**.—See LIMITATION IN INSTRUMENTS, vol. 13, p. 790; WOODS AND FORESTS.

**Stand Committed**.—Where an order directed that a defendant should "stand committed" instead of using the statute phrase "be committed," it was held, that the difference of phraseology was unimportant. Young v. Makepeace, 103 Mass. 50.

"Good standing in a society, not only implies that a party is a member of the society, but that he has a good reputation therein. In the present instance, the words are to be construed with reference to the language of the certificate, and when this is done, they manifestly mean not only good reputation, but good conduct—i. e., freedom from a violation of the pledge of total abstinence." Smith v. Mathew, 36 Mo. App. 192; Royal Templars v. Curd, 111 Ill. 284.

**STANDING BY**—(See also *ESTOPPEL*, vol. 7, p. 12).—The term "standing by," so often used in the books and reports in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means silence where there is knowledge and a duty to make a disclosure.<sup>1</sup>

**STARE DECISIS**.—(See also *DICTA*, vol. 5, p. 661; *RES JUDICATA*, vol. 21, p. 127; *UNITED STATES COURTS*.)

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1. **DEFINITION ; OBITER DICTA**.—The doctrine of *stare decisis* is in no way affected by *dicta*, nor does the doctrine change or control the *dicta* in any way. *Dicta* are casual or incidental comments by the court, which are neither binding nor conclusive. The mind or general tendency of the court is shown by them, perhaps, and an inkling is given as to what the decision would be if the court should be called upon to make it. This doctrine has to do only with direct decisions upon important and vital issues. Any positions or utterances of the court upon the issues necessarily to be decided in a case cannot be *dicta*, but are direct and controlling decisions establishing precedents for future cases involving the same or similar issues. The very name of the doctrine shows that it has to do only with real decisions; and chance or collateral hints are of no binding force, and establish nothing to be relied upon subsequently.<sup>2</sup> It is not material whether the

1. *Anderson v. Hubble*, 93 Ind. 573; 47 Ark. 394; *Gatling v. Rodman*, 6 Ind. 289; *Catherwood v. Watson*, 65 Ind. 576; *Richardson v. Chickering*, 41 N. H. 380; 77 Am. Dec. 769.

2. *Peck v. Jenness*, 7 How. (U. S.) 612; *Ex parte City Bank*, 3 How. (U. S.) 292; *Alexander v. Worthington*, 5 Md. 488; *Michael v. Morey*, 26 Md. 261; 90 Am. Dec. 106.

In *Cohens v. Virginia*, 6 Wheat. (U. S.) 399, the court, by Chief Justice Marshall, said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken

in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles, which may serve to illustrate, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Carroll v. Carroll*, 16 How. (U

decision rests upon principles of the common law or upon the interpretation of a statute. If it settles directly a question in issue, it is a matter decided, and will have a bearing in future cases raising the same issues. A matter, though of secondary importance, if decided, is as completely subject to this doctrine as the principal question in issue. There may be two or more issues, independent each of the other, and the doctrine applies equally to them all, even though they are all embodied in the same case. A trifling or seemingly insignificant issue may have its legal status fixed. The doctrine applies to all decisions, the question being whether the court has really rendered a decision upon the point.<sup>1</sup> *Dicta*, while not binding in themselves, may become finally a part of the recognized law of the land. Even though they have not the merit of having regarded legal principles accurately, yet, having by frequent repetition and approval obtained a familiar place in the current decisions, they may ultimately be clothed with, or substantially with, the strength and importance attached to precedents.<sup>2</sup> Both *dicta* and decisions are subject to reversal or confirmation by the courts, and the latest position taken regarding them will become the binding one in

S.) 287, the court, by Curtis, J., said: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way, without affecting any right brought into question, then according to the principles of the common law an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore, this court (and other courts organized under the common law) has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

1. *Crogg v. Atlanta, etc.*, R. Co., 77 Ga. 202; 4 Am. St. Rep. 79; *Florida Cent. R. Co. v. Schutte*, 103 U. S. 143; *Levy v. Hitche*, 40 La. Ann. 500; *School Trustees v. Stocker*, 42 N. J. L. 117; *Forepaugh v. Delaware R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Bates v. Taylor*, 87 Tenn. 325; *Porter v. Lee*, 88 Tenn. 783; *Carroll v. Carroll*, 16 How. (U. S.) 287; *Weare v. Deering*, 60 N. H. 56.

2. *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 439. In *Groesbeck v. Golden* (Tex. 1887), 7 S.W. Rep. 363, the court,

by Maltbie, J., says: "The doctrine is, without doubt, a wise and useful one, and should be upheld with a firm hand and unshaken purpose on all proper occasions. There are a few general rules of almost universal application underlying and supporting this doctrine. For instance, where a decision has been made, adhered to, and followed for a series of years, it will not be disturbed except on the most cogent reasons, and it must be shown in such case that the former decisions are clearly erroneous; and where property rights have grown up under the decision, the rule will not be changed for any reason. But if the decision is of recent origin and the error plain, the court will usually declare the law as it really is. The supreme court in this State, in a number of cases, has changed the rule on the second appeal of said cases. We do not think that any court has ever held that when there has been an erroneous decision in one case only, and when the doctrine of all cases that have preceded and followed it in reference to the matters decided is contrary to the doctrine of that case, it will be upheld as *stare decisis*, although never having been expressly overruled for the sole purpose of taking a piece of property from one man and giving it to another."

future cases involving the same issues.<sup>1</sup> Where the decision of any tribunal is subject to appeal to a higher court, such decision is not affected by the doctrine of *stare decisis* until passed upon by the higher tribunal of last resort.<sup>2</sup>

It may be difficult sometimes to determine what are *dicta* and what are not. It need not be that points decided must have been fully and completely considered in every detail, in order that they may be regarded as decisions and not merely as *dicta*. The determining point is rather whether the issue is directly involved in the case than whether it has been exhaustively considered.<sup>3</sup> In some courts it is held that points treated, which are outside the record, are not really decided, but that the language of the court regarding them is and can be only *dicta*; while in other States, this has nothing to do with determining the status, it depending upon the directness of the issue and the elaborateness of treatment by the court.<sup>4</sup>

**II. THE LAW OF PRECEDENT—1. In General.**—There is a marked distinction between *dicta* and decisions. The former simply indicate, as it were, the sympathies of the court, while the latter are conclusive in the higher tribunals from the decision of which there is no appeal. Matters outside the record are generally considered as merely incidental or collateral to the direct decision upon the principal issues in a case. Sometimes analogies are given, sometimes illustrations only, and none of these are intended as decisions to be in any way binding in the rendering of subsequent decisions. Decisions are precedents, *dicta* are not.<sup>5</sup> In the con-

1. Paul v. Davis, 100 Ind. 422; Louisville, etc., R. Co. v. Davidson County Ct., 1 Sneed (Tenn.) 695; People v. Mayor, etc., of N. Y., 25 Wend. (N. Y.) 256; 35 Am. Dec. 669.

2. Allen v. Allen (Cal. 1891), 27 Pac. Rep. 30; Lucas v. Tippecanoe County, 44 Ind. 541; Bridge v. Johnson, 5 Wend. (N. Y.) 372.

3. Michael v. Morey, 26 Md. 261; 90 Am. Dec. 106; People v. Winkler, 9 Cal. 236; Pass v. McRae, 36 Miss. 148; Holcomb v. Bonnell, 32 Mich. 8.

4. Buchner v. Chicago, etc., R. Co., 60 Wis. 264; Alexander v. Worthington, 5 Md. 488; State v. Baughman, 38 Ohio St. 455; Etting v. Bank of U. S., 11 Wheat. (U. S.) 59; Morse v. Goold, 11 N. Y. 285; 62 Am. Dec. 103.

5. In Louisville, etc., R. Co. v. Davidson County Ct., 1 Sneed (Tenn.) 695, the court, by Caruthers, J., said: "It may not be out of place here to remark, as the subject seems to be so often and by so many misunderstood, that the generality of the language used in an opinion is always to be restricted to the case before the court, and it is only

authority to that extent. The reasoning, illustrations, or references, contained in the opinion of a court, are not authority, not precedent, but only the points in judgment arising in the particular case before the court. The reason of this is manifest. The members of a court may often agree in a decision—the final result in a case—but differ widely as to the reasons and principles conducting their minds to the same conclusion. It is then the conclusion only, and not the process by which it is reached, which is the opinion of the court, and authority in other cases. The law is thus far settled, but no farther. The reasoning adopted, the analogies and illustrations presented, in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not. So of the principles concurred in and laid down as governing the point in judgment, so far as it goes, or seems to go, beyond the case under consideration. If this were not so, the writer of an opinion would be

sideration of the doctrine of *stare decisis* the interpretation is to be broader than is generally given to decisions, or rather the effect of prior decisions is more comprehensive and wider reaching. For not only are actual decisions followed, but it is even claimed that any subsequent allegations as to what is determined

under the necessity in each case, though his mind is concentrated upon the case in hand and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations, and qualifications which every variety of facts and change of phase in cases might render necessary." The foregoing language was adopted with approval by the *Indiana* court in *Lucas v. Tippecanoe County*, 44 Ind. 541.

In *People v. Mayor, etc., of Brooklyn*, 9 Barb. (N. Y.) 544, the court said: "We look into these opinions in vain for the evidence of that solemn argument and mature deliberation which, upon the doctrine of *stare decisis*, should give to this case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question."

In *Harris v. Clark*, 2 Barb. (N. Y.) 94, the court, by Gridley, J., when pressed with a former decision, responded as follows: "In opposition to this doctrine, however, the case of *Wright v. Wright* (1 Cow. (N. Y.) 598) is pressed upon us as an authoritative adjudication which we are bound to follow. We believe in a rigid adherence to the doctrine of *stare decisis*. We regard it as necessary to preserve the stability, the certainty, and the symmetry of any system of jurisprudence; and, therefore, if we had any reason to believe that the decision in this case was made upon deliberate consideration, and that the adoption of the reasons assigned by the judge was necessary to the decision of the questions before the court, we should certainly regard it as an authority binding upon us, and leave the error, if any there were, to be corrected in the court of the last resort. But we do not think the case of *Wright v. Wright* entitled to the authority of judgment upon the point in question. The case itself was a non-enumerated motion. The disposition of this class of cases is constantly made upon equitable considerations, which address themselves to the

discretion of the court; and relief is frequently granted on equitable terms against the strict legal rights of the parties. The judgment in this case was merely a refusal to stay the proceedings in a cause after verdict, to enable the applicant to move for a new trial upon newly discovered evidence; and the decision might well have been placed upon the ground assumed by the circuit judge in refusing to grant the same order which, in no respect, involved the principle now under consideration. It is manifest from the report of that case that it did not receive a deliberate examination either by the counsel or the court. No one of the cases upon the subject of gifts *causa mortis* appears to have been brought to the notice of the court, and none of the objections which in other cases have been held fatal, were alluded to by the judges in the brief remarks that fell from them in disposing of the motion. For these reasons, we consider ourselves at liberty to dispose of this interesting and important question, unembarrassed by the authority in the decision in *Wright v. Wright*. We may also add that that case has been reviewed and its conclusions disapproved by the courts of *Massachusetts, Connecticut, and Vermont*."

*Greenbaum v. Stein*, 2 Daly (N. Y.) 226; *Holcomb v. Bonnell*, 32 Mich. 8. Decisions long acquiesced in should not be changed if incorrect. *State v. Whitworth*, 8 Lea (Tenn.) 594.

The effect of decisions as precedents is not changed by the setting off of new States or varying the boundaries so that it might seem that an old decision would not be a precedent in a different State. *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123; *Wilson v. Perry*, 29 W. Va. 169.

The decisions of the full bench will control the opinion of a single justice, unless there has been some flagrant error committed, sufficient to justify a change. *Bentley v. Goodwin*, 38 Barb. (N. Y.) 640; *Loring v. U. S. Vulcanized Gutta Percha Co.*, 30 Barb. (N. Y.) 646; *Adams v. Bush*, 2 Abb.

in any case is to be respected, so that not only the particular case but any subsequent interpretation or explanation of its meaning is to be regarded as coming within the doctrine and final.<sup>1</sup>

*the* **Interpretation of Language of Court.**—The language used in the opinions of the court must be construed in the light of the circumstances connected with each case. Its influence and weight as a precedent is also largely dependent upon them. The language in argument, or findings, may have a restricted or enlarged interpretation by reason of its connection with a specific statement of facts.<sup>2</sup>

**3. A Divided Court.**—A decision rendered by a court equally divided in opinion, while binding in the particular case as fully as a decision rendered by a unanimous court, is not binding as a

Pr. N. S. (N. Y.) 118; *People v. Mayor*, etc., of Brooklyn, 9 Barb. (N. Y.) 544; *Harris v. Clark*, 2 Barb. (N. Y.) 101.

A decision of the supreme court becomes the law of the case upon the points involved, even though erroneous. *Lindsay v. People*, 1 Idaho N. S. 438; *Barton v. Thompson*, 56 Iowa 571; 41 Am. Rep. 119. Yet if the decision is overruled before the final trial of the case in the court below, it is the duty of that court on the trial to follow the rule last established by the supreme court. *Barton v. Thompson*, 56 Iowa 571; 41 Am. Rep. 119.

The principle of *stare decisis* applies equally on appeal. *Adams County v. Burlington, etc., R. Co.*, 55 Iowa 94.

Decisions of long standing, which have been frequently relied upon, should be leniently considered and reversed only where their inaccuracy is plain. *Davidson v. Biggs*, 61 Iowa 309; *Henry v. Quackenbush*, 48 Mich. 415.

There is no vested right to claim the benefit of any particular decision of a court. *Taliaferro v. Barnett*, 47 Ark. 359.

The rule of *stare decisis* will not prevent the overruling of a previous decision ascertained to be wrong. *Paul v. Davis*, 100 Ind. 422.

1. *Bennett v. Bennett*, 34 Ala. 53; *Matheson v. Hearin*, 29 Ala. 210; *People v. Benzie County*, 34 Mich. 211; *Baker v. Lorillard*, 4 N. Y. 261; *Davidson v. Allen*, 36 Miss. 421; *Richmond St. Railway Co. v. Reed*, 83 Ind. 9.

2. Where there was an indictment against a bailee for the larceny of money it was held that all the particulars should be set forth including the allegation that it was lawful money of the United States. *People v. Cohen*, 8 Cal. 42.

This was afterwards followed in a case of larceny of cattle, in which the indictment stated the value of the cattle without adding the words "lawful money of the United States." Upon this, the court, by Burnett, J., said: "It is true that the language of that opinion, taken without reference to the circumstances of the case, would bear the construction contended for; but the rule is well settled that the language of an opinion in general must be held as referring to the particular case decided. In that case, Cohen was indicted for converting money to his own use whilst he was the bailee of another. The defect was in describing the thing converted. The thing stolen must be correctly described, for the purpose of identification. And when a party is indicted for stealing coin, the kind of coin must be specified. But in this case, the indictment was for stealing cattle, and the value of the animals stolen was alleged in the language of the statute. The statute defining the offense does not use the words 'lawful money of the United States.' The allegation of the value was sufficient, being as certain as the language of the statute." *People v. Winkler*, 9 Cal. 236; *Mellinger v. Von Behren*, 53 Iowa 374.

In *Pass v. McRae*, 36 Miss. 148, the court, by Harris, J., said: "Such is the flexibility of language, and even of sentences disconnected from their context, as well as the special state of facts to which they have been applied, that in courts it has become a settled rule that all adjudications are to be considered only in connection with, and as explained by, and limited to, the state of circumstances appearing in the record."

precedent in subsequent cases. The rule that where the court is divided the judgment below is affirmed, is one of convenience rather, in order that an end may be made to the particular litigation. When the same question arises in a subsequent case between other parties, it is treated as an open one and the former decision is not to be invoked as *stare decisis*.<sup>1</sup>

4. **Single Decision and Decisions in Series.**—While a number of decisions seemingly corroborative of a previous one add strength to it and make it the more difficult to overrule or reverse it, mere numbers of cases upon the issue will not make the decision conclusive. Much more depends upon the opinion of the court and the emphasis placed upon the decision than upon the fact that any case has been followed subsequently. For a variety of reasons, several cases similarly decided are stronger than one. There is less likelihood of error; any points, decisions, or statutes overlooked in the one may be considered in subsequent cases; and the ease of reversing one decision is greater than the overthrow of a series. If there is but one case upon a point, and there seems no good reason for a reversal, that will ordinarily be taken as a fixed precedent. It is where there is a conflict of opinions or an evident error in the decision that a court will overrule one case, when it would hesitate more about condemning several. Much depends upon the importance of the decision and the weight to be attached to it. Whether the court is emphatic in its approval, whether the decision is one affecting or changing important interests, and whether it is expedient or good policy to sustain or overrule a particular decision, are questions which have much influence upon the court.<sup>2</sup>

<sup>1</sup> 1. "The effect of such judgment of affirmance rendered by a divided court is as conclusive upon the rights of the parties to the judgment as any other, although it is not considered as settling the question of law as to cases which may arise between other parties." *Morse v. Goold*, 11 N. Y. 285; 62 Am. Dec. 103.

In *Etting v. Bank of U. S.*, 11 Wheat. (U. S.) 59, the court was evenly divided, and Marshall, C. J., said: "In the very elaborate arguments which have been made at the bar, several cases have been cited, which have been attentively considered. No attempt will be made to analyze them or decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled, but the judgment is affirmed, the court being divided in opinion upon it." See also *People v. Mayor*, etc., of N. Y., 25 Wend. (N. Y.) 256;

35 Am. Dec. 669; *Bridge v. Johnson*, 5 Wend. (N. Y.) 342; *McCutcheon v. Homer*, 43 Mich. 483; 38 Am. Rep. 212. Where a court is equally divided no original relief can be granted. *Madlem's Appeal*, 103 Pa. St. 584.

2. In *Woolsey v. Judd*, 4 Duer (N. Y.) 389, which involved the right of property in manuscripts, the court, by Duer, J., said: "In proceeding to examine, as we now propose, whether it is possible to reconcile this opinion of the late chancellor with the law as settled by prior decisions, and among these the very cases to which he has himself referred, we must not be understood as meaning to detract in any degree from the weight and authority to which his decisions as those of a very able, learned, and laborious judge are generally and justly entitled. The judges of this court have frequently manifested the high sense which they entertain of his judicial merits; and it is with reluctance that we dissent on any occasion from any deliberate judg-



**5. Adopted Statutes.**—Where the legislature of one State adopts by enactment the statute of another State, it may be said, as a general rule, that the courts adopt the construction put upon such statute by the courts of the State from which it was taken; this, upon the presumption that the legislature was familiar with the construction put upon the statute in the State from which it was taken.<sup>1</sup>

**6. Recent English Decisions.**—The rule last stated is not followed to the extent of making the decisions of the courts of Great Britain since the American Revolution binding upon the courts of the States of the Union in reference to English statutes adopted by the States at that time, even though such statutes are founded upon the common law.<sup>2</sup>

ment which he has pronounced. But we deny that a recent and solitary decision of any judge, however eminent, ought to be regarded by us as conclusive evidence of the existing law, and we deny that we are bound by the decisions of the chancellor in the same sense in which we are bound by those of the court of ultimate resort. We stand now in the same relation to the court of appeals as that in which he stood to the court of errors, and in the cases in which we exercise an equitable jurisdiction have succeeded to all the powers which he possessed in similar cases. We have, therefore, exactly the same right to review, and when convinced that errors have intervened that ought not to be perpetuated, to overrule his decisions that he himself and his successors in office, had not the court of chancery been abolished, might and would have exercised. It is known to us all that the cases are numerous in courts of equity as well as of law, in which judges have felt it their duty to reconsider and reverse their own decisions and those of their predecessors; and deplorable, indeed, would be the actual state of the law (as none who has examined the valuable treatise of Mr. Greenleaf on overruled cases will doubt) had not these powers of revision and correction been frequently and firmly exercised. We must all remember that the judgment in *Hoyt v. McKenzie* (3 Barb. Ch. (N. Y.) 324), from the sanction which it apparently gave to a very dishonorable proceeding, excited general surprise and regret, so that even those who admitted its legality were anxious to relieve the law from the reproach which it occasioned. We are convinced that

this reproach of giving a sanction to immorality is one to which the law was never justly liable, and from the continuance of which it ought therefore to be freed."

See also *Duff v. Fisher*, 15 Cal. 382; *Sauer v. Steinbauer*, 10 Wis. 370.

A question of no light weight is whether a single decision is a reversal or overruling of any prior case. A case simply establishing a point without in any way interfering or contradicting any previous case would have more weight, of course, than one which was in conflict with previous decisions or *dicta*. *People v. Mayor*, etc., of Brooklyn, 9 Barb. (N. Y.) 543; *Oglesby v. Attrill*, 14 Fed. Rep. 214.

In *Butler v. Van Wyck*, 1 Hill (N. Y.) 438, Bronson, J., in a dissenting opinion, said: "It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent. It is an elementary principle that an erroneous decision is not bad law; it is no law at all. It may be final upon the parties then before the court, but it does not conclude other parties having rights depending upon the same question."

1. *Bemis v. Becker*, 1 Kan. 226; *Johnson v. Fall*, 6 Cal. 361; 65 Am. Dec. 518; *Woolsey v. Judd*, 4 Duer (N. Y.) 389; *Howe v. Welch*, 14 Daly (N. Y.) 180; *Forepaugh v. Delaware*, etc., R. Co., 128 Pa. St. 217; 15 Am. St. Rep. 672; *Crocker v. Pearson*, 41 Kan. 410; *Lane v. Watson*, 51 N. J. L. 186; *McIntyre v. Kamm*, 12 Oregon 253; *Goodnow v. Wells*, 67 Iowa 654; *Lord v. Cannon*, 75 Ga. 300; *Hancock Inspirator Co. v. Register*, 35 Fed. Rep. 61.

2. In *Caldwell v. Gale*, 11 Mich. 77, the court by Manning, J., said: "The

**7. Statutes Offered in Evidence.**—If a statute is not adopted from another State, any decisions under the statutes of other States will only be considered for the purpose of determining, if possible, what interpretation is the correct one; but such foreign

first proposition is sustained by adjudged cases both in England and in this country. It appears to have had its origin as a rule of law in *Penraddock's Case*, 5 Coke 100. It has antiquity on its side, and is, therefore, entitled to all the consideration and weight that time can give to an adjudication, as precedent for other courts to follow. We are not, however, aware that the question has ever before arisen in our courts, and we do not feel ourselves bound to follow, as precedents, adjudications outside of our own State—save adjudications in the Federal courts on questions arising under the constitution and laws of the Federal government—any further than they appear to us to be warranted by the fundamental principles of the common law."

In *Cathcart v. Robinson*, 5 Pet. (U. S.) 280, the United States Supreme Court, by Marshall, C. J., said: "The rule which has been uniformly observed by this court in construing statutes is, to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes. By adopting them, they become our own as entirely as if they had been enacted by the legislature of the State. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves and forming an integral part of them. But however we may respect subsequent decisions—and, certainly, they are entitled to great respect—we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them."

In *Mayor, etc., of Baltimore v. Williams*, 6 Md. 235, the court in construing the statute of 27 Eliz., ch. 4, after stating the construction put upon the statute by the English courts, said: "This question has been the fruitful source of much controversy, and has

produced many conflicting decisions; but the better American doctrine seems not to be in unison with the established construction at Westminster Hall. . . . And with a view to avoid the influence of American decisions, the appellant's counsel insist that in this State the English doctrine must prevail, because of the provision in our constitution in reference to the adoption of the common law, and the statutes which were in force here at the beginning of the American Revolution. This is a correct position, if by the English doctrine which is to prevail here, is meant such as was settled by judicial decisions previous to our separation from the British empire. And this renders it necessary to ascertain whether, at that time, the construction of the statute had been settled according to the views entertained by the appellant. This subject was examined by the distinguished Chief Justice Marshall in *Cathcart v. Robinson*, 5 Pet. (U. S.) 280. He concedes that the received construction of the English statutes, at the time of the Revolution, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But subsequent decisions, although entitled to great respect, are not to be received as absolute authority. It is the opinion of the court, as expressed by the chief justice, that the construction of the statute of 27th Elizabeth was not settled in England before, but subsequent to, the year 1776. After speaking of contrariety and ambiguity in the old cases, it is said: 'But this court conceives that the modern decisions, establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement made without valuable consideration—fraud not to be repelled by any circumstances whatever—go beyond the construction which prevailed at the American Revolution, and ought not to be followed.'"

The language of the *Maryland* court in the foregoing case was approved and adopted in *Koontz v. Nabb*, 16 Md. 549, and it was said that English decisions made subsequent to the period of the separation of the States of the

decisions are considered in no sense binding or controlling, and the court will, in the light of such assistance as it can obtain, place its own construction upon the law relating to the case.<sup>1</sup>

**8. Executive Departments of Government.**—Sometimes matters of a kindred nature are passed upon by the executive or other department of a government. Courts need not consider and certainly are not bound by any department other than the judicial of any government. They may consider or not, as they please, the action of any other department. The judicial department is separate from and independent of, in a certain sense, all other branches of the government. Each department, in its decisions, furnishes a precedent unto itself, but for no other branch of government.<sup>2</sup>

Union from the British empire, though entitled to great respect, were not to be received as absolute authority.

1. *Nelson v. Goree*, 34 Ala. 565; *Lownsdale v. Portland*, 1 Oregon 390; *Heinlen v. Martin*, 59 Cal. 181; *McIntyre v. Kamm*, 12 Oregon 253; *Lord v. Cannon*, 75 Ga. 300; *Goodnow v. Wells*, 67 Iowa 654; *Levy v. Hitsche*, 40 La. Ann. 500; *Croocker v. Pearson*, 41 Kan. 410; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Lane v. Watson*, 51 N. J. L. 186; *Howe v. Welch*, 14 Daly (N. Y.) 80; *Bressler v. Wayne County*, 25 Neb. 468; *The Chelmsford*, 34 Fed. Rep. 399; *Norton v. Taxing Dist. of Brownsville*, 36 Fed. Rep. 99; *Lord v. Cannon*, 75 Ga. 300; *Goodnow v. Wells*, 67 Iowa 654.

2. In *Lownsdale v. Portland*, 1 Oregon 390, the court, by Deady, J., says: "When Congress, by the act of 1848, organizing the Territory of Oregon, said that the laws of the United States should be in force in said Territory, 'so far as the same, or any provision thereof, may be applicable,' they did not mean that any particular law of the United States should be in force here, but only such as should be determined 'to be applicable.' Under this state of things, authority is necessarily given to the courts of the country, and it becomes their duty, whenever the question arises, to decide what laws were in force and what were not. Doubtless any administrative department of the government,—the land office, for instance,—charged with the duty of disposing of the public lands in this Territory, may be called upon to decide the same questions; but I respectfully submit that while their decision may operate to pass the title out of the

United States, it does not conclude the courts in a proper case when parties are before the court claiming under conflicting laws of the United States, or any law of the United States, from deciding what laws were applicable, and, consequently, in force, and what were not, at a particular time, independently of the decision of said department, or even adversely to it."

**Decisions of Land Office.**—In *Quinby v. Conlan*, 104 U. S. 420, it was laid down that courts could not exercise a direct appellate jurisdiction over the rulings of the officers of the land department, nor reverse or correct them in a suit between private parties; that it was only where such officers had misconstrued the law, or where their judgment had been affected by misrepresentation or fraud, that, in a proper proceeding, courts could interfere and refuse to give effect to the action of such officers; and that the misconstruction of the law must be made manifest.

In *Johnson v. Towsley*, 13 Wall. (U. S.) 72, it was said that where the law confided to a special tribunal authority to hear and determine certain matters, the decision of such tribunal was in general conclusive, but that, though this was so, a decision of the United States land office did not oust courts of equity of their ordinary jurisdiction, whether in matters of trust or of fraud or mistake. And see generally *Lytle v. Arkansas*, 9 How. (U. S.) 314; *Barnard v. Ashley*, 18 How. (U. S.) 43; *Minnesota v. Bachelder*, 1 Wall. (U. S.) 109; *Lindsay v. Hawes*, 2 Black (U. S.) 554; *Rector v. Gibbon*, 111 U. S. 276; *Cox v. U. S.*, 9 Wall. (U. S.) 208; *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Baldwin v. Stark*, 107 U.

**III. ERRONEOUS PRECEDENTS AS RULES OF PROPERTY—1. In General.**—The law in regard to titles to real estate especially requires stability. As injurious as are frequent changes in the law, no decisions as to personal property or damages require such permanency as those relating to realty. Even one decision in the latter case will be scrupulously guarded and preserved, for titles are for all time and should stand as passed upon if possible. Courts are always reluctant to overrule or reverse any decision unless it is manifestly unjust and inaccurate. Titles may be largely or wholly dependent upon previous decisions, and landed interests would be jeopardized by sudden or frequent changes in interpretation or construction of legal principles.<sup>1</sup>

S. 463; *Haydel v. Dufresne*, 17 How. (U. S.) 23. See also UNITED STATES COURTS.

1. *Rockhill v. Nelson*, 24 Ind. 424; *Harrow v. Myers*, 29 Ind. 470; *Reed v. Ownby*, 44 Mo. 206; *Kearny v. Buttles*, 1 Ohio St. 366; *Lion v. Burtiss*, 20 Johns. (N. Y.) 487; *Duff v. Fisher*, 15 Cal. 382; *Hihn v. Courtis*, 31 Cal. 402; *Pioche v. Paul*, 22 Cal. 110; *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141; *Davidson v. Allen*, 36 Miss. 421; *Matheson v. Hearin*, 29 Ala. 210; *Bennett v. Bennett*, 34 Ala. 53; *Baker v. Lorillard*, 4 N. Y. 261; *State v. Whitworth*, 8 Lea (Tenn.) 594; *Pond v. Irwin*, 113 Ind. 243; *Snyder v. Gascoigne*, 11 Tex. 455; *Lemp v. Hastings*, 4 Greene (Iowa) 449; *Pond v. Irwin*, 113 Ind. 243; *Pawson v. Portland*, 16 Oregon 450; *Stryker v. Goodnow*, 123 U. S. 527; *Chapman v. Goodnow*, 123 U. S. 540; *Litchfield v. Goodnow*, 123 U. S. 549; *Plumb v. Goodnow*, 123 U. S. 560; *Des Moines Nav., etc., Co. v. Iowa Homestead Co.*, 123 U. S. 552. Uniformity is of great importance. *The Chelmsford*, 34 Fed. Rep. 399; *Norton v. Taxing Dist. of Brownsville*, 36 Fed. Rep. 99; *Pickle v. People*, 88 Tenn. 380; *The Madrid*, 40 Fed. Rep. 677.

In *Giblin v. Jordan*, 6 Cal. 418, the court, by Murray, C. J., said: "This case may be a hard one, but it forms no reason why the former decisions should be disregarded. The frequent instances in which courts have relaxed rules to avoid the consequences of cases like this have done more to confuse and complicate the law than all other causes put together. A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have more beneficial effect than if constantly deviated from."

The same court, in *Welch v. Sullivan*, 8 Cal. 188, said: "Courts are permitted to exercise a wide discretion, and judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion, simply because some abstract principle of law has been incorrectly established in the outset. The books are full of cases in which learned judges have acknowledged the errors committed by themselves or their predecessors, and at the same time refused to overthrow the rule established. That judge, who, from petty vanity and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years had settled the rights of property, should be regarded as the common enemy of mankind, and unworthy of the high trust that had been confided to him."

In *Grignon v. Astor*, 2 How. (U. S.) 343, the court, by Baldwin, J., said: "We do not deem it necessary now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity

ought to be placed than those made of the estates of decedents by order of those courts to whom the laws of the States confide full jurisdiction over the subject."

In *Bates v. Relyea*, 23 Wend. (N. Y.) 340, the court, by Cowen, J., said: "The decisions of this court, while unreversed, always form the absolute law of the cases, and enter with very decisive effect into the body of precedents. They must, from the nature of our legal system, be the same to the science of law as a convincing series of experiments is to any other branch of inductive philosophy. They are, upon being promulgated, immediately relied upon as to their character, either as confirming an old or forming a new principle of action which, perhaps, is at once applied to thousands of cases. These are continually multiplying throughout the whole extent of our jurisdiction. Numerous and valuable rights, offensive and defensive, may be claimed under them. And no doubt this remark is peculiarly true of the decision in *Clark v. Luce* (15 Wend. (N. Y.) 479). That decision, moreover, like all others made upon the subject of statute construction, even should it be reversed by the court of *dernier* resort, would still, by force of another statute, be itself equal to a legislative enactment concerning the particular case for the purpose of protecting all persons who may have in the meantime acted under it in good faith, against any penalty or forfeiture. Independent of this statute, Sir William Jones has written an excellent commentary on the maxim *stare decisis*, etc., by way of reply to a remark of Powell, J., who said: 'Nothing is law that is not reason.' 'This is a maxim,' says Jones, 'in theory, excellent; but in practice, dangerous; as many rules true in the abstract are false in the concrete. For, since the reason of Titius may and frequently does differ from the reasoning of Septimius, no man who is not a lawyer would ever know how to advise unless courts were bound by authority as firmly as pagan deities were supposed to be bound by the decrees of fate.' Jones on Bailment 60. The court almost always, in deciding any question, creates a moral power, above itself. And now, when the decision construes a statute, it is legally bound for certain purposes to follow it as a decree emanating from a paramount

authority according to its various applications in and out of the immediate case. This would be so of such a constructive decision, even were we to rule it as erroneous by a subsequent one."

Said the *Texas* court by Lipscomb, J.: "The rule of *stare decisis*, so far as it applies to the decisions of our own court, should not be disregarded but on the fullest conviction that the law has been settled wrong; and even then we should pause and consider how far the reversal would affect transactions entered into and acted upon under the law of the court." *Sydnor v. Gascoigne*, 11 Tex. 455.

It should require the best of reasons to change any legal principles relating to titles, otherwise the injustice, to be avoided, may be only just begun. Such law and principles should be fixed and stable, and generally, if the law is known in advance, owners and purchasers will receive that fairness and justice which would otherwise be impossible. *Boon v. Bowers*, 30 Miss. 256; 64 Am. Dec. 159; *Lindsay v. Lindsay*, 47 Ind. 286; *Hogatt v. Bingham*, 7 How. (Miss.) 569; *Ewing v. Ewing*, 24 Ind. 470; *Emerson v. Atwater*, 7 Mich. 23; *Lemp v. Hastings*, 4 Greene (Iowa) 449.

Where there is already a variance or disagreement among the decisions upon any particular point, the court may decide regardless almost of previous cases, as it must decide differently from some, at least, of the prior cases. *Frane v. Evansville*, etc., R. Co., 111 Ind. 132; *The Madrid*, 40 Fed. Rep. 677.

When legislative or statutory changes are made, they are imperative, and any annoyance or inconvenience arising therefrom must be endured. Laws can be enacted and repealed, and the courts and individuals must submit. *Morse v. Goold*, 11 N. Y. 292; 62 Am. Dec. 103; *Freibroth v. Mann*, 70 Ill. 523.

**Titles to Real Estate.**—In *Harrow v. Myers*, 29 Ind. 470, the court, speaking of real estate titles, said: "The question at the threshold is, whether a rule of property thus repeatedly declared by the court of last resort, after earnest contest, and, it must be supposed, upon the most careful deliberation, should be deemed open to further controversy. The repose of titles is important to the public. Upon the faith of these decisions our people have for a considerable period of years

**2. Decisions of Inferior Courts.**—Ordinarily a higher court may reverse or disregard the decision of an inferior court. But this is not universally true; there are many instances where the decision of an inferior court is practically final, and binding.<sup>1</sup>

**3. Claim to an Office.**—Where decisions have been rendered regarding the legality of a vote whereby a person is chosen to fill an official position, it is largely within the power of any court to decide whether it will maintain a decision, or follow an established precedent. This is a question which does not lie entirely with the judiciary to determine. The legislative department may take such action in the premises as will conclude the courts from further decision and bind them by its legislation.

invested their money in real estate, the titles to which they were thus again and again assured were not liable to be disturbed. There must be a just basis of confidence in the stability of judicial decision somewhere in the history of a controverted legal question, when it may be confidently relied on that the question is settled. It is not always that the courts may freely inquire, in determining a case before them, what is the law? Sometimes investigation should stop when it has been ascertained what has been decided on the subject. The doctrine of *stare decisis* should be applied to the question now presented. Such is its relation to the interests of our people among whom real estate is so much an article of traffic that it is not possible to estimate the extent of the evil which would follow a decision of this court now overruling *Strong v. Clem* (12 Ind. 37), and the cases which followed it. If the doctrine of those cases be admitted to be wrong, it is yet quite obvious that it has already accomplished most of the harm that ever can result from it, while a change now would sow a wide crop of serious evils to the injury of those who are innocent, and who have purchased and sold real estate upon the faith of a doctrine declared by this court no less than half a dozen times within the last ten years." *Grignon v. Astor*, 2 How. (U. S.) 343; *Ewing v. Ewing*, 24 Ind. 470; *Emerson v. Atwater*, 7 Mich. 23.

**Descent.**—In *Rockhill v. Nelson*, 24 Ind. 424, the court by Gregory, J., speaking of a rule of descent which had been assailed by argument, said: "This position, so forcibly addressed to this court before the decision in the case of *Martindale v. Martindale*

(10 Ind. 566), would have been entitled to grave consideration, and it is, indeed, difficult to see how it could have been met by legal argument. But there are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property long recognized and acted upon and under which rights have vested. It must be admitted that our law of descents, among the most important on our statute book, is not remarkable for precision and clearness, and that vexatious questions are often occurring requiring judicial interpretation of this statute. We cannot change a decision without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determination of the court of last resort, is unjust or even distasteful, the legislature can change the rule by a new statute without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion into questions of property by overruling the previous decisions of this court. We have had occasion in the last few months to overrule a number of cases, but only in that class in which the rulings operate upon the future and not upon the past, and which in our opinion will be attended by unmixed good."

1. *Attorney Gen'l v. Lake County*, 33 Mich. 290; 34 Mich. 211; *Morse v. Gould*, 11 N. Y. 292; 62 Am. Dec. 103; *Freibroth v. Mann*, 70 Ill. 523; *Rockhill v. Nelson*, 24 Ind. 424; *Reed v. Ownby*, 44 Mo. 206; *Harrow v. Myers*, 29 Ind. 470; *Reed v. Atlantic, etc., R. Co.*, 21 Fed. Rep. 283.

Still, when there is any doubt as to the construction to be put upon legislative language, it is very properly brought before the courts for interpretation.<sup>1</sup>

**IV. DECISIONS CONSTRUING CONSTITUTIONS AND STATUTES.**—The same or similar principles control in the construction of constitutions and statutes as apply in following precedents or any special or general principles of the common law.<sup>2</sup>

It is generally held that the doctrine of *stare decisis* applies equally to cases of interpretation and construction of constitutions and of statutes. There is seemingly no difference, but in either class of cases, if a palpable wrong or injustice would be done, the doctrine would be so modified as to adapt it wisely to the particular case.<sup>3</sup> If there have been many decisions, or if the business relations of parties or the titles to real estate are to be affected, the courts will, if possible, avoid passing upon the con-

1. *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141; *Duff v. Fisher*, 15 Cal. 382; *Lion v. Burtiss*, 20 Johns. (N. Y.) 487; *Pioche v. Paul*, 22 Cal. 110; *Kearny v. Buttles*, 1 Ohio St. 366; *Hihn v. Courtis*, 31 Cal. 402.

2. *Levy v. Hitsche*, 40 La. Ann. 500; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Crocker v. Pearson*, 41 Kan. 410; *Lane v. Watson*, 51 N. J. L. 186; *Goodnow v. Wells*, 67 Iowa 654.

In *Seale v. Mitchell*, 5 Cal. 403, where the question was as to whether a court should be considered one of inferior or superior jurisdiction, it was held that the question was not an open one after it had acted as the latter for more than five years. The supreme court, by Heydenfeldt, J., said the question was not an open one, since it had "remained as an exposition, by the tribunal of last resort, of the character of the court in question, for nearly five years. The community to be affected by it had acted upon it in a vast number of judicial relations; rights of property had grown up under it, had changed hands and passed through numerous ramifications, until it had become imperative to regard it as a rule of property which no power could disturb." The court further remarked: "What our present opinion may be as to the merits of the decision in that case is now of no consequence whatever. In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*. This is an adjudicated question, and the subject of its correctness is to us a sealed book."

3. *Paul v. Davis*, 100 Ind. 424; *Paulson v. Portland*, 16 Oregon 450; *Henry v. Quackenbush*, 48 Mich. 415; *Heinlen v. Martin*, 59 Cal. 181; *Davidson v. Biggs*, 61 Iowa 309.

In *Willis v. Owen*, 43 Tex. 48, the constitutionality and validity of a tax act came before the court, which by Moore, J., said: "The constitutionality of this law and the liability of the taxpayers for these taxes have been sustained by this court. . . . It may be, therefore, thought that the question should be regarded by us as now open for discussion—that whatever might be our views in respect to it, upon the principle of *stare decisis*, we should hold it as definitely settled and concluded. We cannot, however, regard the rule as having any just application to questions of the character involved in these cases. This doctrine grows out of the necessity for a uniform and settled rule of property and a definite basis for contracts and business transactions. If a decision is wrong, it is only when it has been so long the rule of action as that time and its continued application as the rule of right between parties demand sanction of its error. Because when a decision has been recognized as the law of property and conflicted demands have been adjusted, and contracts have been made with reference to, and on faith of it, greater injustice must be done to individuals and more injury result to society by a reversal of such decision, though erroneous, than to observe and follow it. But where a decision is not of this character, upon no sound principle do we feel at liberty to perpetu-

stitutionality of any statute. That is to say, they will be equally or more reluctant than they would be in overruling or reversing any decisions or precedents.<sup>1</sup> Courts will be extremely reluctant to pass upon any laws which have in any way received, since their enactment, any legislative sanction. All the reasons for not doing it will be raised, the length of time the law has been in force, the numerous decisions under it, and the hardship and injustice likely to arise from any change, the good resulting being more than counteracted by the mischief and harm which would follow.<sup>2</sup>

ate an error into which either our predecessors or ourselves may have unadvisedly fallen merely upon the ground of such erroneous decision having been previously rendered.

"The questions to be considered in these cases have no application whatever to the title or transfer of property; or to matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the government, the limitations upon executive and legislative power as safeguards against tyranny and oppression. Certainly it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis*. The former decisions of the court in such cases are unquestionably entitled to most respectful consideration, and should not be lightly disregarded or overruled. And in case of doubtful interpretation a long settled and well recognized judicial interpretation or even legislative or executive construction within the sphere of their respective functions, might be sufficient to turn the balanced scale. But in such case the former decision or previous construction is received and weighed merely as an authority tending to convince the judgment of the correctness of the particular conclusion, and not as a rule to be followed without inquiry into its correctness."

In *Kneeland v. Milwaukee*, 15 Wis. 454, the subject of *stare decisis* in the case of a statute attacked for unconstitutionality underwent a lengthy discussion.

1. In *Fisher v. Horicon Iron, etc., Co.*, 10 Wis. 355, the constitutionality of a mill-dam act had been sustained. The decision sustaining it stood for a considerable length of time, and was followed by two or three others. The matter coming up again, the court, by Cole, J., confessed that were the

matter of constitutionality available for consideration as a new question, the decision would doubtless be the other way, but yet refused to open the investigation, saying: "We are now asked to depart from that decision; ought we to do it? It is the duty of this branch of the government to pass finally upon the construction of a law and determine whether the legislature in its action has transcended its constitutional limits; and the community has a right to expect with confidence that we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally every six years, and if each change in the organization produces a change in the decisions and a different construction of laws under which important rights and interests have become vested, it is easy to see that the consequences will be most pernicious. For these and other reasons, we decline to reconsider the constitutionality of the mill-dam law." See also *Bibb v. Bibb*, 79 Ala. 437; *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 668; *Grubbs v. State*, 24 Ind. 296.

2. In *Grubbs v. State*, 24 Ind. 296, an act was declared unconstitutional because it embraced more than one subject. After some time had elapsed and three sessions of the legislature had intervened, the court said: "This very question was decided by this court against the validity of the enactment more than five years ago. Three legislatures have since held their sessions and adjourned, we believe, without even attempting to enact the provisions thus held void in a form which would be free from the constitutional objections then adjudged to exist. Our citizens, upon the faith of that decision standing unquestioned so long, have unsuspectingly acted as agents for foreign insurance companies without comply-



**V. THE LAW OF THE CASE—1. General Principles ; Extent of Rule.**

—Where a decision is given by a court of ultimate appeal in any case, that decision must be regarded as conclusive in that particular case. Where a question arises in a case similar to one already adjudicated in a prior case, while the force of precedent is strong, the court may overrule, affirm, or modify any previous decision. In the same case any ruling is final, in a different one it is only the precedent established, and, while courts are reluctant to disregard previous decisions in similar cases, there may be a variety of reasons which will cause them to do it. This general distinction exists and must be recognized, no matter how palpable the error or unfortunate the circumstances. It is one over which the court itself has no control.<sup>1</sup>

ing with an act supposed in good faith to be void and so pronounced by the solemn judgment of the court of last resort. All classes have, upon the like faith, purchased and paid for indemnity covering in the aggregate probably millions in value. We ought, in any case, to proceed with great caution in reversing opinions heretofore pronounced by this court and received and acted upon as settling the law, and especially when a rule of property would be overturned and that would be made criminal which had before been adjudged lawful. In such cases, it were often better that what is settled should not be disturbed by judicial action though it be wrong. This principle has so often received the sanction of appellate courts that it has become a maxim for their guidance; and it is especially important that it should not be forgotten here where the judges hold for short terms, and where, unfortunately, the entire court may be changed at once. If it be also remembered that the validity of every contract of insurance and every policy issued in this State by foreign insurance companies would be brought in question, it would seem quite unfortunate at least if we shall feel compelled to do so." *Romaine v. Kinshimer*, 2 Hilt. (N. Y.) 521; *Fisher v. Horicon Iron, etc., Co.*, 10 Wis. 355.

Or a simple question of jurisdiction, may easily be, and should be, corrected. *Romaine v. Kinshimer*, 2 Hilt. (N. Y.) 521.

Some really erroneous decisions are left undisturbed because of the length of time they have been in force. *Van Wrinkle v. Constantine*, 10 N. Y. 425. And see on the general subject, *Louisville, etc., R. Co. v. Davidson County*

*Ct.*, 1 Sneed (Tenn.) 668; *Willis v. Owen*, 43 Tex. 48; *Levy v. Hitsche*, 40 La. Ann. 500; *Boon v. Bowers*, 30 Miss. 256; 64 Am. Dec. 159.

1. *Clary v. Hoagland*, 6 Cal. 685; *Gunter v. Laffan*, 7 Cal. 588; *Davidson v. Dallas*, 15 Cal. 75; *Lucas v. San Francisco*, 28 Cal. 591; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635; *Booth v. Com.*, 7 Met. (Mass.) 285; *Stiver v. Stiver*, 3 Ohio 19; *Hosack v. Rogers*, 25 Wend. (N. Y.) 313; *Sibbald v. U. S.*, 12 Pet. (U. S.) 488; *The Santa Maria*, 10 Wheat. (U. S.) 431; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 425; *Phelan v. San Francisco*, 20 Cal. 39; *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *Rector v. Danley*, 15 Ark. 307; *Romaine v. Kinshimer*, 2 Hilt. (N. Y.) 521; *Bell v. Lamprey*, 58 N. H. 124; *Plaisted v. Holmes*, 58 N. H. 619; *Frankland v. Cassidy*, 62 Tex. 418; *Langford v. Wilkinson County*, 75 Ga. 502.

In *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 552, the court, by Pierpont, J., explained the importance of the rule thus: "The question is, will this court revise a former decision made by the same court in the same cause and on substantially the same state of facts? Such a decision presses itself upon the consideration of the court with a twofold force; first, as an authority, as though it was a decision made in any other case; second, as an adjudication between the parties, not as one that is conclusive as a matter of law, for the court may revise and reverse it, but as an adjudication that practically is to be regarded as having much the same effect. The rule has been long established in this State, often declared from the bench, and we believe uniformly adhered to, that in

**2. Matters of Fact; Change of Evidence.**—In case of appeal where the court finds certain facts from the evidence, and requires certain findings of fact by the lower court and remands the case for that purpose, there can be no investigation upon a second writ of error. All the facts and rulings, so far as consistently may be, will be adhered to in all subsequent consideration of the case. If new

the same cause this court will not revise or reverse their former decisions. It is urged, and there is force in the argument, that if there is error in the decision and it is ever to be reversed, it should be done in the same court. Although this position may be sound in theory as applicable to a single case, yet as a rule to be acted on in all cases it would lead to incalculable mischief. If all questions that have been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end to their litigation until the ability of the parties or the ingenuity of their counsel were exhausted. A rule that has been so long established and acted upon and that is so important to the practical administration of justice in our courts, we think should not be departed from. And whatever views the different members of this court may entertain as to the soundness of the former decision, we all agree that the doctrine there enunciated is to be regarded as the law of this case."

No new matter or points come before a court beyond what came before the inferior court in cases of appeal. The record, the pleadings and evidence as previously submitted only will be considered, except in some instances where the hearing takes place *de novo*. The *Santa Maria*, 10 Wheat. (U. S.) 431. See also *Hayes v. Collins*, 114 Mass. 54; *Himely v. Rose*, 5 Cranch (U. S.) 313; *Skillern v. May*, 6 Cranch (U. S.) 267; *Matthews v. Sands*, 29 Ala. 136; *Huffman v. State*, 30 Ala. 532; *Ogden v. Lanabee*, 70 Ill. 510; *Rising v. Carr*, 70 Ill. 596; *Hawley v. Smith*, 45 Ind. 183; *Kibler v. Bridges*, 5 S. Car. 336; *Parker v. Pomeroy*, 2 Wis. 122.

In *Attorney-Gen'l v. Lum*, 2 Wis. 514, the court, by Smith, J., said: "This opinion of the supreme court, pronounced by the chief justice, would seem to be conclusive as to the right here sought to be enforced. But it is contended that the opinions pronounced by the supreme court are not of binding authority upon the circuit court, and it is intimated that though

inferior courts may treat such opinions never so contemptuously, yet the mere *remittitur* certified and transmitted by our clerk is the only authoritative direction to the court below. This is not the correct view of the law. It is not intended to be declared that all the reasoning and instances of illustration introduced into an opinion of this court are to be adopted by inferior tribunals from which cases or matters may come here by appeal, writ of error, or otherwise; but it is insisted and declared that the opinion of this court upon the points in judgment presented and passed upon in cases brought here for adjudication, are the law of the land until overruled or otherwise annulled, and that inferior courts and tribunals must yield obedience to the law thus declared. We should be unfaithful to the high trust committed to us should we fail to discharge this solemn duty of enforcing the law in this respect, upon the faithful and complete execution of which the most sacred and vital rights of the citizen must frequently depend; and every inferior officer, judicial or ministerial, must know and be informed that such acquiescence and obedience will be rigidly exacted, and resistance will be most effectually subdued."

See also *Thomason v. Dill*, 34 Ala. 177; *Frankland v. Cassaday*, 62 Tex. 418; *Continental L. Ins. Co. v. Houser*, 111 Ind. 266; *Davis v. Curtis*, 70 Iowa 398; *Mix v. People*, 122 Ill. 641; *Smyth v. Neff*, 123 Ill. 310. *Wood v. Wheeler*, 9 Tex. 128; *Davidson v. Dallas*, 15 Cal. 82; *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 552; *Rector v. Danley*, 14 Ark. 307; *Attorney Gen'l v. Lum*, 2 Wis. 514; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 425.

Where the appellate court declared a deed of trust to be void, that decision was held to be the immutable law of the case to govern all subsequent proceedings therein, notwithstanding that afterwards in another case a different decision was made on a similar deed. *Thomson v. Albert*, 15 Md. 285.

Where a will was construed in refer-

evidence is produced at a subsequent trial, it may so change the whole case as to render a different and entirely independent decision imperative, and the previous rulings will be lightly regarded. But in appellate or any subsequent consideration of a case, the limits within which the evidence has been kept, and the issues involved, will be kept directly in view, and no indirect, collateral, or immaterial evidence or issues will be entitled to any consideration. In cases of title to real estate, the courts will be especially particular to avoid interference, and no evidence or facts will be admitted to show anything having a tendency to vitiate a previous decision if it can be prevented. In fine, all parties will be protected in their property interests, and no question will be passed upon in a way to upset prior decisions and invalidate titles, if there is any way to avoid it.<sup>1</sup>

ence to a certain title and the same will in regard to the same property was again brought up for construction on the same question in another suit, it was held that the former decision would be sustained whether technically conclusive or not. Here the court put it in the proviso, "unless manifestly erroneous." But the rule does not usually admit such a reservation. *Dugan v. Hollins*, 13 Md. 162. Here the court, by Eccleston, J., said: "We have not been able to discover a sufficient reason for making this an exception to the almost uninterrupted practice of all courts of receiving their own decisions as of binding force."

**Relation of Landlord and Tenant.**—Where a decision was given that if a landlord, without the consent of the tenant, should enter upon the premises before the termination of the lease and relet them to another, these acts would release the tenant from his covenant, except as to such part of the rent as had accrued when the entry was made, and afterwards the case again came before the court, when the exception above noted was adjudged palpably erroneous and unjust, the court by Heydenfeldt, J., refused to disturb the decision because it was the law of the case, and said: "The latter portion of that decision is in abrogation of one of the plainest principles of the law, and if this case was a new one I would not hesitate to overrule it. But legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and is not now the subject of revision." *Dewey v. Gray*, 2 Cal. 377.

The same reasons were held in proceedings for divorce, sufficient for al-

lowing the decision to stand. *Hopkins v. Hopkins*, 40 Wis. 462. But not in a case in equity where the ruling was clearly erroneous, and the same was brought directly to the attention of the court. *Bane v. Wick*, 6 Ohio St. 13.

1. *Dodge v. Gaylord*, 53 and. 365; *Tuttle v. Garrett*, 74 Ill. 444; *Matthews v. Sands*, 29 Ala. 140; *Huffman v. State*, 30 Ala. 534; *Thomason v. Dill*, 34 Ala. 177; *Ogden v. Larrabee*, 70 Ill. 510; *Parker v. Pomeroy*, 2 Wis. 122; *Com. v. Stevens*, 142 Mass. 457; *Taliaferro v. Barnett*, 47 Ark. 359; *State v. Baughman*, 38 Ohio St. 455; *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *Heinlen v. Martin*, 59 Cal. 181; *Reed v. Atlantic, etc., R. Co.*, 21 Fed. Rep. 283; *Pond v. Irwin*, 113 Ind. 243; *Weare v. Deering*, 60 N. H. 56; *Frankland v. Cassady*, 62 Tex. 418; *Langford v. Wilkinson County*, 75 Ga. 502; *Feurt v. Ambrose*, 34 Mo. App. 360; *Hombs v. Corbin*, 34 Mo. App. 393.

In *Donner v. Palmer*, 51 Cal. 629, the court, by Wallace, J., said: "The stipulation distinctly looked to the rendition of a final judgment, which should determine that Donner or Bradley, the one or the other, had acquired the title in fee to the undivided quarter assumed and admitted to have been formerly vested in Yontz. We cannot regard it as reserving the question as to whether or not Yontz himself ever had the title, or as merely presenting the abstract question of the relative priority of the lien under which each claimed to have acquired that title for himself. It cannot be considered that it was the purpose of the parties to obtain the opinion of the court upon one ab-

3. **Questions of Jurisdiction.**—The same principle applies in regard to decisions relating to jurisdiction. If there has been either a direct or an implied decision as to jurisdiction, the question cannot be raised again or reopened in the same case, although the decision might be reversed, modified or affirmed in another case.<sup>1</sup>

**VI. LIMITATIONS OF THE RULE.**—There are certain reasonable limitations to this as to almost all rules. There are clear and palpable mistakes of law which should be corrected, especially when it can be done without injury to any person or property. If no injury or injustice would result to anyone, and a future and permanent benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and the future and permanent good to the public is to be considered rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Wherever a correction can be made without working more harm than good, it should be done.<sup>2</sup>

abstract proposition in the first instance, and then upon another, and so on *ad infinitum*, as they may see proper to submit them, and to be followed, it may be, by no determination of the ultimate rights of either party. Our judicial system has not as yet provided for the establishment of moot courts, or made it our duty to solve legal conundrums for purposes of mere amusement or instruction."

1. *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Clary v. Hoagland*, 6 Cal. 685; *Rising v. Carr*, 70 Ill. 596; *Hawley v. Smith*, 45 Ind. 183; *Kibler v. Bridges*, 5 S. Car. 336; *Dewey v. Gray*, 2 Cal. 377; *Dugan v. Hollins*, 13 Md. 162; *Tompson v. Albert*, 15 Md. 285; *Bane v. Wick*, 6 Ohio St. 13; *Hopkins v. Hopkins*, 40 Wis. 462. See also last preceding note.

2. *Bane v. Wick*, 6 Ohio St. 14; *Gwin v. McCarroll*, 1 Smed. & M. (Miss.) 371; *McFarland v. Pico*, 8 Cal. 631; *San Francisco v. Spring Valley Water Works*, 48 Cal. 509; *Aud v. Magruder*, 10 Cal. 291. In this last case, the court, by Baldwin, J., said: "In overruling the case of *Bryan v. Berry* (6 Cal. 394), we feel less reluctance because we think that

the principle there laid down is of injurious import. We think that principles of commercial law long established and maintained by a consistent course of decision in the other States should not be disturbed; that the tendency of such disturbance in any instance is to confusion and uncertainty, and gives rise to perplexing litigation and doubts and uneasiness in the public mind. Almost any general rule governing commercial transactions, if it has been long and consistently upheld as a part of the general system, is better than a rule superseding it, though the latter were much better as an original proposition. Men knowing how the law has been generally received and repeatedly adjudged govern themselves and are advised by their counsel accordingly; but if courts establish new rules whenever they are dissatisfied with the reasons upon which the old ones rest, the standards of commercial transaction would be destroyed and commercial business regulated by a mere guess at what the opinion of the judges at the time might be, and not by a knowledge of what the doctrines of recognized

Where vital and important public or private rights are concerned and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The reason that the rule of *stare decisis* was promulgated was on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it. Much not only of legislation but of judicial decision is based upon the broad ground of public policy, and this latter must not be lost sight of. Permanent rights should not be interfered with if it can be avoided, others may with less hesitancy.<sup>1</sup>

**VII. THE RULE AS BETWEEN STATE AND FEDERAL COURTS.**—On questions of the construction or application of provisions of the Federal Constitution, of treaties, and of Federal law, the decisions of the Federal courts have the greater weight; on such questions the decisions of the Supreme Court of the United States are binding upon the State courts. On questions of the construction or interpretation of State statutes or constitutions, the decisions of the court of the State whose constitution or statute is in question are followed by the Federal courts.<sup>2</sup> On questions of general

works of authority and the precedents of the courts are. The commercial law has a system of its own, built up by centuries and the wisdom of learned jurists all over the world. It is not local but applicable to all the States with few modifications; and *California*, eminently commercial in her character, and in close commercial connection with the other States, finds her interest and safety in adhering to the well-settled general rules which prevail in those States as the laws of trade. We repeat, the stability and certainty of these rules are of more importance than any fancied benefits which might accrue from any innovation upon the system. Innovation begets innovation; and we cannot always see with clearness what is to be the consequence of the new rule established. . . . The doctrine of *stare decisis* seriously invoked by the respondent's counsel can have no effect; or, if any, only the effect to induce us the more readily to return to a principle recognized, we believe, for many years, everywhere else in the commercial world. The conservative doctrine of *stare decisis* was never designed to protect such an innovation."

And see, to the same effect, the reasoning of the *Pennsylvania* court in *Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 471, where a prior decision was

attacked on the ground that it had no support from the cases whence it purported to be derived, and the court yielded, and said in regard to the positive right and duty of a court to correct errors when practicable: "Do we violate the doctrine of *stare decisis* by now correcting the mistake and going back to the well-established doctrine which that case has disturbed? If we do, we commit a greater error than the one we have felt bound to correct; for that doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government."

1. *Hardigree v. Mitchum*, 51 Ala. 151; *Linn v. Minor*, 4 Nev. 462; *Hollinshead v. VonGlahn*, 4 Minn. 190; 1 *Kent's Com.* 477; *Pratt v. Brown*, 3 Wis. 609; *Butler v. Van Wyck*, 1 Hill (N. Y.) 459; *Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 474; *And v. Magruder*, 10 Cal. 291.

2. There is no difficulty in stating the rule; the difficulty is in its application. The Supreme Court of the United States has said that an ejection in a Federal court is governed by the local statute giving one or more new trials as of right. *Equator Min., etc., Co. v. Hall*, 106 U. S. 86.

It was held in *Hamilton Bank v.*

Dudley, 2 Pet. (U. S.) 492, that federal courts should follow the decision of a State court as to the validity of a local law under the State constitution.

So in *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 541, and *Webster v. Cooper*, 14 How. (U. S.) 488, it was held that a decision by the highest court of a State that a statute of the State is repugnant to the constitution of the State, was binding upon the Federal courts.

In *Gut v. Minnesota*, 9 Wall. (U. S.) 35, it was held that the Federal courts were bound by the decision of the highest court of the State that a statute of the State was not in conflict with the constitution of the State.

In *Gilman v. Sheboygan*, 2 Black (U. S.) 510, the supreme court followed the decision of a State court holding a statute requiring a railroad aid tax leviable exclusively on realty to be in violation of a provision of the State constitution declaring that the rule of taxation should be uniform and that taxes should be levied on such property as the legislature should prescribe.

In *Chambers County v. Clews*, 21 Wall. (U. S.) 317, it was held that the Supreme Court of the United States was bound by a decision of the highest court of the State declaring constitutional a statute under which municipal bonds had been issued.

In *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, it was held that where the State court, by a series of decisions, had affirmed the right of a State legislature, under the State constitution, to authorize the issue of municipal bonds in aid of a railroad, the United States Supreme Court, on approving such decisions, would follow them in a suit on bonds issued and put on the market while those decisions remained in force, even though the State court had since finally overruled them. In this case, Miller, J., dissented and wrote an exhaustive opinion reviewing the cases. See, on this point, *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 204; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Mitchell v. Burlington*, 4 Wall. (U. S.) 270; *Larned v. Burlington*, 4 Wall. (U. S.) 275; *Lee County v. Rogers*, 7 Wall. (U. S.) 181; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477.

So it has been held that the Federal courts are bound by the decision of a

State court denying the validity of a statute on the ground that it was not enacted in the mode required by the State constitution. *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County*, 105 U. S. 667. In line with the current of the foregoing cases are *Elmwood Tp. v. Marcy*, 92 U. S. 289, and *Indianapolis, etc., R. Co. v. Vance*, 96 U. S. 450.

On a question of the construction and effect of a State statute regulating voluntary assignments, a decision by the State supreme courts binds the federal courts. *Union Bank v. Kansas City Bank*, 136 U. S. 223.

Where the supreme court affirms the validity of a voluntary conveyance, the Supreme Court of the United States will follow it, although the statute is common to many States and some have differently construed it. *Randolph v. Quidnick Co.*, 135 U. S. 457.

Where, in an action for personal injuries received by a passenger while traveling on Sunday, the trial court ruled that the plaintiff's evidence did not show that he was traveling either from necessity or charity, and he took a nonsuit, and sued in the United States circuit court, this court refused to submit the question of necessity or charity to the jury. *Butcher v. Cheshire R. Co.*, 125 U. S. 555.

It was held in *Fairfield v. Gallatin County*, 100 U. S. 47, that the United States Supreme Court would follow the decisions of the State court construing the State constitution, even though such construction was contrary to that given by the Federal court in a rule of property having been fixed by the interpretation of the State court and not having been abandoned.

In *Louisiana v. Pilsbury*, 105 U. S. 278, it was laid down that the validity of contracts arising under a provision of the organic law of a State must be determined in the light of the construction given to such provision by the highest court of the State. To the same effect substantially is *Randall v. Brigham*, 7 Wall. (U. S.) 523. Other cases of the same court asserting or recognizing the general doctrine are *M'Keen v. Delancy*, 5 Cranch (U. S.) 22; *Polk v. Wendal*, 9 Cranch (U. S.) 87; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Sneed v. Wister*, 8 Wheat. (U. S.) 690; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *M'Dowell v. Peyton*, 10 Wheat. (U. S.) 454; *Shelby v.*

- Guy, 11 Wheat. (U. S.) 361; Jackson v. Chew, 12 Wheat. (U. S.) 153; Waring v. Jackson, 1 Pet. (U. S.) 570; Davis v. Mason, 1 Pet. (U. S.) 503; Bell v. Morrison, 1 Pet. (U. S.) 351; D'Wolf v. Rabaud, 1 Pet. (U. S.) 476; Beach v. Viles, 2 Pet. (U. S.) 675; Gardner v. Collins, 2 Pet. (U. S.) 58; Patterson v. Jenks, 2 Pet. (U. S.) 216; Hamilton Bank v. Dudley, 2 Pet. (U. S.) 492; M'Cluny v. Silliman, 3 Pet. (U. S.) 270; U. S. v. Morrison, 4 Pet. (U. S.) 124; Hinde v. Vattier, 5 Pet. (U. S.) 398; Henderson v. Griffin, 5 Pet. (U. S.) 151; Green v. Neal, 6 Pet. (U. S.) 291; Ross v. McLung, 6 Pet. (U. S.) 283; Livingston v. Moore, 7 Pet. (U. S.) 469; Brashear v. West, 7 Pet. (U. S.) 608; M'Cutchen v. Marshall, 8 Pet. (U. S.) 220; U. S. Bank v. Daniel, 12 Pet. (U. S.) 32; U. S. v. Coombs, 12 Pet. (U. S.) 72; Ross v. Duval, 13 Pet. (U. S.) 45; Wilcox v. Hunt, 13 Pet. (U. S.) 378; Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455; Sims v. Hundley, 6 How. (U. S.) 1; Nesmith v. Sheldon, 7 How. (U. S.) 812; Luther v. Borden, 7 How. (U. S.) 1; Alabama State Bank v. Dalton, 9 How. (U. S.) 522; Van Rensselaer v. Kearney, 11 How. (U. S.) 297; U. S. v. Reid, 12 How. (U. S.) 361; Murray v. Gibson, 15 How. (U. S.) 421; Curran v. Arkansas, 15 How. (U. S.) 304; U. S. v. Coxe, 18 How. (U. S.) 100; Beauregard v. New Orleans, 18 How. (U. S.) 497; Morgan v. Curtenius, 20 How. (U. S.) 1; Fisher v. Haldeman, 20 How. (U. S.) 186; Middleton v. McGrew, 23 How. (U. S.) 45; Smith v. McCann, 24 How. (U. S.) 398; Suydam v. Williamson, 24 How. (U. S.) 427; Foote v. Egery, 24 How. (U. S.) 267; League v. Egery, 24 How. (U. S.) 264; Ryan v. Bindley, 1 Wall. (U. S.) 66; Christy v. Pridgeon, 4 Wall. (U. S.) 196; Nichol v. Levy, 5 Wall. (U. S.) 433; Williamson v. Suydam, 6 Wall. (U. S.) 723; Lane County v. Oregon, 7 Wall. (U. S.) 71; Walker v. Walker, 9 Wall. (U. S.) 743; McGoon v. Scales, 9 Wall. (U. S.) 23; Williams v. Kirtland, 13 Wall. (U. S.) 306; Richmond v. Smith, 15 Wall. (U. S.) 429; Davis v. Gray, 16 Wall. (U. S.) 203; Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678; Walker v. Marks, 17 Wall. (U. S.) 648; Allen v. Massey, 17 Wall. (U. S.) 351; Carroll County v. U. S., 18 Wall. (U. S.) 71; Tioga R. Co. v. Blossburg, etc., R. Co., 20 Wall. (U. S.) 137; Erie R. Co. v. Pennsylvania, 21 Wall. (U. S.) 492; Sweeney v. Lomme, 22 Wall. (U. S.) 208; Bailey v. Magwire, 22 Wall. (U. S.) 215; Seacombe v. Milwaukee, etc., R. Co., 23 Wall. (U. S.) 108; Conway v. Taylor, 1 Black (U. S.) 603; Vance v. Campbell, 1 Black (U. S.) 427; Haussknecht v. Claypool, 1 Black (U. S.) 431; Wright v. Bales, 2 Black (U. S.) 535; Leffingwell v. Warren, 2 Black (U. S.) 599; Sumner v. Hicks, 2 Black (U. S.) 532; Townsend v. Todd, 91 U. S. 452; Taylor v. Secor, 92 U. S. 575; Kibbe v. Ditto, 93 U. S. 674; Leavenworth County v. Barnes, 94 U. S. 70; East Oakland Tp. v. Skinner, 94 U. S. 255; Stone v. Wisconsin, 94 U. S. 181; Lawrence v. Chicago, etc., R. Co., 94 U. S. 164; Peik v. Chicago, etc., R. Co., 94 U. S. 164; Adams v. Mayor, etc., of Nashville, 95 U. S. 19; Hall v. DeCuir, 95 U. S. 485; Brine v. Hartford F. Ins. Co., 96 U. S. 627; Meister v. Bissell, 96 U. S. 83; Meister v. Moore, 96 U. S. 76; Allis v. Minnesota Mut. L. Ins. Co., 97 U. S. 144; Davie v. Briggs, 97 U. S. 628; Amy v. Dubuque, 98 U. S. 470; Orvis v. Powell, 98 U. S. 176; Atlantic, etc., R. Co. v. Georgia, 98 U. S. 359; Howe Mach. Co. v. Gage, 100 U. S. 676; American Emigrant Co. v. Adams County, 100 U. S. 61; Mohr v. Manierre, 101 U. S. 417; Fleitas v. Cockrem, 101 U. S. 301; Scipio v. Wright, 101 U. S. 665; Bowditch v. Boston, 101 U. S. 16; Swift v. Smith, 102 U. S. 442; Barrett v. Holmes, 102 U. S. 651; Ohio v. Frank, 103 U. S. 697; Florida Cent. R. Co. v. Schutte, 103 U. S. 118; Bondurant v. Watson, 103 U. S. 281; Thompson v. Perrine, 103 U. S. 806; Moores v. Citizens Nat. Bank, 104 U. S. 625; Post v. Kendall County, 105 U. S. 667; Burgess v. Seligman, 107 U. S. 20; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51; Bendey v. Townsend, 109 U. S. 665; Flash v. Conn, 109 U. S. 371; San Francisco v. Scott, 111 U. S. 768; Britton v. Thornton, 112 U. S. 526; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250; Bond v. Dustin, 112 U. S. 604; Leeper v. Texas, 139 U. S. 462; German Sav. Bank v. Franklin County, 128 U. S. 526; Anderson v. Santa Anna, 116 U. S. 356.
- Federal courts other than the Supreme Court have thus applied the rule: The decision of the supreme court of a State that a particular corporation is a corporation of that State is binding on the Federal courts. *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812.

mercantile and commercial law the Federal decisions have no special influence or control over State decisions.<sup>1</sup> In determining property rights founded on the constitution of Spanish and

If municipal bonds are declared invalid by one of the judges holding the circuit court, and the case is pending on a writ of error in the supreme court in a subsequent suit involving the same bonds tried by one of the other judges holding the court, the former judgment should be followed, notwithstanding a difference of opinion until the supreme court has passed on the questions involved. *Norton v. Taxing District of Brownsville*, 36 Fed. Rep. 99.

Where the supreme court of a State decides that a penal code is or is not duly enacted under the State constitution, the decision will not be reviewed by a Federal court on *habeas corpus*. *In re Duncan*, 139 U. S. 449; it being the general rule that penal statutes, in *habeas corpus* proceedings, are controlled by the construction of the State courts. *In re Converse*, 42 Fed. Rep. 217.

If, under the Judiciary Act of 1789, the circuit courts have jurisdiction of personal rights and duties, because of adverse citizenship or the alienage of a party, then on application of a citizen of a foreign country residing without the United States, to have awarded to him the custody of his child as against its mother and grandmother (or others), citizens of a State, the courts will be governed by the statutes and decisions of the State. *In re Barry*, 42 Fed. Rep. 113.

Where a court decided that acts were invalid which gave priority to material and supply claims over mortgage bonds, it was held that the decision was binding on the Federal courts. *Fidelity Ins., etc., Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372.

Where, in an action on a policy of insurance, a supreme court has held that certain conduct of the company should be submitted to the jury as evidence of its intention to waive a forfeiture for over-insurance, the ruling is binding on removal to a Federal court. *Cleaver v. Traders' Ins. Co.*, 40 Fed. Rep. 711. This case decides indirectly that causes on removal are bound by prior rulings. This is expressly declared in *Lookout Mountain R. Co. v. Houston*, 44 Fed. Rep. 449.

See also *New England Mortgage Security Co. v. Gay*, 33 Fed. Rep. 636; *Talcott v. Pine Grove Tp.*, 1 Flip. (U. S.) 120; *Tomes v. Barney*, 35 Fed. Rep. 112; *Consolidated Roller Mill Co. v. Smith Middlings Purifier Co.*, 40 Fed. Rep. 305; *U. S. v. Garlinghouse*, 4 Ben. (U. S.) 205.

State courts have discussed and applied the rule in the following cases: *Dubuque County v. Dubuque, etc., R. Co.*, 4 Greene (Iowa) 1; *State v. Bissell*, 4 Greene (Iowa) 328; *Clapp v. Cedar County*, 5 Iowa 15; 68 Am. Dec. 678; *Stokes v. Scott County*, 10 Iowa 166; *McClure v. Owen*, 26 Iowa 253; *Stokes v. Scott County*, 10 Iowa 166; *Bressler v. Wayne County*, 25 Neb. 468; *Howe v. Welch*, 14 Daly (N. Y.) 80; *Krogg v. Atlanta, etc., R. Co.*, 77 Ga. 202; 4 Am. St. Rep. 79; *McIntyre v. Kamm*, 12 Oregon 253; *Lord v. Cannon*, 75 Ga. 300; *Goodnow v. Wells*, 67 Iowa 654; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Com. v. Stevens*, 142 Mass. 457.

1. It was held by this court at an early day that the provision of the judiciary act declaring that the laws of the States should be rules of decision in the Federal courts in certain cases did not apply to the decisions of the State courts in the construction of ordinary contracts or on questions of general commercial law. *Swift v. Tyson*, 16 Pet. (U. S.) 1.

This principle was applied as follows, viz.: That the Federal courts were not bound by decisions of State courts construing and determining the legal effect of insurance contracts. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495. Nor by decisions of State courts as to rights of the parties to negotiable paper; such rights depending on the law of negotiable paper. *Oates v. First Nat. Bank*, 100 U. S. 239; *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 14. Nor by a decision on the construction of a contract of carriage. *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102. Nor by a decision construing a deed by the rules of the common law. *Foxcroft v. Mallett*, 4 How. (U. S.) 353. Nor by a decision on a question of equity law. *Neves v. Scott*, 13 How. (U. S.) 268. Nor by



Mexican law, the Federal courts follow the construction laid down by the courts of the States within the limits of which such law was formerly enforced.<sup>1</sup>

**START.**—The word “start” is not limited to setting out upon a journey or race; it means, as well, the commencement of an enterprise or an undertaking.<sup>2</sup>

**STATE COURTS.**—See COURTS, vol. 4, p. 447; JURISDICTION, vol. 12, p. 244; MUNICIPAL COURTS, vol. 15, p. 1202; SURRENDER; UNITED STATES COURTS.

As to the concurrent jurisdiction of State and Federal courts, see UNITED STATES COURTS.

**STATED ACCOUNT.**—See ACCOUNT, vol. 1, p. 108.

a decision as to the liability over of a tort-feasor. *Chicago v. Robbins*, 2 Black (U. S.) 418. And see further as to the application of the doctrine, *Marlatt v. Silk*, 11 Pet. (U. S.) 1; *Martin v. Waddell*, 16 Pet. (U. S.) 367; *Lane v. Vick*, 3 How. (U. S.) 464; *Rowan v. Runnels*, 5 How. (U. S.) 134; *Williamson v. Irish Presbyterian Congregation*, 8 How. (U. S.) 565; *Williamson v. Berry*, 8 How. (U. S.) 495; *U. S. v. Reid*, 12 How. (U. S.) 361; *Carroll v. Carroll*, 16 How. (U. S.) 275; *Piqua Branch Bank v. Knoop*, 16 How. (U. S.) 369; *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416; *Pease v. Peck*, 18 How. (U. S.) 595; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *Delmas v. Merchants Mut. Ins. Co.*, 14 Wall. (U. S.) 661; *Boyce v. Tobbs*, 18 Wall. (U. S.) 546; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666; *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.) 436; *Venice v. Murdock*, 92 U. S. 494; *Johnson County v. Thayer*, 94 U. S. 631; *Douglass v. Pike County*, 101 U. S. 677; *Roberts v. Bolles*, 101 U. S. 119; *Wright v. Nagle*, 101 U. S. 791; *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 14; *Thompson v. Ferrine*, 103 U. S. 846; *King v. Worthington*, 104 U. S. 44; *Taylor v. Ypsilanti*, 105 U. S. 60; *New Buffalo Tp. v. Cambria Iron Co.*, 105 U. S. 73; *Ralls County v. Douglass*, 105 U. S. 728; *Burgess v. Seligman*, 107 U. S. 20; *Pana v. Bowler*, 107 U. S. 529; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51; *Green County v. Conness*, 109 U. S. 104; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244; *Carroll County v. Smith*, 111 U. S. 556; *Enfield v. Jordan*, 119 U. S. 680. See also *Southern Pac. R. Co. v. Or-*

*ton*, 32 Fed. Rep. 457; *Myrick v. Heard*, 31 Fed. Rep. 241; *Pickle v. Muse*, 88 Tenn. 389; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672.

1. Thus in *Christy v. Pridgeon*, 4 Wall. (U. S.) 196, it is held that “the Mexican Colonization law of August 4, 1824, though general to the republic of Mexico, was, so far as it affected lands, within the limits of *Texas*, after the independence of that country, a local law of the new State, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of the State must be accepted as the true interpretation so far as it applies to titles to lands in that State, whatever may be the opinion of this court of its original soundness. If in courts of other States carved out of territory since acquired from Mexico, a different interpretation has been adopted, the courts of the United States will follow the different rulings so far as it affects titles in those States. The interpretation, within the jurisdiction of a State, of a local law, becomes a part of that law, as much so as if incorporated in the body of it by the legislature. If different interpretations are given in different States to a similar law, that law, in effect, becomes by the interpretations, so far as it is a rule of action by this court, a different law in one State from what it is in another.”

See also *Kennedy v. Hunt*, 7 How. (U. S.) 586.

2. *Graw v. Manning*, 54 Iowa 721. And see that case for the facts which were held sufficient to bring a debtor within a clause of the *Iowa* statute on attachments, as one who had “started” to leave the State.

**STATE LANDS.**—(See also GRANTS, vol. 9, p. 43; PUBLIC LANDS, vol. 19, p. 305.)

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**I. INTRODUCTION.**—The term State lands comprehends all lands in the possession or ownership of the State, as distinguished from lands possessed or owned by private individuals or by the United States.<sup>1</sup> Land which is not the property of private persons is held to be the property of the State within whose limits it lies, or of the United States, according to the circumstances.<sup>2</sup> The so called public lands, being the property of either the State within whose limits they lie, or of the United States, the title to them can only be acquired by grant from the sovereignty to which they belong.<sup>3</sup> The mode of acquiring title to lands belonging to the State is, as a general rule, in all the States, founded exclusively upon statutes general or special.<sup>4</sup> Where one State owns lands within the limits of another State, it occupies simply the position of a private proprietor, and its estate in such lands is subject to all the incidents of ordinary ownership.<sup>5</sup>

**II. ORIGIN AND ACQUISITION OF STATE TITLE**—1. *In General.*—Ownership of land by a State may arise by virtue of original ownership by State sovereignty, or by grant. Acquisition by

1. Anderson's L. Dict.  
2. Tiedeman on Real Prop., § 682; 3 Washb. on Real Prop. 164; 1 Story on Const. 3; Doe v. Beardsley, 2 McLean (U. S.) 412; Johnson v. M'Intosh, 8 Wheat. (U. S.) 543; Terrett v. Taylor, 9 Cranch (U. S.) 50.

3. Tiedeman on Real Prop., § 682; Bingham on Real Estate 80; 3 Washb. on Real Prop. 186; Doe v. Beardsley, 2 McLean (U. S.) 412; Worcester v.

Georgia, 6 Pet. (U. S.) 543; Fletcher v. Peck, 6 Cranch (U. S.) 87; Johnson v. M'Intosh, 8 Wheat. (U. S.) 571.

4. Minor's Insts. 998; 2 Lomax Dig. 502 *et seq.* In the older States which have long had public lands to dispose of, there are few statutes or decisions on the subject which are now practically in force. Hilliard on Real Prop. 236.

5. Burbank v. Fay, 65 N. Y. 57.

State sovereignty may be classified into acquisition by virtue of riparian rights, by escheat, or by forfeiture; of these, each in its order.

**2. Original Ownership.**—The States which possess land by virtue of original ownership are *Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, and Virginia*.<sup>1</sup> In these States lands not held as the private property of individuals, or ceded by the State to the general government, belong to the State within whose limits they lie.<sup>2</sup> In the other States the public lands not given to the States by act of congress are the property of the United States.<sup>3</sup>

1. Tiedeman on Real Prop., §§ 682, 744; 3 Washb. on Real Prop. 182-184; Terrett v. Taylor, 9 Cranch (U. S.) 50; Worcester v. Georgia, 6 Pet. (U. S.) 543; Johnson v. M'Intosh, 8 Wheat. (U. S.) 543; Irvine v. Marshall, 20 How. (U. S.) 558.

2. Tiedeman on Real Prop., § 744; 3 Washb. on Real Prop. 184-188-189; Martin v. Waddell, 16 Pet. (U. S.) 367; Pollard v. Hagan, 3 How. (U. S.) 212; U. S. v. Kagama, 118 U. S. 375.

3. 3 Washb. on Real Prop. 182-184; Tiedeman on Real Prop., § 744; Terrett v. Taylor, 9 Cranch (U. S.) 50; Worcester v. Georgia, 6 Pet. (U. S.) 543; Johnson v. M'Intosh, 8 Wheat. (U. S.) 543.

Upon the admission into the Union of a State formed from the territory of the United States, the right of eminent domain passes to the State, and nothing remains to the United States but the public lands. U. S. v. Crosby, 7 Cranch (U. S.) 115; Kerr v. Moon, 9 Wheat. (U. S.) 565; Pollard v. Hagan, 3 How. (U. S.) 212; Turner v. American Baptist Missionary Union, 5 McLean (U. S.) 344; Darby v. Mayer, 10 Wheat. (U. S.) 465; Calloway v. Doe, 1 Blackf. (Ind.) 372; Cutter v. Davenport, 1 Pick. (Mass.) 81; 11 Am. Dec. 149; Nims v. Palmer, 6 Cal. 8.

The question whether the title to public lands owned by the United States has passed from the United States, is to be determined by the laws of the United States. But as soon as the title shall have passed from the United States, it takes the character of other property within the State and is subject to State legislation. Wilcox v. Jackson, 13 Pet. (U. S.) 498; Cannon v. White, 16 La. Ann. 89; State v. Bachelder, 5 Minn. 223; 80 Am. Dec. 410.

The reason for this difference in the ownership of the public lands lying within the limits of the different States involves a matter of history. According to the principles of international law, as understood by the European powers, the Indian tribes in America were regarded as mere temporary occupants of the soil. Their right to the soil was considered to be in the nature of revocable or defeasible licenses or tenancies at will. The absolute right of property and dominion were considered to belong to the European nations by which any portions of the soil were first discovered. Martin v. Waddell, 16 Pet. (U. S.) 367; 3 Washb. on Real Prop. 182; 4 Dane Abr. 68-70. See an article on Indian Titles in 13 Albany Law Jour. 28.

The Indians, therefore, were deemed to be protected, while in peace, in the possession of their lands. Their interest, however, could be divested only by conquest or purchase. They could transfer the title absolutely to none other than the sovereign of the country. 1 Kent's Com. 257-259; Doe v. Beardsley, 2 McLean (U. S.) 412; Stockton v. Williams, 1 Dougl. (Mich.) 546; Jackson v. Porter, 1 Paine (U. S.) 457; Jackson v. Hudson, 3 Johns. (N. Y.) 375; 3 Am. Dec. 500; Jackson v. Wood, 7 Johns. (N. Y.) 290; Marshall v. Clark, 4 Call (Va.) 268; Stevens v. Smith, 2 Kan. 243; Langford v. U. S., 12 Ct. of Cl. 338.

The sovereignty and general property of the soil in the territory of the original thirteen colonies were claimed by and conceded to Great Britain by the right of discovery. The claim to this part of the American Continent which lay between Newfoundland and the Gulf of Mexico was based upon the discovery of that part of the coast

by John Cabot in 1496. 3 Washb. on Real Prop. 182; 1 Story on Const. 3; Johnson v. M'Intosh, 8 Wheat. (U. S.) 543; Martin v. Waddell, 16 Pet. (U. S.) 367.

The right of the soil and more or less of the sovereignty was granted by the crown of England to companies or proprietors by letters patent, under which communities were formed, with greater or less powers of jurisdiction and government, into colonies, provinces, or proprietaries, according to the style and form of their organization. Worcester v. Georgia, 6 Pet. (U. S.) 534.

The chartered colonies were *Massachusetts, Rhode Island, and Connecticut*. The provinces were *New Hampshire, New Jersey, Virginia, North Carolina, South Carolina, and Georgia*. The proprietaries were *Maryland, Pennsylvania, Delaware, and New York*. 1 Curtis on Const. 425; 3 Washb. on Real Prop. 183.

The jurisdiction over and the disposal of the lands within the limits of these bodies politic were, as a general proposition, committed to and made subject to the immediate governing power thereof in place of the original jurisdiction and property of the royal government. 3 Washb. on Real Prop. 183; Jackson v. Hart, 12 Johns. (N. Y.) 81; 7 Am. Dec. 280; Com. v. Roxbury, 9 Gray (Mass.) 478.

Upon the treaty of peace in 1783, immediately after the Revolution, to whatever lands were lying outside of the boundaries of the respective colonial governments, and previously belonging to Great Britain, the United States government was entitled as successor to the British crown. Complete control of these lands was vested in Congress without limitation. U. S. v. Gratiot, 14 Pet. (U. S.) 526; Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525; Bagnell v. Broderick, 13 Pet. (U. S.) 436; U. S. v. Maxwell Land Grant Co., 121 U. S. 325; Taming v. U. S. Freehold, etc., Co., 93 U. S. 644; Grisar v. McDowell, 6 Wall (U. S.) 363; Irvine v. Marshall, 20 How. (U. S.) 558.

Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States. U. S. Const., art. 4, § 3, ch. 1, 2.

And this power cannot be interfered with, nor its exercise embarrassed by the legislation of any

State. Terry v. Hennen, 4 La. Ann. 458; Foley v. Harrison, 5 La. Ann. 75; Pontalba v. Copland, 3 La. Ann. 86; Purvis v. Harmanson, 4 La. Ann. 421; Gibson v. Chouteau, 13 Wall. (U. S.) 92; Jourdan v. Barrett, 4 How. (U. S.) 169; Union Mill, etc., Co. v. Ferris, 2 Sawy. (U. S.) 176; Vansickle v. Haines, 7 Nev. 249; Lewis v. Lewis, 9 Mo. 182; 43 Am. Dec. 540.

The control of the United States over their own property is independent of locality, and no state or territory can interfere with their control, enjoyment, or disposal of such property; nor are the contracts of the government, with respect to subjects within its constitutional competency, local or confined in respect to their effect or operation strictly to the situs to which they relate. Irvine v. Marshall, 20 How. (U. S.) 558; Farrington v. Willson, 29 Wis. 383; Union Mill, etc., Co. v. Ferris, 2 Sawy. (U. S.) 176;

The legislative power over a place purchased by the United States with the consent of the legislature of the State, is transferred from the State to the Federal government, except as restrained by some qualification in the expression of the consent of the State. Allegheny County v. McClung, 53 Pa. St. 482.

Under the act of Congress of June 15, 1836, admitting *Michigan* into the Union as a State, the State of *Michigan* is expressly prohibited from exercising any power over the public lands within her limits. Turner v. American Baptist Missionary Union, 5 McLean (U. S.) 344; Brewer v. Kidd, 23 Mich. 440; Auditor General v. Williams (Mich. 1892), 53 N. W. Rep. 1097.

In *Missouri*, the constitution provides, that the assembly shall not interfere with the primary disposal of the soil by the United States, nor with the United States' regulations for securing title to purchasers. Const. Mo., art. 10, § 1.

To such of the lands as belonged to the respective colonial governments the respective States which succeeded to the different colonies became entitled, and acquired the power to dispose of them as they might see fit. 3 Washb. on Real Prop. 164-165; 1 Story on Const. 3 and 215; Johnson v. M'Intosh, 8 Wheat. (U. S.) 543; Martin v. Waddell, 16 Pet. (U. S.) 367; 1 Curtis on the Const. 425; Jack-

son v. Hart, 12 Johns. (N. Y.) 81; 7 Am. Dec. 280; Worcester v. Georgia, 6 Pet. (U. S.) 544; Com. v. Roxbury, 9 Gray (Mass.) 478; 1 Kent's Com. 259; Terrett v. Taylor, 9 Cranch (U. S.) 50.

The confederation of the colonies was formed in 1777, but some of the smaller ones hesitated to come into it; one obstacle being the claim of *Virginia, New York*, and some of the other colonies, to what were called the crown lands, that had not been located and settled, though within what was claimed to be their charter limits. The indefinite terms in which the crown grants were made to several of these colonies were sources of conflict among them, and gave rise to claims of an almost unlimited extent beyond the actual settlements. The smaller colonies, which were excluded from these territorial claims, insisted that these lands ought to become and be deemed part of the public domain, and held by the confederacy for public purposes, and *Maryland* refused to become a party to the confederacy until 1781. In the meantime *New York* had taken steps towards ceding the lands claimed by her, and was followed by *Virginia, Massachusetts, Connecticut, South Carolina, North Carolina*, and *Georgia*; and these lands were ceded to the general government, "to be disposed of for the common benefit of the United States." 3 Washb. on Real Prop. 184, and note; Kent's Com. 259; 1 Story on Const. 215. With respect to lands which, prior to the rupture between the British crown and the colonies in America which afterwards formed the United States, had been legally granted to individuals by the crown, or to which the title had been acquired in any other way by individuals, neither the Revolution, nor any change in the form of government, nor any declaration of sovereignty by the people worked any change or forfeiture in the ownership of said property. *People v. Livingston*, 8 Barb. (N. Y.) 253; *Kelly v. Harrison*, 2 Johns. Cas. (N. Y.) 29; 1 Am. Dec. 154; *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 111; *U. S. v. Percheman*, 7 Pet. (U. S.) 87.

This principle applies also to those grantees of the Mexican government who had acquired rights under the Mexican government prior to the admission of *California* as a State into the Union. *Teschemacher v.*

*Thompson*, 18 Cal. 22; 79 Am. Dec. 151; *Estrada v. Murphy*, 19 Cal. 270; *Minturn v. Brower*, 24 Cal. 669; *Leese v. Clark*, 20 Cal. 422. And it is a principle which applies to all instances of a change of sovereignty, and is a recognized principle of international law, that the cession of property from one sovereignty to another does not, independent of treaty stipulations, impair the right of private property. The cession passes only public property, and the sovereignty over the territory. *Vattel's Law of Nations* 388; 3 Washb. on Real Prop. 189; *Bingham on Real Estate* 101.

After the cession of *Virginia* to the United States of her military tract she had nothing left for which she could issue a patent. 3 Washb. on Real Prop. 189; *Miller v. Lindsey*, 1 McLean (U. S.) 32.

In *Massachusetts*, the transition of title to the public lands, which by the charter was at first in the colonial government, was to that of the province under the new charter, and from that to the commonwealth at the Revolution. The fee of the soil, therefore, from that time was in the commonwealth, unless the government of the colony or the province had aliened it. *Com. v. Roxbury*, 9 Gray (Mass.) 478.

*Massachusetts* has owned large tracts of land in *Maine*, which however, for many years it has been her policy to dispose of and has an agent to take charge of same. *Hilliard on Real Prop.* 237.

In *North Carolina*, after the cession of land by that State to the United States in 1789, the State no longer owned the ceded lands and had no right to convey or grant the lands within the ceded territory to a grantee who had not the incipient title before the cession. *Polk v. Wendal*, 9 Cranch (U. S.) 87.

In *Pennsylvania*, the right to the soil of the province, as well as the sovereignty in absolute fee simple, was in the proprietaries upon the original constitution of that province. *Penn. v. Klyne*, 1 Wash. (U. S.) 207.

In *New York*, of the lands not actually granted by the crown, the State became the immediate possessor as successor to the crown. By the Revolution, the State succeeded to all lands within the limits of the State which had not been prior thereto legally granted, held, or possessed by persons or corporations, or in whom the title

*Texas*, on being admitted to the Union, retained possession of all the public lands lying within its limits. This was effected by the congressional resolutions providing for its admission into the Union as a State.<sup>1</sup>

**3. State Sovereignty—*a.* RIPARIAN RIGHTS.**—See ACCRETION, vol. 1, p. 136; NAVIGABLE WATERS, vol. 16, p. 236; WATERS AND WATERCOURSES.

*b.* ESCHEAT—(See also ESCHEAT, vol. 6, p. 854).—It is a general principle in the American law that when the title to land fails from defect of the heirs or devisees, it necessarily reverts or escheats to the people, as forming part of the common stock to which the whole community is entitled. Whenever the owner dies intestate without leaving any inheritable blood, the title vests in the State by operation of law.<sup>2</sup>

had not legally vested, and being the source of title the State is presumed to be the owner of the land not granted by it until the contrary appears. *Bingham on Real Estate* 81; *People v. Van Rensselaer*, 8 Barb. (N. Y.) 189; *Van Rensselaer v. Hays*, 19 N. Y. 96; 75 Am. Dec. 268; *Wandell v. Jackson*, 8 Wend. (N. Y.) 183; 22 Am. Dec. 635; *People v. Trinity Church*, 30 Barb. (N. Y.) 548; 22 N. Y. 48.

In the early grants by the crown in the province of *New York*, large tracts of land were, in some cases, given to the individuals with manorial rights attached thereto, and questions have arisen within a few years how far it was competent for the crown to create new manors, after the passage of the act of *quia emptores* by the British parliament in 18 Edw. I. It has been held, however, that the grant of lands with such privileges was not void, and that that statute did not restrain the king from granting to his own tenants authority to grant lands, to be holden of such tenants instead of the king as superior lord; and that even if the grant of manorial privileges and franchises was void, it did not affect the validity of the grant of the land itself. *People v. Van Rensselaer*, 9 N. Y. 271. But the courts of *New York* hold that the principles of the statute above mentioned have always been the law of that State, as well during its colonial condition as after it became an independent body politic. *Van Rensselaer v. Hays*, 19 N. Y. 74; 75 Am. Dec. 278, controlling *DePeyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470; 3 Washb. on Real Prop. 189, 190 and note.

1. The resolutions passed in 1845, providing for the "Annexation of *Texas*," contained a provision that "Said State when admitted to the Union, after ceding to the United States, etc., etc.; and shall also retain the vacant unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of *Texas*; and the residue of said lands after discharging said debts and liabilities, to be disposed of as said State shall direct, etc., etc.," Stephens' History of the United States, p. 477; *State v. Williams*, 8 Tex. 384.

A title of possession to land in *Texas* before the adoption of the common law, issued to an attorney in fact of the original grantee for the latter's use, vests the title in such grantee and not in the attorney. *Hanrick v. Barton*, 16 Wall. (U. S.) 166.

2. 4 Kent's Com. 424; 3 Washb. on Real Prop. 344.

The principle of the text is usually declared and asserted by statute. Sometimes the statute diverts the title into other channels, as, for example, in *Indiana* and *Tennessee*, to the school fund. *State v. Reeder*, 5 Neb. 203; *State v. Meyer*, 63 Ind. 33; *Hinkle v. Shadden*, 2 Swan (Tenn.) 46; *Parchman v. Charlton*, 1 Coldw. (Tenn.) 381. In *North Carolina* to the State University. *University v. Foy*, 2 Hayw. (N. Car.) 310; *University v. Harrison*, 90 N. Car. 385.

The title to lands acquired by the commonwealth on the escheat of the right of the eldest patentee does not accrue to the junior patentee for the same land, but the commonwealth may regrant the escheated title. *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; 16

c. FORFEITURE—(See also FORFEITURE, vol. 8, p. 443).—Where the State sells land and the purchaser fails to pay, a forfeiture may take place.<sup>1</sup> Where the statute limits the quantity or value of land which a corporation may take or hold, an excess may be forfeited to the State.<sup>2</sup>

Am. Dec. 86; *Stith v. Hart*, 6 T. B. Mon. (Ky.) 624; *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332; *Jones v. Jones*, 1 Call (Va.) 468.

**How Escheat Right Conveyed.**—This is a matter of statutory enactment and is regulated by the statutes of the different States. *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *Jackson v. Adams*, 7 Wend. (N. Y.) 367; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Jones v. Badley*, 4 Md. Ch. 167; *Casey v. Inloes*, 1 Gill (Md.) 430; 39 Am. Dec. 658; *Com. v. Hite*, 6 Leigh (Va.) 588; 29 Am. Dec. 226; *Nettles v. Cummings*, 9 Rich. Eq. (S. Car.) 440.

In some States it is held that grants of escheated lands by officers appointed to convey vacant lands are void. *Trustees of University v. Sawyer*, 1 Tayl. (N. Car.) 114; *Straub v. Dimm*, 27 Pa. St. 46; *Bodden v. Speigner*, 2 Brev. (S. Car.) 321; *Hinkle v. Shadden*, 2 Swan (Tenn.) 46; *Wolfe v. Reynolds*, 80 Pa. St. 204.

An escheat patent is *prima facie* evidence of an escheat at the date of the warrant and not before. *Peterkin v. Inloes*, 4 Md. 175.

An escheat grant passes all the land comprehended in the true location of the land escheated, but this rule does not apply when it is clearly apparent that the escheat grant was not intended to include it all, and the party who took out the escheat warrant knew it did not. *Jones v. Badley*, 4 Md. Ch. 167.

As the law governing the succession to property emanates from the State, and the State has power to determine who shall take it, it follows that land which has been patented by the United States to an alien, will on his death, without inheritable blood, escheat to the State and will not revert to the general government. *Etheridge v. Malempre*, 18 Ala. 565.

In *Pennsylvania*, lands returning to the State by escheat or forfeiture, or other proceeding investing her with title, are not governed in their disposition by the ordinary laws and usages regulating the land office. *Wolfe v. Reynolds*, 80 Pa. St. 204.

1. As in *California*, where it was

held in *Borland v. Lewis*, 43 Cal. 569, that a failure to pay interest annually and the principal at the end of five years on a swamp and overflowed land purchase, made under the act of 1855, worked a forfeiture, and that the State might resell as if no purchase had been made.

Where the title to land granted by patent has been revested in the State by forfeiture, a subsequent patent of the same land upon an entry and survey thereof as waste and unappropriated is void, and in such case the State can only pass the title by special grant. *Whittington v. Christian*, 2 Rand. (Va.) 353; *Warwick v. Norvell*, 1 Rob. (Va.) 308; *Wolfe v. Reynolds*, 80 Pa. St. 204. Where land has been located and patented it will not revert in the State merely for the owner's neglect to pay the taxes. *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72.

When State lands once sold have been forfeited for a default in payment of principal or interest by their terms and by force of the statute under which they issued, the certificates of sale become absolutely void, and if trespasses have been committed upon the lands by cutting and removing the timber, the right of action for the trespass or for the timber is thenceforth in the State until the land is resold. *Conklin v. Hawthorn*, 29 Wis. 476.

**2. Lands Owned by Corporations in Excess of Corporate Powers.**—In many of the States, statutes prohibit or limit corporations from holding or acquiring more than a specified quantity of real estate.

In *Virginia*, corporations have power, where it is not otherwise provided, to purchase, hold, and grant estates real and personal, but they may not hold more than is proper for the purposes for which they are incorporated. 2 Minor's Inst. 592; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; 15 Am. Dec. 706; 1 Lom. Dig. 14.

In *Pennsylvania*, in *Methodist Church v. Remington*, 1 Watts (Pa.) 219; 26 Am. Dec. 61, C. J. Gibson says: "The statutes of mortmain have been extended to this State only so far as

4. **Grant.**—The State may acquire title to land by grant from a private individual,<sup>1</sup> or from the United States.<sup>2</sup> A grant by Congress to a State cannot be recalled at the will of Congress any more than can a grant to a private individual.<sup>3</sup> By acts of Congress passed at various times grants have been made to States and Territories for particular purposes, as, for example, the school land grants,<sup>4</sup> the swamp land grants,<sup>5</sup> the internal improvement acts.<sup>6</sup> So miscellaneous grants have been made at various times.<sup>7</sup>

**III. TRANSFER OF STATE TITLE**—1. **What Lands May be Transferred.**—The statutes of each State regulate what portion of the

they prohibit dedications of property to superstitious uses and grants to a corporation without statutory license." This statement of the law is repeated by Woodward, C. J., in *Miller v. Porter*, 53 Pa. St. 292. See also *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 218; *Leasure v. Union Mut. L. Ins. Co.*, 91 Pa. St. 491.

Under these or similar statutes, where a corporation is incompetent to take title to real estate, a conveyance to it is not void, but voidable only; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Jones v. Habersham*, 107 U. S. 174; *Mallett v. Simpson*, 94 N. Car. 37; 55 Am. Rep. 594; *Leazure v. Hillegas*, 7 S. & R. (Pa.) 313; *Groundie v. Northampton Water Co.*, 7 Pa. St. 233; *National Bank v. Whitney*, 103 U. S. 99; *Runyan v. Coster*, 14 Pet. (U. S.) 122; *Bank v. Poitiaux*, 3 Rand. (Va.) 136; 15 Am. Dec. 706; *Hickory Farm Oil Co. v. Buffalo, etc., R. Co.*, 32 Fed. Rep. 22; *Alexander v. Tolleston Club*, 110 Ill. 65; *Russell v. Texas, etc., R. Co.*, 68 Tex. 646; *Smith v. Sheeley*, 12 Wall. (U. S.) 358; *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 758; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Davis v. Old Colony R. Co.*, 131 Mass. 273; 41 Am. Rep. 221.

If a corporation violates the provision by acquiring more land than it is allowed to acquire, and the State institutes proceedings to enforce forfeiture, in the absence of any legislative enactment as to its disposition, the excess goes to the State. 2 Minor's Insts. 592, 593; 1 Lomax Dig. 14, 777; *Leazure v. Hillegas*, 7 S. & R. (Pa.) 313; 1 Purd. (Pa.) 361; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; 10 Am. Dec. 706.

A private individual cannot insist upon the forfeiture, by a railroad com-

pany, of certain lands granted by Congress and the State, because of the failure to perform the conditions of the grant. Where a State reserves the power to resume all rights conferred upon any railroad company failing to comply with the condition that its line shall be completed by a certain day, the title of the company is not affected until the right is exercised. *Chicago, etc., R. Co. v. Lewis*, 53 Iowa 101; *Little v. Watson*, 32 Me. 214.

1. A relinquishment of land to the State by the owner of the superior title passes such claim to the government. *Stith v. Hart*, 6 T. B. Mon. (Ky.) 624. See DEDICATION, vol. 5, p. 395; GRANT, vol. 9, p. 43.

2. U. S. Rev. Stat., § 2449. See 21 U. S. Stat. at L. 326; 25 U. S. Stat. at L. 676; 26 Stat. at L. 222, as to grants to the territories *Montana, Dakota, Idaho and Wyoming*. See 10 U. S. Stat. at L. 305; 13 Stat. at L. 28; 25 Stat. at L. 673, as to grants to *Washington Territory*, confirmed afterwards to the State upon its admission into the Union. See 12 U. S. Stat. at L. 504; 12 Stat. at L. 208; 23 Stat. at L. 10, whereby *Colorado* was allowed to select a portion of the public lands belonging to the United States and lying within the State limits for the purposes of an agricultural college.

3. *Busch v. Donohue*, 31 Mich. 480; *St. Louis, etc., R. Co. v. McGee*, 115 U. S. 469.

4. See PUBLIC LANDS, vol. 19, p. 305. See also *infra*, this title, *School Lands*.

5. See PUBLIC LANDS, vol. 19, p. 305. See also *infra*, this title, *Swamp Lands*.

6. See PUBLIC LANDS, vol. 19, p. 305.

7. See the various provisions of the United States statutes.



public domain belonging to the State shall be granted by it to private individuals. The State must, as a rule, own the lands to be granted.<sup>1</sup> Certain portions of the public domain owned by the State may be reserved from sale, and an attempt to dispose

1. Bingham on Real Estate 80; De Peyster v. Michael, 6 N. Y. 467; 57 Am. Dec. 470.

Lands within the ordinary jurisdiction of the land office are those granted upon application, according to the forms of the office, and fit for settlement and cultivation and within the navigable rivers. Poor v. McClure, 77 Pa. St. 214.

Where it clearly appears on the face of the warrant and survey that the land is not subject to entry, or is subject to entry only on conditions which have not been complied with, the secretary may refuse to issue a grant therefor. Wool v. Saunders, 108 N. Car. 729.

Where lands subject to entry are applied for and payment tendered, the commissioner of the land office has no discretionary power to retain them from the market in order to accommodate other parties. People v. Pritchard, 17 Mich. 338.

Lands adapted to the growth of fruits are agricultural lands, and may be entered as such, fruits being "an ordinary agricultural crop," as that phrase is used in Pol. Code Cal., § 3495, prescribing the tests of lands which may be entered as agricultural. Reeves v. Hyde, 77 Cal. 397.

**Escheat Lands.**—In some of the States it is held that the method of taking up lands by warrant and survey does not apply to lands reverting to the State by escheat and applies to vacant lands only, and that lands to which the State becomes entitled by virtue of the law of escheat must be taken up by virtue of an escheat warrant or some other method than that by which the title to vacant lands is acquired. Straub v. Dimm, 27 Pa. St. 36; Wolfe v. Reynolds, 80 Pa. St. 204.

**School Lands.**—The State can obtain no title to school lands until the survey is completed; and a location on unsurveyed lands is void and carries no title. Smith v. Athern, 34 Cal. 506; Hastings v. Devlin, 40 Cal. 358; Medley v. Robertson, 55 Cal. 396.

**Lien Lands.**—All selections of lieu lands, upon unsurveyed public lands

of the United States are utterly void, and all public land of the United States is considered unsurveyed until a certified copy of the official plat of the survey is filed in the local land office. U. S. v. Curtner, 38 Fed. Rep. 1.

Coal lands are mineral lands, and therefore not open to selection in *California* in lieu of lands included in the sixteenth and thirty-sixth sections, but occupied before survey or reserved for public purposes. Mullan v. U. S., 118 U. S. 271.

#### Lands Which have been Once Granted.

—It is held in some of the States that land once granted by the State will not be granted by the State a second time; and that a patent for such land, though vacant, does not pass the title. Jackson v. Murray, 7 Johns. (N. Y.) 5; Smith v. Baker, 4 Md. Ch. 29; State v. Bevers, 86 N. Car. 588; Atkins v. Lewis, 14 Gratt. (Va.) 30. Gen. Stat. Ky. ch. 109, § 3; Roberts v. Davidson, 83 Ky. 279.

In *North Carolina*, lands once granted by the State to individual citizens do not become vacant lands within the meaning of the statute, where the State subsequently acquires title to them, but abandons the use to which they were put. State v. Bevers, 86 N. Car. 588.

A valid disposal of lands by the State made to one person, cannot be affected by another disposal of them by the State board, and want of notice is no defense to the second grantee against the first grantee's suit for conveyance, but the second grantee will be considered trustee for the legal title. Wardwell v. Paige, 9 Oregon 517.

Public land sold by the State for bonds afterwards adjudged to be void, does not become vacant land which may be resold by the State. Cochran v. Cobb, 43 Ark. 180.

A patent for lands covered by a prior claim does not pass a title to the patentee, subject only to such claim. But if the latter is a mere entry, which fails to take effect by neglect to survey and return the plat, the land is open to a warrant in favor of any third person. Nichols v. Covey, 4 Rand. (Va.) 365.

of such reserved lands is of no effect to pass the title thereto.<sup>1</sup> In the absence of legislative enactment, the State may dispose of all lands owned by it.<sup>2</sup>

**2. To Whom Transfer May be Made.**—Any person may acquire State land by compliance with the statutory provisions, unless prevented by some legislative enactment.<sup>3</sup> In some States he

1. *Best v. Polk*, 18 Wall. (U.S.) 112; *Stoddard v. Chambers*, 2 How. (U.S.) 284; *U. S. v. Arredondo*, 6 Pet. (U.S.) 728.

Where, in a grant by the State of *Maine*, of a township of lands, there are reserved one thousand acres for public uses, the fee in such reserved land does not rest in the grantees of the township, even if no town should be established there. *Dillingham v. Smith*, 30 Me. 370.

A reservation by a State of lands for the use of a town is a covenant in law that those lands shall only be for the use of the town and forever, and a grant of those lands made afterwards is of no effect. *Hawkins v. Arthur*, 2 Bay (S. Car.) 195.

In *Texas*, by a provision of the constitution, the sale of unappropriated lands, in quantities exceeding 160 acres, to others than actual settlers is forbidden. *Looney v. Bagley* (Tex. 1877), 7 S. W. Rep. 766.

2. *Bingham on Real Estate* 80. Public lands on which the settler is located without authority are considered vacant. *Tigh v. Chouquette*, 21 Mo. 233.

After land has been located and patented, it will not revert to the State merely for the owner's neglect to pay taxes. *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72.

A grant by the State of land in its possession, although another State disputes the title, is not affected by the fact that the latter State afterwards acquires the land. *Coffee v. Groover*, 20 Fla. 64.

In *Freytag v. Powell*, 1 Whart. (Pa.) 536, it was held that land within high and low water mark on the great river of the State was not within the jurisdiction of the land office; and that land in Philadelphia was not considered within the jurisdiction of the land office.

The State is not bound to evict parties unlawfully holding possession of public lands before granting them to others; there being nothing prohibiting the State from granting lands held in possession, the grantee from the

State takes against the party in possession. *Austin v. Dungan*, 46 Tex. 236.

In *Virginia*, there shall be no warrants for land vested in the State for nonpayment of taxes or grants of unappropriated lands on the Chesapeake bay, the seashore, or that of a public river or creek. *Hilliard on Real Prop.* 261.

In *South Carolina*, lands recently purchased by the State from a corporation, to whom they were formerly granted, are not within the meaning of the term "vacant lands;" hence a grantee acquires no good title to them. *Hilliard on Real Prop.* 269; *State v. Arledge*, 2 Bailey (S. Car.) 401; 23 Am. Dec. 145.

3. Under the land laws of *Nevada*, a patent cannot be issued to a person who has already purchased from the State three hundred and twenty acres of land. *State v. Hatch*, 15 Neb. 304.

In *Missouri*, an officer attached to the State land office cannot purchase lands by entry at his own office. *Massev v. Smith*, 64 Mo. 347.

In *Franklin v. Fokes*, 15 Tex. 180, it is held that a government commissioner, to extend the titles to lands, cannot alienate to himself as a colonist, directly or indirectly, and a contract to obtain a title for a grantee for half the land is void.

Nothing in the *Tennessee* statute prohibits the entry of public land by an entry taker for his deputy. Even an entry by the entry taker himself, in his own name, would be voidable only, not void. *Berry v. Wagner*, 13 Lea (Tenn.) 591.

A conveyance of the land by the sovereign power invests the grantees with the requisite power to take and hold it. *Bingham on Real Estate* 83, 84; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 100; *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320; *Jackson v. Lervey*, 5 Cow. (N. Y.) 397; *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693; *Jackson v. Cory*, 8 Johns. (N. Y.) 385; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73.

must be an actual settler.<sup>1</sup> In some States, it is only the lands which have been left undisposed of after a public sale which are open to

**Power of Aliens to Acquire Lands Belonging to the State.**—An alien can take lands and hold them by grant from the State. Bingham on Real Estate 83, 101; Jackson v. Beach, 1 Johns. Cas. (N. Y.) 399; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Dudley v. Grayson, 6 T. B. Mon. (Ky.) 259; Marshall v. Conrad, 5 Call (Va.) 364; Trustees v. Grey, 1 Litt. (Ky.) 147; Larreau v. Davignon, 5 Abb. Pr. N. S. (N. Y.) 367; Jackson v. Etz, 5 Cow. (N. Y.) 397; Goodell v. Jackson, 20 Johns. (N. Y.) 693.

If an alien purchase lands of the State with covenants of warranty, the State cannot claim the land of the alien nor of his heirs. 1 Washb. on Real Prop. 49; Bingham on Real Estate 83, 101; Goodell v. Jackson, 20 Johns. (N. Y.) 694; People v. Schermernhorn, 19 Barb. (N. Y.) 540; Com. v. Andre, 3 Pick. (Mass.) 224.

In *Massachusetts*, an alien may acquire title to land as against the State by adverse possession. Bingham on Real Estate 91, 92; Piper v. Richardson, 9 Met. (Mass.) 157.

One who has entered upon the vacant public domain as a purchaser from another, who assumed to have a title, may, on discovering that the land is vacant, repudiate the executory contract for its purchase without quitting possession, resist the payment of the notes given for the purchase money, and while in possession, if entitled to pre-empt land, may take steps to secure it as a purchaser. Rogers v. Daily, 46 Tex. 578.

In *California*, in *Peabody v. Prince*, 78 Cal. 511, the court held that a cross complaint alleging that before defendant applied to purchase the land, a third person applied, and he and the plaintiff settled the contest between them in fraud of the defendant, the third person receiving money from plaintiff, and withdrawing from the contest, must also allege, to entitle defendant to recover on the ground of fraud, that the application of the third person was invalid, and that the defendant possesses the qualifications necessary to entitle him to become a purchaser.

An allegation, in action to determine the right to purchase land from the State, that the surveyor-general "referred the contest arising under the

various applications to purchase said land to the superior court," with "profert of said order of reference," sufficiently avers that an order of reference was made under Pol. Code Cal., § 3498, providing for dismissal of unapproved applications, "wherein the contest has been referred to court, or a demand made for an order of reference." *Riddell v. Mullen*, 77 Cal. 577.

1. *Hickie v. Starke*, 1 Pet. (U. S.) 98; *Upton v. Wilson*, 65 Cal. 11; *Johnson v. Squires*, 55 Cal. 103; *Bass v. Dinwiddie*, *Cooke* (Tenn.) 130; *Taylor v. Burke*, 66 Tex. 643; Const. Cal., art. 17, § 3; Const. Tex., art. 14, § 4; *Swetman v. Sanders* (Tex. 1892), 20 S. W. Rep. 124; *Sanborn v. Gunter* (Tex. 1891), 17 S. W. Rep. 117; 20 S. W. Rep. 72.

Under *California* constitution, providing that land shall be granted only to actual settlers, an applicant to purchase who is not an actual settler can acquire no rights even though his application was made before the constitution was adopted. *Urton v. Wilson*, 65 Cal. 11; *Johnson v. Squires*, 55 Cal. 103; Const. Cal., art. 17, § 3; *Jacobs v. Walker*, 90 Cal. 43.

Under the provision requiring grantee of State lands to be an actual settler, and Pol. Code Cal., § 3500, requiring an applicant for such lands to state in his affidavit that he is an actual settler, a certificate of purchase issued to one who is not an actual settler, though his affidavit states that he is such, confers no rights, and neither he nor his assignee can maintain an action to annul a patent to another. *Davidson v. Cucamonga, etc., Land Co.*, 78 Cal. 4.

*California* Const., art. 17, § 1, providing that State lands that are "suitable for cultivation" shall be granted only to actual settlers, applies to swamp lands granted as such to the State by Congress, but which afterwards became dry and fit for cultivation. *Goldbug v. Thompson* (Cal. 1892), 30 Pac. Rep. 1019; *Fulton v. Brannan*, 88 Cal. 454.

One who makes an actual entry followed by building a house and occupation, while doing so is an actual settler. *Gavitt v. Mohr*, 68 Cal. 506.

In *Mississippi*, by act Feb. 17, 1890 (Laws, 1890, ch. 12, p. 34), lands held by

settlers.<sup>1</sup> Lands under the waters of navigable lakes and rivers are frequently granted to adjacent owners, to enable them to improve such lands.<sup>2</sup> On the admission of a new State into the Union, the "shore" or tide lands therein not disposed of by the United States prior thereto, become the property of the State, and are sold under certain statutory regulations.<sup>3</sup> An individual cannot be made the grantee of land without his consent.<sup>4</sup>

**3. Application to Purchase.**—The application to purchase State land must contain all that the statute requires.<sup>5</sup>

the State, with specified exceptions, are reserved for purchase by residents of the State.

In *Texas*, in order to be a settler as required by the act of April 12, 1883, one must reside on the land or occupy it preparatory, with a *bona fide* intention of returning. Occupancy for such purposes must be in good faith. Occupancy for other purposes does not entitle the party to purchase as an actual settler. However, the occupancy need not be longer than is necessary to show good faith. *Burleson v. Durham*, 46 Tex. 152; *Taylor v. Burke*, 16 Tex. 643. The terms "settlement and improvement," include the *animus residendi*, and, in case of a temporary departure, the *animus revertendi*. *Clemmins v. Gottshall*, 4 Yeates (Pa.) 330; *McLaughlin v. Mayberry*, 4 Yeates (Pa.) 534.

In *North Carolina*, the statute\* permitting non-residents to enter and take out grants for vacant lands, provided they "comply with the laws of the State in relation to such entries," has been construed to require the enterer to become a resident within the time prescribed for perfecting the entry. *Mockridge v. Howerton*, 72 N. Car. 221.

1. See *State v. Public Land Com'rs.*, 61 Wis. 274; *Attorney-Gen'l v. Smith*, 31 Mich. 359; *Attorney-Gen'l v. Thomas*, 31 Mich. 365.

Lands left undisposed of after a public sale may be entered at the State land office only after the land commissioner has received and entered the returns from the public sale, and fixed a minimum price and the time for future entries. *Potter v. State Land Com'r.*, 55 Mich. 485.

2. *New York Laws*, 1850, ch. 283, § 1. See *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *Wilson v. Shiveley*, 11 Oregon 215.

3. *Case v. Toftus*, 39 Fed. Rep. 730.

4. Acceptance of a grant is established by proof that the grantee has assumed to dispose of the land by will. *Mackinnon v. Barnes*, 66 Barb. (N. Y.) 91.

Actual use of right of way by a railroad company or other grantee is conclusive evidence of acceptance of the grant. *Fazende v. Morgan*, 31 La. Ann. 549.

5. *McEntee v. Cook*, 76 Cal. 187; *Fruit Land Co. v. Moir*, 83 Cal. 101; *McCoy v. Byrd*, 65 Cal. 92; *Remeau v. Mills*, 24 Mich. 15.

If the statute requires that the payment of a portion of the price should accompany the application, this is vital; and a tender long afterwards will not make the application valid. *Wanke v. Foit*, 80 Tex. 591.

In *California*, the applicant must show by affidavit that he is entitled to purchase the land. *Millidge v. Hyde*, 67 Cal. 5.

An application is void if sworn to before an officer not authorized to administer the oath. *Garfield v. Wilson*, 74 Cal. 175. So in *California* the applicant must show that he has entered the land according to law. *Cucamonga Fruit Land Co. v. Moir*, 83 Cal. 101, and that he is an actual settler upon it. *Davidson v. Cucamonga Fruit, etc., Co.*, 78 Cal. 4; *Urton v. Wilson*, 65 Cal. 11.

In *Texas*, he must be a *bona fide* settler and a citizen of the State. *McCarthy v. Gomez* (Tex. 1892), 19 S. W. Rep. 999; *Burleson v. Durham*, 46 Tex. 152.

In *Nevada* there must be an actual occupation. *Robinson v. Imperial Silver Min. Co.*, 5 Nev. 44. And so in *California*. *Rogers v. Shannon*, 52 Cal. 99.

The affidavit must state truly all that the statute requires. *McKenzie v. Brandon*, 71 Cal. 209; *Taylor v. Weston*, 77 Cal. 534.

**4. Elements of Transfer—*a*. IN GENERAL.**—The analogy between the mode of transfer of State land and United States land is very close, except as to the character of the surveys and divisions of the land.<sup>1</sup> The conveyance by which the title is transferred is called a public grant.<sup>2</sup>

Every individual interest in lands which once belonged to the State must trace its title from a grant by the State.<sup>3</sup> The transfer of lands belonging to the State is regulated by statutes. The legislature, as a rule, is charged with the power to dispose of the

Where the statute requires the applicant to show in his affidavit that he "knew the land applied for and the exterior bounds thereof, and that he knew of his own knowledge that there were no settlers thereon," a person is qualified to make this affidavit by information obtained by going upon the land and examining it as indicated by a guide, unless it is proved that the guide pointed out the wrong land. *Price v. Beaver*, 73 Cal. 625.

Under a statute providing that the lands shall be sold in tracts of 640 acres each, an application to purchase land in one body, to be surveyed in 640-acre tracts, it is not essential to describe the land "section by section," since the act simply prescribes the amounts to be purchased and does not prescribe or affect the form of application. *Jumbo Cattle Co. v. Bacon* (Tex. 1890), 17 S. W. Rep. 136; 79 Tex. 5.

The provisions of *California* Pol. Code, § 3444, as to the affidavit to be filed by one seeking to purchase swamp or overflowed land, requiring that "if the applicant is a female, such affidavit must show that she is entitled to purchase real estate in her own name," is complied with by a statement in such affidavit that applicant "is an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the State of *California*, of lawful age." *Price v. Beaver*, 73 Cal. 625.

If the affidavit states the facts untruly it will not support the application, though the facts if truly stated might support it. *Plummer v. Woodruff*, 72 Cal. 29.

In *Texas*, under act April 12, 1883, creating the State land board and directing the procedure, the board may inquire into the facts on which the application was based, and finding them false may declare the rights of the purchaser forfeited, even though

he has paid part of the price and given his obligation for the rest. *King v. Jones*, 78 Tex. 285.

The fact that the surveyor-general's certificate and approval and application to purchase State land are void, does not necessarily invalidate the application and the right of priority thereunder. *Pollard v. Putnam*, 54 Cal. 630.

An application properly made creates a vested right which the legislature cannot divest by amending the statute under which the application was made. *Jumbo Cattle Co. v. Bacon*, 79 Tex. 5; *White v. Martin*, 66 Tex. 340.

But the mere filing of an application for the purchase of land, prior to a statute withdrawing the land from sale, confers no vested right. *State v. Work*, 63 Tex. 148.

It was held in *Cadierque v. Duran*, 49 Cal. 356, that the application did not confer a right in the lands such as could be transferred.

Under the *Texas* statute, which provides that an application shall be made for land as a homestead donation within a certain time after settlement, a failure to make the application within the prescribed time will not defeat the rights of the settler, when the rights of no other person have intervened before the making of the application. *McCarthy v. Gomez* (Tex. 1892), 19 S. W. Rep. 999; *Gammage v. Powell*, 61 Tex. 629.

1. 3 Washburn on Real Prop. \*519. See PUBLIC LANDS, vol. 19, p. 305.

2. Tiedeman on Real Prop., § 734.

3. Bingham on Real Estate 80.

"The State in the exercise of its sovereignty and through its duly authorized agents, may execute to individuals the most ample and comprehensive conveyance of land which it is possible to make, but the grantee will not acquire the absolute right of property. He will take at most an

public domain; hence for every grant, although the executive functionaries may be the intermediate agents in making it, there must be the authority of a general or special statute.<sup>1</sup>

Statutes regulating the transfer of the title to State lands provide generally for a warrant from the land office; an entry, or location by designated limits, in the books of the proper officer in the county or district where the land lies; a survey by the county surveyor or other designated officer; and a grant or letters patent.<sup>2</sup>

*b. WARRANT.*—A warrant from the land office is usually the first step in proceedings for the acquisition of State land. The warrant empowers the applicant or claimant to claim and appropriate the number of acres of unappropriated land belonging to the State mentioned in the warrant. It authorizes a survey. The warrant does not of itself effect an appropriation, but confers

estate in the land only; and there will remain to the State still, the absolute and ultimate right of property, to which the estate granted will remain in a measure subordinate so long as it will continue to exist. But after the estate is granted and while it continues to exist, this absolute right of property remaining in the State is called in legal language sometimes the escheat, sometimes the reversion, and sometimes the possibility of reverter. (*De Peyster v. Michael*, 6 N. Y. 501; 57 Am. Dec. 470.) The difference in the right of the State as it exists before and after the grant of an estate is that before the grant the State has both the right of property and the right of immediate possession, while after the grant and while it is in force, the State has only the right of property without the right of possession. Whenever, for any cause, the estate has ceased to exist, then the State becomes entitled to the immediate possession. On the termination of an estate, it is said to revert or escheat, by which is meant, that the right of possession before granted by the State has ceased to exist, leaving the right of possession in the State the same as if the grant had never been made." Bingham on Real Estate 4.

1. Bingham on Real Estate 82; *Shapleigh v. Pillsbury*, 1 Me. 280; 2 Min. Inst. 998; 2 Lomax Dig. 501; *Wilcox v. Calloway*, 1 Wash. (Va.) 38; *Whittington v. Christian*, 2 Rand. (Va.) 353; *Lavasser v. Washburn*, 11 Gratt. (Va.) 584; *McCaughal v. Rvan*, 27 Barb. (N. Y.) 376; *Harris v. Dyer*, 27 Ga. 211; *Patterson v. Trabue*, 3 J. J.

Marsh. (Ky.) 598; *Nims v. Palmer*, 6 Cal. 8.

In many of the States, conveyances by special act of the legislature are discouraged, if not absolutely inhibited, by the constitution, hence conveyances by special act of the legislature are rare. 2 Min. Inst. 995; Va. Const., 1869, art. 5, § 20; *Faulkner v. Davis*, 18 Gratt. (Va.) 651.

Where an unauthorized sale of public lands is made under a misconstruction of the act of the legislature, a grant issued to the purchaser is void, and evidence of the irregularity may be given. *Harris v. Dyer*, 27 Ga. 211.

A State auditor has no power to make agreements respecting the lands of the State, unless such power is expressly conferred upon him by statute. *McCaslin v. State*, 99 Ind. 428.

It is the general policy of the *Michigan* land laws that there shall be no private sale of State lands until they shall have been offered at public sale. The act fixing a minimum price does not authorize their sale, but merely prohibits it below the price. Lands left undisposed of after public sale cannot be entered at the State land office until the commissioner has had opportunity to receive and enter the returns from the public sales, and to fix a minimum price and the time for future entries. Nor does the previous deposit of money confer precedence on the depositor. *Potter v. State Land Comm'r*, 55 Mich. 485.

2. 2 Minor's Inst. 998 *et seq.*; 2 Lom. Dig. 592 *et seq.*; *Cox v. Ewing*, 4 Yeates (Pa.) 429; *Ross v. Cutshall*, 1 Binn. (Pa.) 399.

only power to appropriate in the mode pointed out by the statute.<sup>1</sup>

c. ENTRY.—A failure to comply with the entry laws will invalidate a grant by the State.<sup>2</sup> Where the statute requires the entry to be so specific and precise as to enable others to locate their warrants on the adjacent lands with certainty, and an entry made is so vague as not to identify the land, such an entry will not give any priority of right as against another individual who makes a proper entry.<sup>3</sup> Where the claimant is required to produce to the entry-taker a writing describing the land, and the entry-taker is required to enter a copy thereof in a book, an entry of land placed in the entry-taker's book without his authority by a claim-

1. **Warrant.**—2 Minor's Inst. 999; 2 Lomax Dig. 502, 503; Wilson v. Mason, 1 Cranch (U. S.) 45; Taylor v. Brown, 5 Cranch (U. S.) 234; Tryon v. Munson, 77 Pa. St. 250.

A warrant upon which the purchase money has been paid is authority to survey vacant lands to the person taking it out, and it is a contract between the State and the warrantee to permit him to select unappropriated land where he shall designate. Tryon v. Munson, 77 Pa. St. 250.

The withdrawal of a State's warrant from land by the person directly interested leaves the land vacant and subject to appropriation. Porter v. Gordon, 5 Yerg. (Tenn.) 100.

A loosely descriptive warrant conveys only propinquity, and the lands must be surveyed in order to identify it; it takes title from the survey. Manhattan Coal Co. v. Green, 73 Pa. St. 310.

A person who advances money for the purchase of land warrants acquires rights in the warrants which follow them into whosoever hands they may come with notice of his claim. Patrick v. Marshall, 2 Bibb (Ky.) 40; 40 Am. Dec. 670.

**Assignability of Warrant.**—A warrant may be assigned. 2 Minor's Inst. 999; 2 Lom. Dig. 503; Session Laws, Cal. 1859, p. 227; Watkins v. Lynch, 71 Cal. 21; Morrison v. Campbell, 2 Rand. (Va.) 206.

The facts that a person causes a certificate to be located on land and a survey to be made in the name of the original grantee, and that this is returned to the general land office, are not sufficient proof that the original grantee sold the land certificate to such person. Hemdon v. Davenport, 75 Tex. 462.

**Nature of Warrant.**—The warrant,

until it is located by entry in the surveyor's book on specified lands, is personal estate; after entry, the interest becomes real estate. 2 Minor's Inst. 999; 2 Lom. Dig. 503.

Land warrants are not to be regarded as real estate in the settlement and distribution of estates in the probate office. Moody v. Hutchinson, 44 Me. 57; Dodge v. Litter, 73 Tex. 319; Adams v. Houston, etc., R. Co., 70 Tex. 252; Forbes v. Withers, 71 Tex. 302; Barker v. Swenson, 66 Tex. 407.

In *Texas* it was held in the case of Dodge v. Litter, 73 Tex. 319, that where the wife of one who died possessed of a land certificate, sold and conveyed in writing her one-half interest in it, and shortly afterwards it was located, and the field notes of the survey, together with the certificate, were returned and filed in the general land office with an indorsement that the balance of said certificate was entered in the name of the purchaser, but the purchaser neither recorded his conveyance in the county where the land was situated nor filed it in the land office; as the land certificate was personalty, the registration laws did not apply, and the purchaser acquired title thereto as against a subsequent purchaser from the wife, who had no notice of the prior sale, except the memorandum on file in the land office; that being sufficient to put him on inquiry as to the prior purchaser's connection with the certificate. Dodge v. Litter, 73 Tex. 319.

2. **McNamee v. Alexander**, 109 N. Car. 242; **Mockridge v. Howerton**, 72 N. Car. 221.

3. **Buckner v. Feagins**, 2 Bibb (Ky.) 138; **Davis v. Davis**, 2 Bibb (Ky.) 134; **Moore v. Whitledge**, Hard. (Ky.) 95; **Camp v. Prather**, 7 B. Mon. (Ky.) 599;

ant is of no validity.<sup>1</sup> If the land lies in different counties, an entry upon it must be made in each county.<sup>2</sup> The land must be subject to entry.<sup>3</sup> An entry of land already located is void.<sup>4</sup> A prior location, followed by the statutory diligence in making survey and returning the field notes, is an appropriation of the land against any claim having its inception subsequently.<sup>5</sup> But the one having a prior location may be estopped from claiming title

*Hinckley v. Fowler*, 43 Cal. 56; *Hildebrand v. Stewart*, 41 Cal. 387; *Cunningham v. Browning*, 1 Bland (Md.) 299; *Wood v. Elledge*, 11 Heisk. (Tenn.) 607; *Kendrick v. Dallum*, *Cooke* (Tenn.) 220; *Winchester v. Gleaves*, 2 Hayw. (Tenn.) 213; *Bowley v. Taylor*, 5 Cranch (U. S.) 191; *McNeal v. Herold*, 11 Gratt. (Va.) 309; *Harper v. Baugh*, 9 Gratt. (Va.) 508.

Where an entry calls for lands on a certain creek, "about seven miles" from its mouth, the word "about" must be rejected, and the distance taken in a straight line from its mouth if the stream is of sufficient length. *Sanders v. Morrison*, 2 T. B. Mon. (Ky.) 109; 15 Am. Dec. 140; *Johnson v. Rowland*, *Sneed* (Ky.) 77; *Nichols v. Wells*, *Sneed* (Ky.) 255; *Whitaker v. Hall*, 1 Bibb (Ky.) 72; *Green v. Watson*, 1 Bibb (Ky.) 105; *Lockhart v. Trabue*, 2 Bibb (Ky.) 250; *Smith v. Watson*, 3 Bibb (Ky.) 153; *Carland v. Rowland*, 3 Bibb (Ky.) 127; *Stephens v. Hedden*, 4 Bibb (Ky.) 107; *Morrison v. Coghill*, 4 Bibb (Ky.) 379.

In such case, if the stream is a large river, or is not of sufficient length, the meanders may be followed in measuring the distance. *Sanders v. Morrison*, 2 T. B. Mon. (Ky.) 109; 15 Am. Dec. 140.

1. *Pearson v. Powell*, 100 N. Car. 86.

2. *Stith v. Jones*, 4 B. Mon. (Ky.) 375; *Avery v. Strother*, Cam. & N. (N. Car.) 434.

The *Tennessee* Act, 1823, ch. 49, providing for the entry of vacant lands lying north and east of the congressional reservation line and north of the Tennessee river, provided for the election and qualification of one entry-taker for each county, fixed the amount per acre to be paid the enterer, and limited the quantity to be covered by one entry. The act of 1825 reduced the price, and the act of 1827, ch. 69, increased the quantity. Act Jan. 9, 1830, ch. 87, provided that "where an entry has been heretofore made, or may hereafter be made, in any county," under the above acts, the beginning

corner of which is in one county and a part of the entry in another, it shall be lawful for the surveyor of the county where such beginning corner is situated to proceed and survey such entry. It has been held that, as these acts all relate to the same subject, they must be construed together, and that act Jan. 9, 1830, ch. 87, applied to an entry and grant under the act of Jan. 9, 1830, ch. 85, which enlarged the quantity to be covered by an entry, and reduced the enterer's fee, and that an entry in the county where the beginning corner was situated was sufficient, though part of the entry was situated in another county. *Graham v. Gunn*, 87 Tenn. 458.

3. *Reeves v. Hyde*, 77 Cal. 397; *Looney v. Bagley* (Tex. 1887), 7 S. W. Rep. 360.

One who has entered upon the vacant public domain, as a purchaser from another who assumed to have a title, may, on discovering that the land is vacant, repudiate the executory contract for its purchase, without quitting possession, resist the payment of the notes given for the purchase-money, and while in possession, if entitled to pre-empt land, may take steps to secure it as a purchaser. *Rodgers v. Daily*, 46 Tex. 578.

4. *Fitch v. Bullock*, 1 Bibb (Ky.) 228; *Miller v. Hays*, 42 Tex. 479.

In an action to recover land, where defendant claims under a grant in 1856 of 59,000 acres, evidence is admissible that a large number of persons have settled upon the land, for the purpose of showing that the lands were not vacant and subject to entry in 1881, when plaintiff's grant was issued. *Dugger v. McKesson*, 100 N. Car. 1.

5. *Houston, etc., R. Co. v. McGehee*, 49 Tex. 481.

On the question of priority of locations, the opinion of the commissioner of the general land office is not admissible. *Houston, etc., R. Co. v. McGehee*, 49 Tex. 481.

But the regulations prescribed by him are entitled to the highest consid-



by acquiescing in the subsequent entry.<sup>1</sup> Land subject to entry cannot be refused to one who makes a valid entry because such entry is made subsequent to an entry which is void. But if the invalidity of a prior entry is doubtful, a subsequent entry may be refused.<sup>2</sup> The right to make an entry upon land subject to entry cannot be defeated by the refusal of the surveyor to accept the location, or by the subsequent issue of a patent to another.<sup>3</sup> One who makes an entry and has it surveyed cannot afterwards shift its location, to the detriment of a subsequent enterer.<sup>4</sup> In case of a conflict between enterers, the number and position on the entry-taker's books are to be regarded rather than the date, which generally indicates the time of making the location.<sup>5</sup> No estate or interest in the land is acquired by the entry; the enterer acquires only a right of preference,<sup>6</sup> which right cannot be assigned.<sup>7</sup>

d. SURVEY—(See also SURVEY, vol. 24).—Next follows the survey by the county surveyor of the land appropriated, and the return of the survey to the register of the land office.<sup>8</sup>

eration as evidence. *Johnson v. Eldridge*, 49 Tex. 507.

1. *Sensenderfer v. Smith*, 66 Mo. 80. Compare *Sensenderfer v. Neale*, 66 Mo. 669.

2. *Rainey v. Aydelette*, 4 Heisk. (Tenn.) 122.

It was held in *Sampson v. Galloway*, 5 Heisk. (Tenn.) 275, that an entry-taker could not enter land in his own office, but that nothing in the *Tennessee* statute prohibited an entry by such entry-taker for his deputy.

In *Berry v. Wagner*, 13 Lea (Tenn.) 591, it was held that an entry by the entry-taker for himself in his own name was not void, but voidable.

In *Massey v. Smith*, 64 Mo. 347, it was held that an officer attached to a land office in that State could not make an entry for purchase in his own office.

3. *De Montel v. Speed*, 53 Tex. 339.

4. *Munroe v. McCormick*, 6 Ired. Eq. (N. Car.) 85.

5. *Brummett v. Scott*, 4 Heisk. (Tenn.) 319; *Sampson v. Bone*, 4 Heisk. (Tenn.) 702.

6. *Hall v. Hollifield*, 76 N. Car. 476. See *Judson v. Malloy*, 40 Cal. 299.

7. *Morrison v. Campbell*, 2 Rand. (Va.) 206.

In *Iowa* a certificate of entry may be assigned. When a certificate of entry is assigned, the assignee is invested with the legal title to the land.

*Burdick v. Wentworth*, 42 Iowa 440.

8. 2 Minor's Inst. 999; 2 Lom. Dig.

507 *et seq.* See generally SURVEY, vol. 24.

A survey not founded on an entry is void and constitutes no title; the land so surveyed remains vacant and liable to be appropriated by any person holding a land warrant. *Wilson v. Mason*, 1 Cranch (U. S.) 45.

A survey variant from the entry is not void, but voidable. *Estill v. Hart*, Hard. (Ky.) 577.

A private survey is not evidence of title. *Paxton v. Griswold*, 122 U. S. 441; *Greenlee v. Tate*, 1 Dev. (N. Car.) 300.

A survey does not mean a map, *ex vi termini*, but will include a description in words or figures of the lands located. *Attorney Gen'l v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526.

A surveyor's certificate is only *prima facie* evidence of their doings. *Wallace v. Maxwell*, 1 J. J. Marsh. (Ky.) 447.

When the meanders of a river are called for in a survey, and also courses and distance, the former will control. *Galveston County v. Tankersley*, 39 Tex. 651.

Granting a patent according to the return of the survey is virtually an acceptance of the return. *Brandon v. Fritz*, 91 Pa. St. 88.

A shifted survey, if fairly made, returned and accepted by the proper authorities, will, when there is no intervening and opposing right, hold and secure the lands from the time of ac-

*c.* GRANT.—The transfer may be by operation of law,<sup>1</sup> or by grant, or patent. The grant is generally in form a certificate from the State officer authorized to execute it, and signifies that the State has granted the land described in the survey to the grantee. It is required usually to issue under the seal of the State.<sup>2</sup> The legislature may enact a statute confirming an invalid grant, and thus make it valid as though it had been so originally.<sup>3</sup> A grant which purports to convey land, a part of which has been granted already, may be valid in part and void in part.<sup>4</sup> A grant from the State is color of title, even if the grant should be void for irregularities.<sup>5</sup> A grantee from the State has no greater title than his grantor in the lands granted.<sup>6</sup>

ceptance. *Smith v. Walker*, 98 Pa. St. 133; *Munroe v. McCormick*, 6 Ind. 85.

Objection that a land grant is void, because upon the land plat attached it appears that no survey was ever made by one having authority to survey and locate entries, cannot be raised in an action to recover possession. *Dugger v. McKesson*, 100 N. Car. 1.

In *Pennsylvania*, since the proprietary government and customs have ceased, a survey without a warrant is void, except survey as allowed to actual settlers under the act of April 3, 1872. *Manhattan Coal Co. v. Green*, 73 Pa. St. 310.

After a survey and patent under a warrant to the owner thereof, a resurvey to correct error was made, returned to the surveyor-general, and by him accepted and approved. *Held*, that the State thereafter had no right to the land described in the second survey, and therefore, one who with notice of the facts took a warrant and survey of the same land, could have none, and could not question the authority of the State officers to order a resurvey. *Huntley v. Barclay* (Pa. 1892), 24 Atl. Rep. 223.

The survey may be assigned. 2 Minor's Inst. 999; 2 Lom. Dig. 503; *Morrison v. Campbell*, 2 Rand. (Va.) 206.

In *Pennsylvania*, by a custom in the surveyor-general's office, the dates of the receipt of returns to surveys are marked in pencil upon them, and this is held by the courts to furnish evidence of such dates. *Conkling v. Westbrook*, 81½ Pa. St. 81.

In *Pennsylvania*, after the lapse of 21 years from the return of a survey, the presumption is that the warrant was located as returned by the sur-

veyor to the land office; but this presumption is not conclusive and is rebutted by evidence of the existence of marked lines and monuments, and other facts tending to show that the actual location was different from the official courses and distances; and the fact that younger surveys of fixed lines call for the older is admissible to aid the jury in discovering the actual location of the survey. *Clement v. Packer*, 125 U. S. 309.

1. 3 Washburn on Real Prop. 185; *Worthern v. Ratcliffe*, 42 Ark. 330.

2. 2 Minor's Inst. 1000.

3. 3 Washb. Real Prop. 185; *Surget v. Doe*, 24 Miss. 118; *Dent v. Bingham*, 8 Mo. 579; *Tucker v. Burris*, 13 La. Ann. 614.

The legislature cannot legally confirm a patent or survey of land which was absolutely void so as to divest a title legally acquired before the attempted confirmation. *Sherwood v. Fleming*, 25 Tex. Supp. 408; *McNamee v. Alexander*, 109 N. Car. 242; *Wright v. Hawkins*, 28 Tex. 452.

4. *Patterson v. Jenks*, 2 Pet. (U. S.) 216; *Hough v. Dumas*, 4 Dev. & B. (N. Car.) 328; *Thomson v. Gaillard*, 3 Rich. (S. Car.) 418; 45 Am. Dec. 778.

5. *Moody v. Fleming*, 4 Ga. 115; 48 Am. Dec. 210.

6. *Tymannus v. Williams*, 7 Humph. (Tenn.) 80; 46 Am. Dec. 69.

In *Webster v. Clear* (Ohio 1892), 31 N. E. Rep. 744, *Minshall, J.*, says: "The principle seems to be that, in making purchases from the State, the individual is bound to inquire for himself as to the title of the State, and its power to convey; and can acquire no rights against a previous purchaser of the same lands from the State. He stands in the shoes of the State and takes

Formerly, grants from the State to an individual were construed strictly against the State and in favor of the grantee.<sup>1</sup> Nothing was presumed beyond the letter of the grant.<sup>2</sup> But this strict rule of construction was applied only where there was uncertainty or ambiguity in the terms of the grant, and where the grant was not for a valuable consideration; otherwise the rules of construction applicable to grants between individuals were applied.<sup>3</sup> The modern tendency, however, is toward a liberal construction in favor of the grantee,<sup>4</sup> so as to carry out fully and liberally the legislative intent so far as it is ascertainable.<sup>5</sup>

Possession continued for a sufficient length of time may raise a presumption of a grant from the State.<sup>6</sup>

such title as it had power and right to convey. In *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332, it is said: "The State never intends to grant the lands of another, and where the grantee is ignorant of the previous patent, the maxim *caveat emptor* is emphatically applicable to this species of contract."

1. Washb. Real Prop. 190; 2 Minor's Insts. 996; *People v. New York*, etc., Ferry Co., 68 N. Y. 71; *Tolson v. Latham*, 2 Har. & J. (Md.) 17.

2. *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Townsend v. Brown*, 24 N. J. L. 80; Mayor, etc., of *Allegheny v. Ohio*, etc., R. Co., 26 Pa. St. 355; *Green's Estate* 4 Md. Ch. 349; *Dubuque R. Co. v. Litchfield*, 23 How. (U. S.) 88; *Gildart v. Gladstone*, 11 East 685.

3. 3 Washb. Real Prop. 190; 2 Minor's Inst. 996; 2 Co. Lit. 607, n. A.; *Molyn's Case*, 6 Co. 6 a.

4. 2 Minor's Inst. 997; 2 Lom. Dig. 501; 3 Washb. Real Prop. 190; *Hyman v. Read*, 13 Cal. 455; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 596; *Com. v. Roxbury*, 9 Gray (Mass.) 492; *Martin v. Waddell*, 16 Pet. (U. S.) 411; *Attorney Gen'l v. Delaware*, etc., R. Co., 27 N. J. Eq. 631.

5. *McArthur v. Nevill*, 3 Ohio 183. Conditions of forfeiture in grants must be created by express terms or clear implication, and construed strictly. *Brown v. State*, 5 Colo. 496.

6. *Bingham on Real Estate* 4; *Des Moines v. Harker*, 34 Iowa 84; *Gardiner v. Miller*, 47 Cal. 570; *Cary v. Whitney*, 48 Me. 516; *State v. School Dist. No. 3*, 34 Kan. 237; 9 Am. & Eng. Corp. Cas. 587; *Alton v. Illinois Transp. Co.*, 12 Ill. 38; 52 Am. Dec. 479; *Brinsfield v. Carter*, 2 Ga. 143; *Wright v. Swan*, 6 Port. (Ala.) 84; *Kirschner*

*v. Western*, etc., R. Co., 67 Ga. 760; *Glaze v. Western*, etc., R. Co., 67 Ga. 761; *Wallace v. Miner*, 6 Ohio 366; *Harlock v. Jackson*, 3 Brev. (S. Car.) 254; *Kennedy v. Townsley*, 16 Ala. 239; *Troutman v. May*, 33 Pa. St. 455; *Lavasser v. Washburn*, 11 Gratt. (Va.) 572; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Walls v. McGee*, 4 Harr. (Del.) 108; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Crooker v. Pendleton*, 23 Me. 339; *Tubbs v. Lynch*, 4 Harr. (Del.) 521; *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279; *Doe v. Roe*, 20 Ga. 467; *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Hanes v. Peck*, Mart. & Y. (Tenn.) 228; *Pipkins v. Wynns*, 2 Dev. (N. Car.) 402; *Rogers v. Mabe*, 4 Dev. (N. Car.) 180; *Sulphen v. Norris*, 44 Tex. 204; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 568.

As between a junior patentee and one in possession who traces his title backwards seventy years, it is a presumption of law that a grant has issued for the land, and it is not subject therefore to entry and grant as waste and unappropriated. *Matthews v. Burton*, 17 Gratt. (Va.) 317; *Archer v. Saddler*, 2 Hen. & M. (Va.) 370; *Doe v. Barksdale*, 11 Ired. (N. Car.) 461.

After forty years, all presumptions are in favor of the regularity of proceedings had to acquire public land in *Texas*, and in favor of the construction there put by the public officers on the laws and their powers under them. *State v. De Leon*, 64 Tex. 553.

After the lapse of forty years, during which possession was shown and a destruction of the public records, payment of the appraised value recited in the *expediente* will be presumed. *State v. Sais*, 60 Tex. 87.

A presumption of a conveyance by

Provision is made sometimes for filing a *caveat* in the case of conflicting claims. The principles and procedure, while varying in detail in different jurisdictions, are not dissimilar to those governing the *caveat* in the case of patents for inventions.<sup>1</sup>

*f. PATENT*—(1) *Definition and Form*.—A patent is the instrument that forms the evidence of title to lands acquired from the State. It is designed to define the lands to be granted and the terms of the grant.<sup>2</sup> It is nothing more than a deed in which the State is the grantor and the patentee is the grantee.<sup>3</sup> A patent for lands owned by the State must be executed in the manner provided by statute. The requirements of the various States vary as to the form and requisites of the patent. It is usually made necessary that the governor sign the patent and that the great seal of State be affixed.<sup>4</sup> The principles governing the law

the State cannot arise in a case where from the constitution or common law of the State, the legislature never acted and never will act. *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429; 19 Am. Dec. 139.

A grant of land will not be presumed from lapse of time unless the lapse of time is so great as to create the belief that it was actually made; or unless the facts in the case show that the party to whom it is presumed to have been made was legally or equitably entitled to it. *Jackson v. Moore*, 6 Cow. (N. Y.) 706.

As the State's lands cannot be taxed, one claiming them under a sale for taxes shows no title as against a proceeding instituted by the State for their recovery. *State v. Pinckney*, 22 S. Car. 484.

See, generally, ADVERSE POSSESSION, vol. 1, p. 225; PRESUMPTIONS, vol. 19, p. 36.

1. *Alexander v. Noland*, 88 Ky. 142; *Preston v. Harvey*, 3 Call. (Va.) 495; *Davis v. Stafford*, 8 B. Mon. (Ky.) 274; *Allen County v. Allen*, 2 A. K. Marsh. (Ky.) 30; *Currie v. Martin*, 3 Call. (Va.) 28; *Walton v. Hale*, 9 Gratt. (Va.) 194; *Harper v. Baugh*, 9 Gratt. (Va.) 508; *Carter v. Ramey*, 15 Gratt. (Va.) 346; *Person v. Davey*, 1 Murph. (N. Car.) 115; *Miller v. Woodard*, 29 Ga. 753; *Records v. Melson*, 1 Houst. (Del.) 139; *Trotter v. Newton*, 30 Gratt. (Va.) 582; *Sharp v. Curds*, 4 Bibb (Ky.) 547; *Lewis v. Billups*, 1 Leigh (Va.) 353; *Smith v. Devecmon*, 30 Md. 473. See PATENT LAW, vol. 18, p. 25.

2. 3 Washb. on Real Prop. 185; *Anderson's Law Dict.*; *Black's Law Dict.*

3. See PUBLIC LANDS, vol. 19, pp. 354, 355.

4. 3 Washb. on Real Prop. 185; 2 Minor's Inst. 1000; *Compton v. Killen*, 60 Ga. 543; *People v. Livingston*, 8 Barb. (N. Y.) 253; *Doe v. Roe*, 14 Ga. 252; *Hulick v. Scovill*, 9 Ill. 174; *Exum v. Brister*, 35 Miss. 391; *Bradley v. Parkhurst*, 20 Kan. 462; *Jarrett v. Stevens*, 36 W. Va. 445.

In *New York*, it was held that a patent without the governor's signature was valid if sealed with the great seal. The fact of the seal being attached was considered as evidence that the patent had been approved by the governor. *People v. Livingston*, 8 Barb. (N. Y.) 253.

In *Mississippi*, a land patent issued under the act of Mar 15, 1852, which required that the "patent shall be signed by the governor and attested by the secretary with the great seal of the State," was held to be good if signed by the governor and sealed by the great seal, even though not signed by the secretary of state. *Exum v. Brister*, 35 Miss. 391.

In *Arkansas*, patents are to be signed by the governor and sealed with the great seal of the State. *State v. Morgan*, 52 Ark. 150.

In *West Virginia*, in *Jarrett v. Stevens*, 36 W. Va. 445, *Brannon, J.*, says: "The act of May, 1779, in the form of grant, and by express enactment, required such seal. The grant is an act of great solemnity and can only be issued as the law directs. While the commonwealth's grant cannot be generally attacked, yet if void on its face it may be. 2 Lom. Dig. 388; *Patterson v. Winn*, 11 Wheat. (U. S.) 380. In such case, we have no need to

regulating patents for State land are founded upon general principles of law and equity, and are, as a rule, applicable as well to patents issued by the United States for its public lands as to those issued by the States.<sup>1</sup>

(2) *Issuance*.—The existence of a patent implies a compliance with every prerequisite. The presumption is that the officer issuing the patent has done what the law requires of him.<sup>2</sup> The issuance of a patent must be performed according to law; and if issued against law, it is void, and those claiming under it acquire no title nor right.<sup>3</sup>

bring in matter *dehors* the grant, but itself affords record evidence of the matter invalidating it. In the Virginia Court of Appeals. in *Carter v. Edwards*, 88 Va. 205, it seems to be conceded that the want of a seal would invalidate the grant. A deed of an individual will not pass land without seal. *Cromwell v. Tate*, 7 Leigh (Va.) 301; 30 Am. Dec. 506; *Pratt v. Clemens*, 4 W. Va. 443; 2 Minor's Inst. 651. I do not see why it is not indispensable in a commonwealth's grant. It is the highest evidence of the authority of the act, the *signum*, or mark of the genuineness of its act, and of its finality. It is the sign of sovereignty. In *Doe v. Roe*, 14 Ga. 252, though the decision was that there was evidence to show there once had been a seal, it seems conceded that a seal is indispensable to a State grant of land. The court said: 'It is the signature of the governor, and the great seal which gave it effect and validity.' In *Hunter v. Williams*, 1 Hawks (N. Car.) 221, the court said that public lands could be granted only as the legislature authorized; that as that required a grant to be authenticated by the governor and countersigned by the secretary, and as the grant involved was not so countersigned, it was the same as if no mode had been adopted, and was held void. My own opinion is that the want of a seal invalidates a patent."

The duplicate copy of a lost land patent authorized by the *Illinois* school law of 1857, § 96, to be issued by the State auditor, need not have the seal of the State affixed, to render it admissible in evidence for the same purposes for which the original might have been offered. *Jackson v. Berner*, 48 Ill. 203.

1. PUBLIC LANDS, vol. 19, pp. 354, 355; *Brown v. Huger*, 21 How. (U. S.) 305.

2. *Bingham on Real Estate* 85; 3

*Starkon Ev.* 1248, 1250; *Hartwell v. Root*, 29 Johns. (N. Y.) 347; 10 Am. Dec. 232; *Barry v. Gamble*, 8 Mo. 88; *Parkinson v. Bracken*, 1 Pin. (Wis.) 174; 49 Am. Dec. 296; *Polk v. Wendal*, 9 Cranch (U. S.) 98; *subnom.* *Polk v. Wendell*, 5 Wheat. (U. S.) 304; *Patterson v. Jenks*, 2 Pet. (U. S.) 237; *Groves v. Slaughter*, 15 Pet. (U. S.) 490; *Gibson v. Chouteau*, 39 Mo. 536; *Jackson v. Marsh*, 6 Cow. (N. Y.) 281; *Sutton v. Menser*, 6 B. Mon. (Ky.) 433; *Surget v. Doe*, 24 Miss. 118; *Ray v. Barker*, 1 B. Mon. (Ky.) 364; *McMillan v. Hutchinson*, 4 Bush (Ky.) 611; *Schnee v. Schnee*, 23 Wis. 377; 99 Am. Dec. 183, note 186; *Mayor, etc. v. Eslava*, 9 Port. (Ala.) 577; 33 Am. Dec. 325; *People v. Mauran*, 5 Den. (N. Y.) 389.

A sale of lands forfeited to the State for non-payment of rent reserved in a grant thereof will be assumed to have been in accordance with the State; but an omission of any of its requirements will not invalidate the title of a grantee, as against a subsequent grantee of the State. *DeLancy v. Piepgras*, 63 Hun (N. Y.) 169; *Gilchrist v. Middleton*, 108 N. Car. 705.

The presumptions that arise in support of a patent for public lands issued by the State can have no force in the face of the facts that the State selection of the same was originally void and that the selection has been validated by Congress. *Chant v. Reynolds*, 49 Cal. 213.

3. *State v. Delesdemer*, 7 Tex. 76.

Though the issuance of a patent upon a junior location is unauthorized, the patent is voidable only and not void. *Gullett v. O'Connor*, 54 Tex. 408.

The statute of limitations does not begin to run against the patentee of lands until the time of the issuance of the patent. *Ring v. Gray*, 6 B. Mon. (Ky.) 368; *Dubois v. McLean*, 4 McLean (U. S.) 486.

(3) *Validity and Conclusiveness*.—A valid patent cannot be issued for lands to which the State has no title, or which may not be granted.<sup>1</sup> If the land is reserved from sale, the patent is void.<sup>2</sup> A patent is good only for so much of the land which it purports to convey as is properly included in it.<sup>3</sup> A patent issued without authority of law is void, and if void on its face may be assailed by anyone.<sup>4</sup> So a patent obtained by fraud will

The register of the land office must not issue a patent for State lands until the applicant surrenders his certificate of purchase. *Duncan v. Gardner*, 46 Cal. 24.

A public grant or patent need not be delivered or accepted in order to vest title, but takes effect immediately after the date of issuance. *Ex parte Kuhlman*, 3 Rich. (S. Car.) 257; 55 Am. Dec. 642.

A land patent is not operative against the rights of a third person existing before it was issued. One purchasing after the issuance, whose whole claim originates after its date cannot search into the imperfections of the previous title of the patentee. Such patent may be impeached if tainted by fraud, procured by imposition or in entire excess of the proceedings on which it is founded. *Smith v. Vashinder*, 77 Pa. St. 127.

1. *Coffee v. Groover*, 123 U. S. 1; *Robinson v. Bailey*, 26 Fed. Rep. 219; *Garrett v. Weaver*, 70 Tex. 463; *Parker v. Baines*, 59 Tex. 15; *Attorney-Gen'l v. Thomas*, 31 Mich. 365; *Hoover v. Thomas*, Phil. (N. Car.) 184; *Webster v. Clear* (Ohio 1892), 31 N. E. Rep. 744; *Roseberry v. Hollister*, 4 Ohio St. 297; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *U. S. v. Arredondo*, 6 Pet. (U. S.) 728; *Rechart v. Felps*, 6 Wall. (U. S.) 160; *New Orleans v. U. S.*, 10 Pet. (U. S.) 731; *Best v. Polk*, 18 Wall. (U. S.) 112; *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332.

A patent for and including part of the 500,000 acre grant, if issued as for swamp land, is void and conveys nothing. *Laugenour v. Shanklin*, 57 Cal. 70.

A patent for tide lands as swamp is void. *Knight v. Roche*, 56 Cal. 15.

The fact that swamp lands are within the limits of an incorporated city will not avoid a patent when not appearing on its face. *McNear v. Hutchinson*, 31 Cal. 177.

2. *Best v. Polk*, 18 Wall. (U. S.) 112; *Stoddard v. Chambers*, 2 How. (U. S.)

284; *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332.

A court of law will receive a parol evidence that the officers of State have granted lands forbidden to be granted, and will take notice that such grant is void. *Den v. Cathey*, 1 Murph. (N. Car.) 162.

3. *Jarrett v. West*, 1 Har. & J. (Md.) 501; *Delaware, etc., Canal Co. v. Dimock*, 47 Pa. St. 393.

A land warrant issued in *Virginia*, and a patent issued thereon for lands described as and declared to be within the State are simply void as to lands within the limits of *Maryland*. *Baker v. Swan*, 32 Md. 355.

A grant of public land made by a special commissioner whose want of authority has not been shown, and whose acts have not been repudiated by the government, conveys good title. *Groesbeck v. Golden* (Tex. 1887), 7 S. W. Rep. 362.

A patent for land granted by a sister State is one of those public acts to which every other State is bound to give full faith and credit under the constitution of the United States: therefore the invalidity of the patent cannot be drawn collaterally into question by the courts of another State on a suggestion that the survey on which the patent was founded was a forgery. *Lassly v. Fontaine*, 4 Hen. & M. (Va.) 146; 4 Am. Dec. 510.

4. *Webster v. Clear* (Ohio, 1892), 31 N. E. Rep. 744; *Todd v. Fisher*, 26 Tex. 239; *Wright v. Rutgers*, 14 Mo. 585.

A patent issued by virtue of an unconstitutional act is void on its face. *Winter v. Jones*, 10 Ga. 190; 54 Am. 379.

A title is not void because the officer in extending it has not incorporated into it the evidence of the concession or sale. The want of authority of an officer which renders a title void is not shown by proof of mere error of the officer in extending a title to one in fact not legally entitled,

not prevail against a subsequent valid title.<sup>1</sup> A patent once issued, after having been signed, countersigned, and delivered, cannot be recalled, nor impeached collaterally, nor cancelled by any act of the government officers.<sup>2</sup> If the patent is not void on its face, it cannot be impeached collaterally.<sup>3</sup>

(4) *Effect*.—A difference of opinion exists in the different State tribunals as to the effect of the patent in regard to vesting the legal title. In some States it is held that the issuance of the patent vests the legal title, and that not until the patent issues is the patentee vested with complete legal title.<sup>4</sup> In other States the courts hold that the title takes effect by relation to the first steps of the proceedings, and that the patent does not pass the title, but is merely evidence that it has passed.<sup>5</sup>

but whom he supposed to be. *Haurick v. Jackson*, 55 Tex. 17.

The governor's and surveyor general's certificate, required by the act of April 10, 1862, in relation to swamp lands, is indispensable to the validity of the State's patent, and it not having been given, the patentees may be ousted. *People v. Center*, 66 Cal. 551.

A patent issued by the governor of a State in pursuance of an express grant is not void upon its face and passes the legal title to the property therein granted. It may be impeached for fraud or set aside for other sufficient cause, but it cannot be assailed collaterally. *State v. Sioux City, etc.*, R. Co., 7 Neb. 357.

*California* Pol. Code, § 3500, requires an affidavit of certain facts in the case of one desiring to purchase State lands. Held that this affidavit is indispensable to the validity of the patent. *Milledge v. Hyde*, 67 Cal. 5.

A government grant never in fact issued by the officer purporting to have issued it, or by subsequent alterations made to confer other rights than those conferred at its issue, is absolutely void, and may be shown to be so by a subsequent grantee. *Haurick v. Cavanaugh*, 60 Tex. 1.

1. *Wright v. Rutgers*, 14 Mo. 585; *Winter v. Jones*, 10 Ga. 379; 54 Am. Dec. 379; *Wilson v. Shiveley*, 11 Oregon 215; *Attorney-Gen'l v. Thomas*, 31 Mich. 365.

2. *Hennen v. Wood*, 16 La. Ann. 263; *Franklin v. Woodland*, 14 La. Ann. 184; *Merrill v. Roberts*, 64 Tex. 441; *Spofford v. Bennett*, 55 Tex. 293.

3. *Bingham on Real Estate* 85; *People v. Livingston*, 8 Barb. (N. Y.) 253; *Jackson v. Lawton*, 10 Johns. (N. Y.)

23; 6 Am. Dec. 311; *Jackson v. Hart*, 12 Johns. (N. Y.) 77; 7 Am. Dec. 280; *Norvell v. Camm*, 5 Munf. (Va.) 233; 8 Am. Dec. 742; *Jackson v. Marsh*, 6 Cow. (N. Y.) 281; *Brady v. Begun*, 36 Barb. (N. Y.) 533; *People v. Mauran*, 5 Den. (N. Y.) 398; *Parmelee v. Oswego, etc.*, R. Co., 6 N. Y. 75; *Hill v. Miller*, 36 Mo. 182.

This rule does not apply to sales and conveyances by State municipal officers for the non-payment of taxes and other like cases. The party who claims the right under that class of proceedings is bound to prove all that is required to make the conveyances regular and valid by other evidence than the deed. *Bingham on Real Estate* 85; *Sharp v. Spier*, 4 Hill (N. Y.) 76; *Varick v. Tallman*, 2 Barb. (N. Y.) 113; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88; 17 Am. Dec. 502; *Striker v. Kelly*, 2 Den. (N. Y.) 323.

4. *Green v. Liter*, 8 Cranch (U. S.) 229; *Jones v. Bache*, 3 Wash. (U. S.) 199; *Delaware, etc., Canal Co. v. Dimock*, 47 Pa. St. 393; *Reed v. Bullock*, Litt. Sel. Cas. (Ky.) 510; 12 Am. Dec. 345; *Bodley v. Taylor*, 5 Cranch (U. S.) 191; *Roads v. Symmes*, 1 Ohio 281; 13 Am. Dec. 621; *Brill v. Stiles*, 35 Ill. 305; 85 Am. Dec. 364; *Moore v. Wilkinson*, 13 Cal. 487; *Seekright v. Bogen*, 1 Hayw. (N. Car.) 177; *Dickey v. Hoodenpile*, 1 Hayw. (N. Car.) 359; *Den v. Mooney*, 1 Murph. (N. Car.) 401.

5. 3 Washb. on Real Prop. 192; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Hunter v. Hemphill*, 6 Mo. 106; *Innerarity v. Mims*, 1 Ala. 660; *Goodlet v. Smithson*, 5 Port. (Ala.) 245; 30 Am. Dec. 561; *Jones v. Inge*, 5 Port. (Ala.) 527; *Bullock v. Wilson*, 5 Port.

When a patent is issued by the State it is regarded as a conveyance of the existing rights of the State.<sup>1</sup> It is subject to any and all encumbrances legally existing on the lands.<sup>2</sup> When granted it enures to the benefit of anyone to whom the patentee ought to convey the land or for whose use he ought to hold it.<sup>3</sup> A patent merges the irregularities of the former proceedings and is notice to a subsequent claimant that the land is not vacant.<sup>4</sup>

(Ala.) 338; *Waterman v. Smith*, 13 Cal. 419; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Waters v. Bush*, 42 Iowa 255; *Rankin v. Miller*, 43 Iowa 11; *Heath v. Ross*, 12 Johns. (N. Y.) 140.

A patent is only requisite to ascertain that all the prerequisites of the law have been complied with. *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379.

A land patent relates back to the original land office certificate and is a patent from that date. *West v. Hughes*, 1 Har. & J. (Md.) 6; *Ringgold v. Mallott*, 1 Har. & J. (Md.) 299.

While a survey may be made first, and the certificate afterward applied, the title accrues from the date of the application, and not from the date of the survey. *Stewart v. Cook*, 62 Tex. 522.

A grant was held not to relate back to the certificate of entry so as to overreach a prior grant for the same land when the certificate had not been returned, nor the composition paid within the time limited by the rules of the land office. *Beall v. Beall*, 1 Har. & J. (Md.) 346; *Peter v. Mains*, 4 Har. & M. (Md.) 423.

A patent for land which passes the great seal after its date as to parties relates back to its date so as to vest the title in the patentee from that time and enable him to maintain an action for injuries done by strangers to the land after its date. But the right of relation does not, however, apply so as to prejudice the rights of third persons not parties or privies having a right. *Heath v. Ross*, 12 Johns. (N. Y.) 140.

1. *Beeler v. Coy*, 9 B. Mon. (Ky.) 312; *Green v. Liter*, 8 Cranch (U. S.) 229; *Green v. Watkins*, 7 Wheat. (U. S.) 28; *Clay v. White*, 1 Munf. (Va.) 162; *Tolson v. Mainor*, 85 N. Car. 235; *Webster v. Clear* (Ohio 1892), 31 N. E. Rep. 744.

Where an act of transfer of land by the State to a corporation expressly conveys the occupancy and "possession" forever, not the mere usufruct,

but the full ownership of the property, is thereby passed. *In re Mechanics' Society*, 31 La. Ann. 627.

A State patent to land passes its title, but does not establish that it had title; so a law of the State making such patent presumptive evidence of absolute title in fee in the grantee is of no force in the courts of another State, so as to make the patent evidence that the title had passed from the United States to the State. *Musser v. McRae*, 38 Minn. 409.

A patent from the State passes the legal possession to the grantee, which continues until disturbed by an actual adverse possession. The title vests in the grantee upon the return and acceptance of the survey and payment of the purchase money, and the title rests at the same time. *Potts v. Gilbert*, 3 Wash. (U. S.) 475.

A patent for the land under the *Virginia* land law, as modified by usage and judicial construction in *Kentucky* and *Ohio*, conveys the legal title, but leaves the equities open. *Brush v. Ware*, 15 Pet. (U. S.) 93.

2. *Baltimore v. McKim*, 3 Bland (Md.) 453; *Webster v. Clear* (Ohio 1892), 31 N. E. Rep. 744.

3. *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *Watterston v. Bennett*, 18 La. Ann. 250; *Stark v. Mather*, *Walker* (Miss.) 181; 12 Am. Dec. 533; *Duer v. Boyd*, 1 S. & R. (Pa.) 203; *People v. Clarke*, 10 Barb. (N. Y.) 120.

A patent though granted to A. B. is really in favor of his prior vendees, and enures to their benefit. *Watterston v. Bennett*, 18 La. Ann. 250.

4. *Balliot v. Bauman*, 5 W. & S. (Pa.) 150; *Fritz v. Brandon*, 78 Pa. St. 342; *Bushey v. South Mountain, etc., Co.*, 136 Pa. St. 541; *James v. Betz*, 2 Binn. (Pa.) 12; *Wolf v. Goddard*, 9 Watts (Pa.) 547.

A purchaser under a patent from the commonwealth is bound to take notice of a prior title to which reference is made in the patent. *Burkart v. Bucher*, 2 Binn. (Pa.) 455; 4 Am. Dec. 57.



At common law, a patent issued after the death of the person named therein as patentee is void,<sup>1</sup> but generally the statutes provide that in case of death before the issue of the patent to one entitled to it, it shall issue to his heirs.<sup>2</sup>

A patent issued to a fictitious person conveys no title to the lands therein described; and no one, not even a subsequent *bona fide* purchaser for value, can derive any right under a conveyance to such fictitious patentee.<sup>3</sup>

(5) *Construction*.—A patent is to be construed by the same rules as a private conveyance.<sup>4</sup> All parts must be construed together in order to ascertain boundaries, and effect must be given to every part if possible.<sup>5</sup> A construction that gives effect to a patent is to be preferred to one that renders it inoperative and void; and in determining what land is embraced within the calls of a patent, reference may be had to the surveyor's field notes and the original plat if the patent itself is uncertain.<sup>6</sup>

The law does not devolve on the patentee the burden of proving that the land embraced in his patent or some part of it was vacant. *Munford v. Carpenter*, 11 Bush (Ky.) 51.

1. *Davenport v. Lamb*, 13 Wall. (U. S.) 427; *Wood v. Ferguson*, 7 Ohio St. 288; *Galloway v. Finley*, 12 Pet. (U. S.) 264; *McCracken v. Beall*, 3 A. K. Marsh. (Ky.) 210; *Thomas v. Wyatt*, 25 Mo. 26; 31 Mo. 188; 69 Am. Dec. 446, note; *Lyles v. Lescher*, 108 Ind. 382; *Price v. Johnston*, 1 Ohio St. 390.  
2. *Cox v. Prewitt*, 88 Ky. 156; *Briggs v. McClain*, 43 Kan. 652; *Cobb v. Stewart*, 4 Metc. (Ky.) 255; 83 Am. Dec. 465; *Bowman v. Bartlett*, 3 A. K. Marsh. (Ky.) 86; *Russell v. Marks*, 3 Metc. (Ky.) 37.

A patent issued to A. and B., after A's death vests the entire estate in B., one half for himself and one half in trust for A's heirs. *Reynold v. Clark*, Wright (Ohio) 656.

In *Kentucky*, by an act passed in 1792, a patent issued to a deceased person vests the title in his heirs. Prior to 1792, a patent issued to a deceased person was void and of course yields to one of later date. *Bowman v. Bartlett*, 3 A. K. Marsh. (Ky.) 86.

A patent to a deceased person vests the legal title in the heirs, and in the suit to recover the land by the devisees the heirs are necessary parties and the action must be in equity. *Cobb v. Stewart*, 4 Metc. (Ky.) 255; 83 Am. Dec. 465.

A grant to the "heirs" of a decedent, made in *Texas* in 1827, from the

Mexican Government, can enure only to such persons as were heirs according to the civil law which was in force in Mexico at that time. *McGahan v. Baylor*, 32 Tex. 789.

3. *Thomas v. Wyatt*, 25 Mo. 24; 69 Am. Dec. 446; *Thomas v. Boerner*, 25 Mo. 27; *Morrison v. Kelley*, 22 Ill. 610; 74 Am. Dec. 169.

A patent issued to a person under an assumed name is not void, but vests the title in him, and his title will pass by a transfer of the land under his assumed name. *Thomas v. Wyatt*, 31 Mo. 183; 77 Am. Dec. 640.

A patent will not be void for misnomer of the patentee; if he is otherwise sufficiently described the title will vest in him. *Russell v. Marks*, 3 Metc. (Ky.) 137.

4. *Moore v. Smaw*, 17 Cal. 199; 79 Am. Dec. 123.

5. *Alexander v. Lively*, 5 T. B. Mon. (Ky.) 159; 17 Am. Dec. 50; *Budd v. Brooke*, 3 Gill (Md.) 198; 43 Am. Dec. 32.

Where a patent has two irreconcilable dates, the ambiguity, if unexplained, must be taken most strongly against the patent, and the latest date being the true one, the patent must yield to another conflicting patent issued between the two dates. *McGowan v. Crooks*, 5 Dana (Ky.) 65.

6. *Alexander v. Lively*, 5 T. B. Mon. (Ky.) 159; 17 Am. Dec. 50.

A map referred to in the patent is part of the patent and will control its calls. *Alexander v. Lively*, 5 T. B. Mon. (Ky.) 159; 17 Am. Dec. 50; *Sheppard v. Wilmott*, 79 Wis. 15.

(6) *Conflicting Patents.*—Where two patents are granted for the same land, the second patent is inoperative until the first patent is set aside.<sup>1</sup> A State cannot pass title to public land belonging to the United States.<sup>2</sup> A State patent to lands which have been granted to the State by the United States is good as against a subsequent United States patent for such lands.<sup>3</sup>

A patent is governed by the actual survey in the field if it refers thereto. *Sheppard v. Wilmott*, 79 Wis. 15; *Lyon v. Fairbank*, 79 Wis. 455; 24 Am. St. Rep. 732.

A patent for 74,000 acres, "excluding 60,518 acres prior grants," with no description of the land excluded, is void for indefiniteness. *Hamilton v. Fugett*, 81 Ky. 366.

If the State issues a patent describing the land by metes and bounds, and stating that it contains 200 acres, when in fact it contains 300, the patent is good for the 300 when attacked collaterally, not being void on its face. *Frazier v. Frazier*, 81 Ky. 137.

1. *Jackson v. Lawton*, 10 Johns. (N. Y.) 23; 6 Am. Dec. 311; *Gallipot v. Manlove*, 2 Ill. 156; *Botts v. Shields*, 3 Litt. (Ky.) 32; *Howard v. Richeson*, 13 Tex. 553; *Garner v. White*, 18 Ill. 455.

Where both parties have equities, the legal title arising *prima facie* from a patent must obtain, unless there is a preponderance of the adverse equitable right. *Johnson v. Eldridge*, 49 Tex. 507.

Where the older patentee has had no actual possession of the land contained in his grant, and the later patentee takes and enters upon the land, and takes and holds possession of any parts thereof, claiming the title to all within the limits and bounds of his grant, it is an adversary possession of the whole, to the extent of the limits of the later patent, and to that extent is an ouster of the seisin or possession of the older patentee as to those lands. *Overton v. Davisson*, 1 Gratt. (Va.) 211; 42 Am. Dec. 544; *Koiner v. Rankin*, 11 Gratt. (Va.) 428; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Millar v. Humphries*, 2 A. K. Marsh. (Ky.) 446; *Moss v. Currie*, 1 Dana (Ky.) 266; *Harrison v. McDaniel*, 2 Dana (Ky.) 348; *Wilson v. Stevers*, 4 Dana (Ky.) 634; *Sicard v. Davis*, 6 Pet. (U. S.) 124.

If the elder patentee is in the actual possession of any part of the land in controversy, at the time of the junior patentee's entry thereon, the latter by such entry gains no adversary possession beyond the limits of his mere en-

closure, cultivation or actual use, without an actual ouster of the older patentee from the disputed territory. *Overton v. Davisson*, 1 Gratt. (Va.) 211; 42 Am. Dec. 544; *Koiner v. Rankin*, 11 Gratt. (Va.) 428; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Turpin v. Saunders*, 32 Gratt. (Va.) 27; *Millar v. Humphries*, 2 A. K. Marsh. (Ky.) 446.

Where the elder patentee is in actual possession of part of his own grant, but not of any part included in the junior grant, the entry and possession of the patentee will be limited to his mere enclosure or actual use. *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Turpin v. Saunders*, 32 Gratt. (Va.) 27; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Koiner v. Rankin*, 11 Gratt. (Va.) 428; *Green v. Liter*, 8 Cranch (U. S.) 229.

Where the senior patentee is in actual possession of the lands of his patent lying without the bounds of the junior patentee, and the latter enters on and holds the lands embraced within the patent, it is an ouster of the senior patentee only to the limits of the junior patentee's actual close or use, and not to the limits of his grant. 2 *Minor's Inst.* 577; *Green v. Liter*, 8 Cranch (U. S.) 229.

2. *Irvine v. Marshall*, 20 How. (U. S.) 558; *Pratt v. Brown*, 3 Wis. 603; *Foley v. Harrison*, 5 La. Ann. 75.

The Territory of *Wisconsin* could not impair the title of the United States in lands by the exercise of the right of eminent domain over the same. The title conveyed by the United States could not be hampered by any claim derived from such authority. *Pratt v. Brown*, 3 Wis. 603.

Where a State selected in lieu of school lands certain lands not the subject of selection, and they were listed to the State and by the State patented to private persons, it was held, upon a bill by the United States, that equity would annul the selection, listing and patent, whether such unlawful acts were the result of fraud, accident or mistake. *U. S. v. Mullan*, 7 Sawy. (U. S.) 466.

3. *Megerle v. Ashe*, 27 Cal. 322; 87

Statutes sometimes provide for judicial contests in case of conflicting claims.<sup>1</sup>

(7) *Action to Annul*.—When the false suggestion, mistake, or illegality appears on the face of the patent it is void, and may be declared so in whatever court it is adduced as an evidence of title.<sup>2</sup> A State patent void on its face may be impeached in an action of ejectment.<sup>3</sup> A patent may be impeached in a court of

Am. Dec. 76; *Matthews v. Goodrich*, 102 Ind. 557. See *Cramer v. Keller*, 98 Mo. 279; *Le Beau v. Armitage*, 56 Mo. 191.

It was held in *Matthews v. Goodrich*, 102 Ind. 557, that a United States patent to an individual issued after the swamp land grant to the State passed no title, and that neither did the attempted release of the governor of the State to the United States effect anything, such release being unauthorized and void. See also *Gormley v. Uthe*, 116 Ill. 643.

1. *People v. Carrick*, 51 Cal. 325; *Thompson v. True*, 48 Cal. 601; *Espinosa v. Phelan*, 77 Cal. 100.

It was held in *Greenwade v. De Camp*, 72 Cal. 448, that a default after a first reference to the court did not preclude a second reference.

It was held in *Thompson v. True*, 48 Cal. 601, that the court had jurisdiction to determine not only the rights of the contestants but the question of the title of the State.

As to the order of reference, it was held in *Espinosa v. Phelan*, 77 Cal. 100, that an order was sufficient which showed that a contest had arisen, and that the reference was made upon the demand of one of the parties to the contest, although owing to a clerical omission the order of reference did not recite that the reference was founded upon such demand. But it was held in *Lane v. Pferdner*, 56 Cal. 122, that the fact that the surveyor-general made the order of reference must be averred and proved.

In *Cunningham v. Shanklin*, 60 Cal. 118, it was held that mandamus might issue to enforce the judgment rendered upon the reference.

Pending the contest the State cannot sell the land to an applicant whose claim was filed after the inception of the contest. *People v. Carrick*, 51 Cal. 325; *Cunningham v. Shanklin*, 60 Cal. 118.

2. *Minor's Inst.* 997; *Cooper v. Roberts*, 6 McLean (U. S.) 93; *White*

*v. Jones*, 4 Call (Va.) 253; 2 Am. Dec. 564; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23; 6 Am. Dec. 311; *Jackson v. Marsh*, 6 Cow. (N. Y.) 281.

The case of *Norvell v. Camm*, 6 Munf. (Va.) 238; 8 Am. Dec. 742 (Roane, J.) states the true general doctrine in regard to the extent to which a court of law will go to impeach a patent. It says: "It is equally clear that a patent perfect on its face is not to be avoided in a trial of law by anything short of an older patent; it is not to be affected by circumstances of equity tending to show that in a caveat court or court of equity, the party relying on it would probably prevail. The jurisdiction of the two tribunals must be kept distinct and the actual patent must prevail at law, although it may be made to the superior right of the adverse party in another form. In the case of an actual and perfect patent, there is no remedy but to set it aside in a court of equity, or in some other proceeding having that as its direct end and object. It cannot be done in the ordinary progress of a trial at law, the patent alone must prevail. These principles seem to us plain, and are fairly deducible from the case of *Witherington v. McDonald*, 1 Hen. & M. (Va.) 306; 3 Am. Dec. 603; they ought not therefore to be departed from." As supporting this general doctrine see *Klein v. Argenbright*, 26 Iowa 493; *State v. Bachelder*, 5 Minn. 223; 80 Am. Dec. 410; *Polk v. Wendal*, 9 Cranch (U. S.) 87; *Boggs v. Merced Min. Co.*, 14 Cal. 362; *Yount v. Howell*, 14 Cal. 465; *Leese v. Clark*, 18 Cal. 535.

3. *Jackson v. Hart*, 12 Johns. (N. Y.) 77; 7 Am. Dec. 280; *Norvell v. Camm*, 6 Munf. (Va.) 233; 8 Am. Dec. 742; *State v. Bachelder*, 5 Minn. 223; 80 Am. Dec. 410; *People v. Livingston*, 8 Barb. (N. Y.) 253; *Brady v. Begun*, 36 Barb. (N. Y.) 533; *Hoover v. Thomas*, Phil. (N. Car.) 184; *Alexander v. Greenup*, 1 Munf. (Va.) 134; 4 Am. Dec. 541.

law for any matter which makes it absolutely void.<sup>1</sup> But for causes which make a patent voidable only and not void, and which are not apparent on its face, it cannot be impeached collaterally. To annul a patent the proceeding is by *scire facias*, bill, or information.<sup>2</sup>

(8) *Patent as Evidence*.—A patent is only *prima facie* evidence of the facts recited. It may be overcome by proof.<sup>3</sup> A

1. *People v. Livingston*, 8 Barb. (N. Y.) 253; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23; 6 Am. Dec. 311; *White v. Jones*, 4 Call (Va.) 253; 2 Am. Dec. 564; *Jackson v. Marsh*, 6 Cow. (N. Y.) 281.

2. 1 Minor's Inst. 997, 1000; *People v. Livingston*, 8 Barb. (N. Y.) 253; *State v. Bachelder*, 5 Minn. 223; 80 Am. Dec. 410; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Alexander v. Greenup*, 1 Munf. (Va.) 134; 4 Am. Dec. 541; *Bledsoe v. Well*, 4 Bibb (Ky.) 319; *Doll v. Meador*, 16 Call. 327; *Gallipot v. Manlove*, 2 Ill. 162; *Arnold v. Grimes*, 2 Greene (Iowa) 83; *Jackson v. Lawton*, 10 Johns. (N. Y.) 26; 6 Am. Dec. 311; *Finlay v. King*, 3 Pet. (U. S.) 379; *Norvell v. Camm*, 6 Munf. (Va.) 238; 8 Am. Dec. 742; *French v. Loyal Co.*, 5 Leigh (Va.) 627; *White v. Jones*, 4 Call (Va.) 253; 2 Am. Dec. 564; *Hartley v. Hartley*, 3 Metc. (Ky.) 56; *Taylor v. Fletcher*, 7 B. Mon. (Ky.) 80; *Ray v. Barker*, 1 B. Mon. (Ky.) 364.

Where letters patent are sought to be vacated on the ground that they were issued on false suggestions, it must be proved that the suggestions were material as well as false. *People v. Clarke*, 10 Barb. (N. Y.) 120.

When a grant is void on its face, in a controversy between individuals, the State need not be made a party to the suit. *Dart v. Orme*, 41 Ga. 376.

A patent for land cannot be treated as void on account of any fraud practiced by the patentee to procure it. *Marshall v. McDaniel*, 12 Bush (Ky.) 378; *Decourt v. Sproul*, 66 Tex. 368; *Oliver v. Pullam*, 24 Fed. Rep. 127.

That a patent was prematurely issued does not authorize the State to avoid it, if locator is in a position to compel another patent to be issued when land is properly certified to the State. *People v. Jackson*, 62 Cal. 548.

A patent prematurely issued, or issued on a mistake of fact, is only voidable, and conveys the legal title. *Romain v. Lewis*, 39 Mich. 233.

If a patent emanated from competent authority, although in the prelimi-

nary proceedings upon which it was based an illegality should intervene, which eventuates in the grant of a patent to a party who otherwise would not have been entitled to receive it, it can only be attacked by the State or someone having color of title from the State or an equitable interest in the land. *Todd v. Fisher*, 26 Tex. 239.

A court of equity will not entertain a bill to repeal a patent filed more than ten years after patent was issued. *Goodwin v. McCluer*, 3 Gratt. (Va.) 291.

3. *Wallace v. Maxwell*, 1 J. J. Marsh. (Ky.) 447; *People v. Mauran*, 5 Den. (N. Y.) 389; *Huidekoper v. Burris*, 1 Wash. (U. S.) 109; *Gingrich v. Foltz*, 19 Pa. St. 38; 57 Am. Dec. 631; *Cox v. Bowman*, 2 Yerg. (Tenn.) 108.

The act of Congress known as the swamp land grant conveyed to each of the States respectively in fee all lands within the purview, and title thereof vested in the State from the date of such act, and the patent which afterwards issued for such land is only evidence of the grant and not of the date on which the grant took effect. *Sterling v. Jackson*, 69 Mich. 488; 13 Am. St. Rep. 405.

In a real action it is no objection to the admission of the plaintiff's patent for lands that it was issued after the commencement of the suit when it was founded on a certificate issued before. *Pitts v. Booth*, 15 Tex. 453.

A patent by the governor, under the seal of State, of State swamp lands is admissible in evidence to prove title in the patentee, without proof of the title of the State or the authority of the governor to issue the patent. *Grant v. Smith*, 26 Mich. 201; *Chrisman v. Jones*, 31 Ark. 609.

The recitals in a State certificate of purchase are not evidence of facts recited against the holder of a prior United States patent. *Laughlin v. McGarvey*, 50 Cal. 169.

A patent is not *prima facie* evidence if made upon a State survey as against one claiming under the United States. *Bludworth v. Lake*, 33 Cal. 255.

certified copy of the recorded patent is admissible as primary evidence.<sup>1</sup>

*g. CERTIFICATE OF PURCHASE.*—A certificate of purchase is a writing issued by the officer authorized to execute it, showing that the State has granted the land, of the description contained in the survey, to the applicant.<sup>2</sup>

The certificate does not, like a deed, transfer the legal title, but is simply a chose in action.<sup>3</sup>

**IV. SCHOOL LANDS—1. In General.**—School lands generally consist of certain lands set apart from the public domain, and granted by Congress to States or to territories about to become States.<sup>4</sup> In some of the older States, lands which are forfeited for the non-payment of taxes are, under certain statutory provisions, sold, and the proceeds applied to the school fund.<sup>5</sup>

**2. Sale.**—An application to purchase school lands, to be good against other claimants, must be in the prescribed form.<sup>6</sup> All the prerequisites of the statute,<sup>7</sup> such as making affidavit that the applicant is a citizen of the United States, or has filed his intention to become such, that he is an actual settler on the land,<sup>8</sup> or that he intends that the land shall be actually settled within the specified time,<sup>9</sup> must be complied with or the sale will be invalid.

A duplicate receipt of the receiver of the land office at any time is evidence of the title at any time before patent issues. *Birdwell v. Bowlinger*, 5 Port. (Ala.) 86.

A report of the register of the land office of the State is not competent evidence to show that lands have been patented to the railroad company. *Gordon v. Bucknell*, 38 Iowa 438.

The record of the United States patent to the State in the county where the land is situated and located is admissible. *Laugenour v. Shanklin*, 57 Cal. 69.

1. The duplicate copy of the lost land patent need not have the seal of State affixed to render it admissible in evidence. *Jackson v. Berner*, 48 Ill. 203.

Where a party has proved by his own oath the destruction of his patent, he will not be allowed in the same way to prove that a plat and a certificate of survey produced was annexed to such patent. As there is a counterpart of all old patents and plats lodged in the secretary's office, the title should be proved by the production of such counterpart. *Seekright v. Bogan*, 1 Hayw. (N. Car.) 178, note.

2. *Minor's Inst.* 1000.

3. *Whipple v. Whipple*, 109 Ill. 418.

The title does not pass until full payment has been made. *Yoakum v. Brower*, 52 Cal. 373. Compare *Somo v. Oliver*, 52 Cal. 378.

Mandamus may issue to compel the delivery of a certificate to one entitled to it. *Robertson v. Land Com'rs*, 44 Mich. 274.

4. See *PUBLIC LANDS*, vol. 19, pp. 360-362; *SCHOOLS*, vol. 21, p. 748.

5. *McClure v. Mauperture*, 29 W. Va. 633. See also *SCHOOLS*, vol. 21, p. 748.

6. *White v. Douglass*, 71 Cal. 115.

7. *Trimmer v. Bode*, 82 Cal. 647; *Woods v. Sawtelle*, 46 Cal. 389.

The requirements of the law respecting the description of the land in the affidavit is imperative. *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 101.

Where an applicant desiring to purchase school lands proceeded under a statute which was changed subsequently, it was held that, before he was entitled to purchase the land at its appraised value, he must comply with all the prerequisites of the law in force at the time he presented his petition for the lands to the probate court. *State v. Budgett*, 35 Kan. 600.

8. *White v. Douglass*, 71 Cal. 115; *Bratton v. Cross*, 22 Kan. 673. See *Clay County Land, etc., Co. v. Wood*, 71 Tex. 460.

9. *State v. Opperman*, 74 Tex. 136.

A certificate of purchase may be attacked on the ground that the purchaser was not a citizen, had not de-

A fictitious application secures no preference.<sup>1</sup> The officers entrusted with the sale of school lands must comply with the provisions of the law respecting such sales. Public policy requires that they should not be permitted to speculate in such lands, or purchase from themselves.<sup>2</sup> But one who has obtained a right to purchase school lands under the statute may compel by *mandamus* the county treasurer to take the purchase money and to receipt therefor.<sup>3</sup> If the lands sold are not surveyed or classified as required by the statute,<sup>4</sup> or if the sale is not made at public outcry in the county where situated, where the statute so requires, the purchaser acquires no title.<sup>5</sup> If the lands are sold in larger quantities than authorized by the statute, the sale will be void.<sup>6</sup> But where one purchases the maximum quantity of land allowed to be sold, he is not disqualified from taking an assignment of a certificate of purchase issued to another applicant or from receiving a deed from the proper authorities for such land in his own name.<sup>7</sup> A patent regular on its face, that is, in proper form, signed by the proper officers, and with the proper seal, is conclusive evidence of the legal title, and can be defeated only by want of title in the State or want of power in the officers.<sup>8</sup>

clared his intention to become such, and was not an actual settler on the land at the time of making his affidavit. *Trimmer v. Bode*, 82 Cal. 647.

A certificate of purchase of State school lands, issued under *California* Pol. Code, § 3495, which requires an applicant to make affidavit whether the land is or is not suitable for cultivation, and, if it is, that he is an actual settler thereon, is only *prima facie* evidence of the purchaser's title, and may be impeached by proof showing that he was not legally entitled to purchase the land. *Miller v. Prentice*, 82 Cal. 104.

1. *Martin v. Brown*, 62 Tex. 467.

2. *Cotulla v. Laxson*, 60 Tex. 443.

3. *Wilkie v. Howe*, 27 Kan. 518.

4. *State v. Opperman*, 74 Tex. 136; *Martin v. McCarty*, 74 Tex. 128; *Brown v. Shiner*, 84 Tex. 505.

A location under a school land warrant issued under *California* act of May 3, 1853, providing for the disposition of the half million acres of land donated to *California* by the United States, made before the survey and selection by the State of the lands thus donated, is valid as between the locator and the State. *Roberts v. Columbet*, 63 Cal. 22.

5. *State v. Opperman*, 74 Tex. 136; *Martin v. McCarty*, 74 Tex. 128.

The *California* sixteenth and thirty-sixth section are deemed to be sur-

veyed for the purpose mentioned in Cal. Pol. Code, § 3495, only when the plat of the survey of the township has been approved by the U. S. surveyor-general. Until then, title to a particular section does not vest in the State, and an application to purchase, prior to that time, is unauthorized and void. *Medley v. Robertson*, 55 Cal. 396.

The selection by the State of public land as a portion of the seventy-two sections granted to the State for the use of a seminary of learning—even if approved by the register and receiver of the local land office—does not confer a title on the State until the selection is approved by the secretary of the interior; and the plaintiff must prove such approval. *Buhne v. Chism*, 48 Cal. 467.

6. *Hicken v. French*, 70 Cal. 430; *Clay County Land, etc., Co. v. Wood*, 71 Tex. 460.

7. *Gliem v. Board of Com'rs*, 16 Oregon 479.

8. *McKinney v. Bode*, 33 Minn. 450. When school lands, after forfeiture for non-payment of the purchase money, are sold for taxes, and the balance due is paid by the purchaser at the tax sale, who receives a patent from the State, the title thus conveyed cannot be questioned by any private person. *Baker v. Newland*, 25 Kan. 25. See *Ewing v. Baldwin*, 24 Kan. 82.

A subsequent applicant for a patent to school land cannot attack a prior patent on the ground that the name of the applicant was changed by a fraudulent alteration under the application so recorded. The point can be raised only by the State or by one having an antecedent or contemporary equity.<sup>1</sup> An attack on the title of a purchaser of school lands cannot be based on the fact that someone other than himself has paid interest on the unpaid balance of the purchase money, the State not having seen fit to interfere.<sup>2</sup> And where a patentee purchases school lands with knowledge of a former sale and payment, equity will decree the title to be vested in the first purchaser.<sup>3</sup>

A sale of school lands may be annulled for a default in payment of interest or principal, or for irregularities, or non-compliance with the statutory requirements. In order to forfeit the rights of the purchaser for default to pay interest annually, or the balance of the purchase money when due, notice of default must be given and served by the county clerk, as provided by the statute.<sup>4</sup> A State cannot bring suit to annul a contract for the sale of school lands held by an innocent assignee, for irregularities or non-compliance with the statutory requirements for a sale, unless it does equity by paying or tendering back the purchase money received under the contract.<sup>5</sup>

**3. Lease.**—A constitutional provision relating to county school lands, providing that "each county may sell or dispose of its land in whole or in part," does not deprive a county of the right to utilize such lands temporarily by lease.<sup>6</sup> Nor does a statute which authorizes the leasing of school lands conflict with a constitutional provision which declares that school lands "shall be sold under such regulations, at such times, and on such terms as may be prescribed by law."<sup>7</sup> After the county has once leased its lands, or otherwise indicated its policy to lease and not to sell them, settlers have no right to occupy any part of them.<sup>8</sup>

If, before leasing the lands, the commissioner is required to be satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, his act is conclusive of the question of such demand.<sup>9</sup> If they are leased for a higher rental than the statute requires, the lessee will be bound by his acceptance of such lease.<sup>10</sup> An action to recover rent for the use of

1. *Martin v. Brown*, 62 Tex. 485.

2. *McKinney v. Bode*, 32 Minn. 228.

3. *Barksdale v. Brooks*, 70 Mo. 197.

4. *Hansen v. Wilson*, 40 Kan. 211.

5. *State v. Dennis*, 39 Kan. 509.

6. *Smisson v. State*, 71 Tex. 222; *Falls County v. De Laney*, 73 Tex. 463; *Brown v. Shiner*, 84 Tex. 505.

7. *Swenson v. Taylor*, 80 Tex. 584.

The rejection, by a constitutional convention, of a proposition authorizing the lease as well as sale of public

school lands, shows nothing more than that the people did not mean to give the legislature power to accept leases whereby the lands might become tied up, and sale rendered impossible; and it cannot be relied upon to show that leases were intended to be altogether prohibited. *Smisson v. State*, 71 Tex. 222.

8. *Falls County v. De Laney*, 73 Tex. 463.

9. *Brown v. Shiner*, 84 Tex. 505.

10. *Smisson v. State*, 71 Tex. 222.

school lands may be brought in the county where by the lease the rent is payable.<sup>1</sup>

**STATEMENT.**—In a general sense, an allegation; a declaration of matters of fact. The term has come to be used of a variety of formal narratives of facts, required by law in various jurisdictions as the foundation of judicial or official proceedings.<sup>2</sup>

**STATE PRISON.**—See PRISONS, vol. 19, p. 85.

**STATES.**—(See also CONFLICT OF LAWS, vol. 3, p. 499; INTERNATIONAL LAW, vol. 11, p. 431; STATE LANDS, vol. 23; UNITED STATES.)

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**I. DEFINITION.**—A state is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength.<sup>3</sup> This is the commonly accepted definition of the term as employed in international law, but as the subject in that connection has received full treatment elsewhere in this work,<sup>4</sup> this article will deal with the term only as used in American constitutional law.

1. *Fitzgerald v. State* (Tex. 1888), 9 S. W. Rep. 150.

2. Abb. L. Dict.

For statement as a component part of a bill in equity, see BILL IN EQUITY, vol. 2, p. 211.

**Brief Statement.**—In *Maine* practice, see BRIEF, vol. 2, p. 565.

**Statement or Certificate.**—In an *Illinois* election law, see CERTIFICATE, vol. 3, p. 60.

**Statement on Appeal.**—See SETTLED CASE ON APPEAL, vol. 22, p. 467.

**Within a Statute.**—Statement is "the act of stating, reciting, or presenting verbally or on paper." So defined where used in a statute prohibiting a party sued by the personal representative of the decedent from testifying as to any "transaction with or statement by deceased." *Montague v. Thomasson* (Tenn.), 18 S. W. Rep. 264. See also WITNESSES.

3. *Vattel's Law of Nations*, b. 1, ch. 1, § 1.

4. INTERNATIONAL LAW, vol. 11, p. 431.



A state, in the ordinary sense of the Federal Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed—one of the component commonwealths of the United States.<sup>1</sup>

Within the meaning of the word "state," as used in the grant of judicial power to the Federal Government in the Constitution, neither the District of Columbia, nor a territory,<sup>2</sup> nor Indian

1. In the clauses which impose prohibitions upon the states in respect to the making of treaties, emitting of bills of credit, and laying duties on tonnage, and which guarantee to the states representation in Congress, are found some instances of this use of the term in the constitution. It is also employed in a geographical sense simply, as in the clauses which require that a representative in Congress shall be an inhabitant of the state in which he shall be chosen; and that the trial of crimes shall be held within the state where committed. It is sometimes used in the sense of a people or political community as distinguished from a government. This idea is presented in the provision that the United States shall guarantee to every state a republican form of government, and protect it against invasion. *Texas v. White*, 7 Wall. (U. S.) 700.

2. At an early day in *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445, it was held, that under the judiciary act giving the national courts jurisdiction of controversies between citizens of different states, a citizen of the District of Columbia could not sue in such courts as a citizen of a state, because the District was not a member of the Union.

Subsequently the same principle was asserted in reference to a territory, in *New Orleans v. Winter*, 1 Wheat. (U. S.) 91, where it was said that although the District and the territory are both states—political societies—in the larger and primary sense of the word, neither of them is such in the sense in which the term is used in the constitution in the grant of judicial power to the national government on account of the citizenship or residence of the parties to a controversy, when it is understood to comprehend only "members of the American confederacy."

In what sense the District of Columbia may be regarded a distinct political

society, see *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, qualifying the statement above, that the District is a state in the larger sense of the term, and also the position assented to by Ch. J. Marshall, in *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445, that the District of Columbia is a distinct political society, and is therefore a state according to the definitions of writers on general law.

When a bank is chartered, and its charter repealed by the legislature of a territory, the question of the validity of the repealing act cannot be brought before the United States Supreme Court under the 25th section of the judiciary act. The power of review is confined by that section to certain laws passed by states, and does not extend to those passed by territorial legislatures. *Miners' Bank v. Iowa*, 12 How. (U. S.) 1.

And it has been decided that an organized political body within the limits of the United States does not become, by virtue of this organization merely, a state. It must be admitted to statehood in accordance with the Federal Constitution and laws. *Scott v. Jones*, 5 How. (U. S.) 343. See *infra*, this title, *Admission Into the Union*.

In *Cissell v. McDonald*, 16 Blatchf. (U. S.) 150; 57 How. Pr. (N. Y.) 175, it is held that a citizen of the District of Columbia is not a citizen of a state; and in *Prentiss v. Brennan*, 2 Blatchf. (U. S.) 162, it is said that "a person may be a citizen of the United States and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia and in the territories of the United States." See also *Picquet v. Swan*, 5 Mason (U. S.) 35.

In *Barney v. Baltimore City*, 6 Wall. (U. S.) 287, these rulings were followed without question, upon the principle of *stare decisis*; and in *Watson v. Brooks*, 8 Sawy. (U. S.) 316,

tribes or nations,<sup>1</sup> can be said to be a state; but in some statutes the term "state" has been held to comprehend both the territories and the District of Columbia.<sup>2</sup>

**II. ADMISSION INTO THE UNION.**—The sole power of admitting new states into the Union is vested in Congress by the Constitution.<sup>3</sup>

they were followed, but questioned, the court observing: "It is very doubtful if this ruling would now be made if the question was one of first impression, and it is to be hoped that it may yet be reviewed and overthrown."

**1. Indian Tribes and Nations.**—They are neither states of the Union nor foreign states. Yet in a certain domestic sense, and for certain municipal purposes, they are states, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of these treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as states. *Holden v. Joy*, 17 Wall. (U. S.) 211; *Warner v. Joy*, 17 Wall. (U. S.) 253. See also *Eastern Band of Cherokee Indians v. U. S.*, 117 U. S. 288.

In *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, the nation was not permitted to sustain an action in the U. S. court, it not being a foreign state in the sense of the constitution, and it was said that the relation of the Indian tribes to the Federal government resembles that of a ward to his guardian.

Again, it has been said that the Cherokee Nation bears the same relation to the U. S. Government as a territory did under the Ordinance of 1787. It is not a foreign, but a domestic territory. *U. S. v. Cox*, 18 How. (U. S.) 100.

See generally **INDIANS**, vol. 10, p. 438.

**2. Under Statutes.**—"State" in the Internal Revenue Title of the Revised Statutes, includes the territories and the District of Columbia when such construction is necessary to carry out

its provisions. *U. S. Rev. Stats.*, § 3140.

The term "state," in the act of March 2, 1837 (*U. S. Rev. Stats.*, § 4236), regulating the taking of pilots on a water forming the boundary between two states, includes an "organized territory" of the United States. *The Panama, Deady* (U. S.) 31. In this case, the court, by Deady, J., said: "Whether the word 'state' as used in this act should be construed so as to include a territory, is a question not free from doubt. The case is within the mischief intended to be remedied by the act, and it seems to me might be held to come within its spirit and purview without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the court in *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445, in which it was held that under the judiciary act, giving the national courts jurisdiction of controversies between citizens of different states, that a citizen of the District of Columbia could not sue in such courts as a citizen of a state, because such District was not a member of the Union." This ruling was followed in *The Ullock*, 9 Sawy. (U. S.) 641; *The Abercorn*, 26 Fed. Rep. 877.

And the word "state" as used in § 1 of the act of Congress, July 20, 1870, relating to the shipping and deserting of seamen, embraces a territory of the United States. *In re Bryant, Deady* (U. S.) 118.

**3. U. S. Constitution**, art. 4, § 3, ch. 1, provides: "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress." See *Brittle v. People*, 2 Neb. 198. According to the opinion of Attorney-General Bates, the act for the admission of *West Virginia* was unconstitutional, for the reason that it did not receive the assent of the peo-

Admitting a state into the Union on equal footing with the original states, means that the newly admitted state is equal to her sister states in being alike free in the formation of her constitution and the exercise of government, under such restrictions and limitations as she may voluntarily impose upon herself, and in the people having power to modify or change the constitution at will.<sup>1</sup> Upon the unconditional admission into the Union of a territory as a state, the erection of Federal courts therein, and

ple of the State of *Virginia*. 10 Opinions Attorney-Generals, p. 426. But the decision in *Virginia v. West Virginia*, 11 Wall. (U. S.) 79, settles the question the other way.

In *Cooley Const. Lim.* (6th ed.), p. 41, it is said: "The people of the several territories may form for themselves state constitutions whenever enabling acts for that purpose are passed by Congress; but only in the manner allowed by such enabling acts, and through the action of such persons as the enabling act shall clothe with the elective franchise to that end. If the people of a territory shall, of their own motion, without such enabling act, meet in convention, frame and adopt a constitution and demand admission to the Union under it, such action does not entitle them as matter of right to be recognized as a state. But the power that can admit, can also refuse, and the territorial status must be continued until Congress shall be satisfied to suffer the territory to become a state. There are always in these cases questions of policy as well as of constitutional law to be determined by the Congress before the admission becomes a matter of right. . . . These questions, in which the whole country is interested, cannot be finally solved by the people of the territory for themselves; but the final decision must rest with Congress and the judgment must be favorable before admission can be claimed or expected."

When a constitution has been adopted by the people of a territory, preparatory to admission as a state, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and such changes and additions are declared to be fundamental conditions of the admission of the state, and the legislature accepts such changes, additions and conditions, and the state is thus admitted, they become thereby a part of the constitution and binding as

such, although not submitted to the people for their approval. *Brittle v. People*, 2 Neb. 198.

There are several theories as to when a territory ceases to be such and becomes a state, and as to when the constitution and governmental machinery of a new state goes into operation. One theory is, that a territory continues in all respects a territory until admitted into the Union by act of Congress, and that until such act of admission, the proposed state constitution cannot take effect, nor any part of the machinery of a state government go into operation. A second theory is that where, under an enabling act of Congress, the people adopt a state constitution and form a state government, such constitution goes into effect upon its adoption by the people, and the former territory thereby becomes a state, although not in the Union, for the purposes of representation in Congress, until formally admitted by Congress. Still another theory, which is really only an extension of the one last named, is that an enabling act operates as a constitutional act of admission, and that when a state complies with the conditions of that act, it is a state in the Union for all purposes without any further action on the part of Congress. *Secombe v. Kittelson*, 29 Minn. 555; *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119; *Campbell v. Fields*, 35 Tex. 751.

The *Texas* reconstruction constitution became operative before the state was admitted to representation in Congress. *Peak v. Swindle*, 68 Tex. 242.

An amendment to the *Minnesota* original constitution adopted before formal admission of the state is valid. Any irregularity is healed by the admission, and the subsequent recognition of the validity of the amendment by the state. *Secombe v. Kittelson*, 29 Minn. 555.

1. *Spooner v. McConnell*, 1 McLean

the extension of the laws of the United States over the same, the territorial government is extinguished, and with it the existence of the territorial courts of the General Government, and, consequently, if a cause, brought from the supreme court of the territory, is pending in the Supreme Court of the United States at the time of the admission, the jurisdiction of the latter tribunal ceases, in the absence of provision for the disposal of such cases.<sup>1</sup> But by adoption on the part of the state, with the consent of Congress, those courts may become provisional and temporary courts of the state.<sup>2</sup> When a new state is carved from an old one, a contract made in the original state to convey lands subsequently embraced in the newly created state, is binding according to the laws of the original state which existed at the time the contract was made.<sup>3</sup>

Where a state is divided into two or more states, in the adjustment of liabilities between each other the debts of the parent state should be ratably apportioned among them.<sup>4</sup>

**III. RELATION BETWEEN.**—For national purposes embraced by the Federal Constitution, the states are regarded as domestic, being united under the same sovereign authority and governed by the same laws; in other respects, they are necessarily foreign to, and independent of, one another. Thus, in the matter of bills of exchange drawn in one state upon a party in another, the states are foreign.<sup>5</sup> The courts of one of the states are not presumed to know, and therefore not bound to take judicial notice of, the

(U. S.) 337, where, also, it is said that this does not mean that its powers, legislative, executive, and judicial, shall be exercised to the same extent, and in the same mode, as all the other states; in this respect the states are unequal, as perhaps, the powers of no two states are exercised in the same mode and to the same extent.

1. *Ames v. Colorado, etc.*, R. Co., 4 Dill. (U. S.) 251; *Benner v. Porter*, 9 How. (U. S.) 235; *McNulty v. Batty*, 10 How. (U. S.) 72; *Preston v. Brocken*, 10 How. (U. S.) 81; *Freeborn v. Smith*, 2 Wall. (U. S.) 160; *Hunt v. Palao*, 4 How. (U. S.) 588.

**Laws of the United States.**—The provision of the act admitting a state which declares, upon such admission, the laws of the United States which are not locally inapplicable, to be in force there, renders the Process Act of 1828 in force in the Federal courts of such newly admitted state. *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *Smith v. Cockrill*, 6 Wall. (U. S.) 756.

*Texas* having been admitted to the Union on December 29th, 1845, from that date the laws of the United States

were extended over it and therefore the revenue laws of *Texas* were not in force in 1846, so that goods seized for a noncompliance with those laws were illegally seized. *Calkin v. Cocke*, 14 How. (U. S.) 227.

2. *Ames v. Colorado, etc.*, R. Co., 4 Dill. (U. S.) 251. See also *Freeborn v. Smith*, 2 Wall. (U. S.) 160.

3. *Caldwell v. Carrington*, 9 Pet. (U. S.) 86.

**Erection of State of West Virginia—Effect on Virginia Corporation.**—Upon the creation of the State of *West Virginia*, a corporation created by *Virginia* continues to be a corporation of *Virginia* until it becomes affirmatively a corporation of *West Virginia*, by complying with an act of the legislature of that state, providing for certain proceedings, which being taken by corporations shall result in their becoming corporations of the new state. *Kanawha Coal Co. v. Kanawha, etc.*, Coal Co., 7 Blatchf. (U. S.) 391.

4. *Hartman v. Greenhow*, 102 U. S. 672.

5. *Buckner v. Finley*, 2 Pet. (U. S.) 581; *Bank of U. S. v. Daniel*, 12 Pet.

laws of another state—the members of the Union being, in this respect, also, foreign to one another.<sup>1</sup>

**IV. CONTRACTS—POWER TO MAKE—INCIDENTS OF.**—A state may make a binding contract; indeed, the power to contract is one of the necessary constituents of its sovereignty.<sup>2</sup> When a state enters into a contract with a private individual it relinquishes its sovereign character *quoad* such transaction, and, as a general rule, can claim no exemption from the rules of law applicable to the contracts of private parties under like circumstances.<sup>3</sup> Thus, upon a breach of its contract, the state is liable for prospective

(U. S.) 32; *Dickins v. Beal*, 10 Pet. (U. S.) 572; *Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60; 43 Am. Dec. 14; *State Bank v. Hayes*, 3 Ind. 400; *Warren v. Coombs*, 20 Me. 139; *Phoenix Bank v. Hussey*, 12 Pick. (Mass.) 483; *Carter v. Union Bank*, 7 Humph. (Tenn.) 548; 46 Am. Dec. 89; *Carter v. Burley*, 9 N. H. 558; *Wells v. Whitehead*, 15 Wend. (N. Y.) 527; *Ocean Nat. Bank v. Williams*, 102 Mass. 141. See also **BILLS AND NOTES**, vol. 2, p. 313.

The sentiment of the text was expressed with force by the President of the Court of Appeals of *Virginia* in *Warder v. Arall*, 2 Wash. (Va.) 282; 1 Am. Dec. 488, where he states that in cases of contracts the laws of a foreign country where the contract was made must govern, and then adds as follows: "The same principle applies, though with no greater force, to the different states of America, for though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal corporations, are to each other foreign."

1. *Hanley v. Donoghue*, 116 U. S. 1. See also **JUDICIAL NOTICE**, vol. 12, p. 151.

**Judgments.**—Prior to the adoption of the confederation and the Constitution of the *United States*, the several states were considered entirely independent of each other, and judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government, and whatever changes now exist in this respect must be sought for in the Constitution and laws of the *United States*. *Warren Mfg. Co. v. Actna Ins. Co.*, 2 Paine (U. S.) 501.

"**Full Faith and Credit.**"—In *Smith v. Lathrop*, 44 Pa. St. 326; 84 Am. Dec. 448, it was held that, except in

cases governed by that clause of the Federal Constitution which gives "full faith and credit" in each state to judicial proceedings in every other state, the courts of the several states are foreign to each other. See also *Davis v. Morriss*, 76 Va. 27.

2. *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *Danolds v. State*, 89 N. Y. 36; 42 Am. Rep. 277; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99; 73 Am. Dec. 699. A state may contract with an individual by an act of the legislature; and two or more states may contract *inter se*, in the same manner. *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 5. In *State v. Woram*, 6 Hill (N. Y.) 33; 40 Am. Dec. 378, it was held that a state is a corporation, and as such may be the payee of a promissory note.

And in *Dikes v. Miller*, 25 Tex. Supp. 281; 78 Am. Dec. 571, it was held that a state has capacity to take by deed or devise, and a release to it by a grantee of land will be operative and effectual to divest the title of the grantee.

3. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665; *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624.

The state must be governed by the same rules of common honesty and justice which bind individuals. It is for its interest that its contracts should be binding on all the parties thereto. If it can at pleasure violate or abandon its contracts in the absence of any stipulation authorizing it to do so, there will be such uncertainty and risk attending all its contracts that it will go into the market for work and materials at a great disadvantage. Per *Earl, J.*, in *Danolds v. State*, 89 N. Y. 36; 42 Am. Rep. 277.

As was well said by *Allen, J.*, in *People v. Stephens*, 71 N. Y. 549, "There

profits, if such profits would have constituted a proper item of damages had the contract been between private individuals.<sup>1</sup> A contract by the state violative of the organic law of the Union is invalid.<sup>2</sup> The intention of a state in making a contract must be ascertained by the acts and declarations of its constituted authorities and agents acting within the scope of their duty, and all acts which relate to the contract, and all declarations of agents which in the case of a private individual would affect the contract, must be held as in like manner affecting a contract made by the state.<sup>3</sup> But to the general rule stated above, there appears to be an exception in the matter of interest, it being held that a state is not liable therefor in the absence of express contract or positive

is not one law for the sovereign and another for the subject, but when the sovereign engages in business, and the conduct of business enterprises, and contracts with individuals, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor."

With a view to raising revenue, a state statute required the inspection of tobacco and the storing of it in the state tobacco warehouses for that purpose. The plaintiff stored his tobacco in conformity with that law, and while stored it was destroyed by fire. The plaintiff was empowered by special act of the legislature to bring suit therefor. He accordingly brought an action, alleging that the loss occurred through the negligence of the state. It was held on demurrer that there was no contract or obligation on the part of the state to keep the tobacco safe, and that the state was not liable for the loss as bailee or in any other capacity. *Moore v. State*, 47 Md. 467; 28 Am. Rep. 483.

1. *Danolds v. State*, 89 N. Y. 36; 42 Am. Rep. 277. See also *Masterton v. Mayor*, etc., of Brooklyn, 7 Hill (N. Y.) 61; 42 Am. Dec. 38; *U. S. v. Speed*, 8 Wall. (U. S.) 77; *U. S. v. Smith*, 94 U. S. 214; *Thompson v. U. S.*, 9 Ct. of Cl. 187.

2. As, for example, a contract made by a state with a corporation with intent to aid the Confederate States in the late war, and this although the contract was made in conformity to the law and policy of the *de facto* government.

*Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665. In this case the court, by Byrd, J., said: "Ordinarily, a sovereignty cannot make a contract obnoxious to the principle which declares all illegal contracts void or voidable. In other words, it cannot be said with strict propriety that a sovereign power can, in a contract, violate its public policy, or make a contract which can be assailed in its own courts on that ground. For the contract which it makes is as much a declaration of its policy as any pre-existing law or policy. But in a government like ours, where in theory, at least, all sovereignty is in the people, and where they have conferred on the state and national governments only certain sovereign powers, retaining all inherent sovereignty in themselves, it does not seem that the same rule would be applicable to contracts made by the government, as in a government in which the sovereignty inherent in the people has been vested in it—the government. A government like ours with limited and well-defined powers cannot adopt any law, or make any contract which can be enforced in the courts which is hostile to, or violative of, the fundamental law—the Constitution of the *United States*. And all such contracts whether made by the *United States*, the states or individuals, which are clearly in contravention of the provisions of this instrument or of its evident spirit and meaning, are alike reprehensible and invalid. The Constitution is the supreme law of the land, and all laws and contracts in derogation of its provisions and policy must necessarily be inoperative, at least, in the courts of the country."

3. *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665.

enactment.<sup>1</sup> Interest, however, accrues in favor of the state precisely as it does in favor of private parties.<sup>2</sup> There is one essential difference between the contract of a state and that of an individual—not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the state to defeat the enforcement of its contract:—the state may defeat enforcement, but the individual cannot. This is the logical result of the rule that a state cannot be sued without its own consent.<sup>3</sup> But it seems to be beyond controversy that the constitutional provision which denies to the state the power to pass laws impairing the obligation of contracts, applies as well to contracts made by the state as to those made by individuals.<sup>4</sup>

1. *U. S. v. North Carolina*, 136 U. S. 211; *State v. Thompson*, 10 Ark. 61; *Attorney-Gen'l v. Cape Fear Nav. Co.*, 2 Ired. Eq. (N. Car.) 444; *Bledsoe v. State*, 64 N. Car. 392; *Western, etc., R. Co. v. State* (Ga.), 14 L. R. A. 438.

But a state is not bound by a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. This is upon the familiar principle that a sovereign is not bound by the words of a statute, unless expressly named. *State v. Board of Public Works*, 36 Ohio St. 409. To the same effect is *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624. And in this case, it was also held that a state is not chargeable with interest upon interest unless it expressly contracts to pay such interest.

In *Auditorial Board v. Arles*, 15 Tex. 72, it was held that a state is not bound by the contract of its agent to pay interest, unless there is a law authorizing the agent to contract to pay it.

But in *Res Publica v. Mitchell*, 2 Dall. (U. S.) 101, it was held that the state is liable to pay interest as well as individuals.

And in *Pennsylvania*, it has been held that where one pays money properly chargeable against the state, he is entitled to the interest from the time of payment, but ordinarily a demand must be made on the legislature before the state may be charged with interest. *Milne v. Republican*, 3 Yeates (Pa.) 101.

In *Mississippi*, it has been adjudged that as a general rule the state is not bound to pay interest, and in cases where a contract contemplates the action of the legislature in order to pay the claim, interest cannot be claimed

until demand has been made upon that body. *State v. Mayes*, 28 Miss. 706.

And in *People v. Canal Com'rs*, 5 Den. (N. Y.) 401, it was held that the state is liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use after a lawful demand made by the party entitled of the officers charged by law with the duty of making payment. See also *UNITED STATES*.

2. *Chevallier v. State*, 10 Tex. 315. As to the principles governing interest generally, see *INTEREST*, vol. 11, p. 379.

3. *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624. See *infra*, this title, *Actions against State*.

Under some of the state constitutions, the states may defeat the enforcement of their obligations by the failure or refusal of their legislatures to make the necessary appropriations. *State v. Porter*, 89 Ind. 260; *May v. Rice*, 91 Ind. 546; *Rice v. State*, 95 Ind. 33; *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624. See also *Hans v. Louisiana*, 24 Fed. Rep. 55.

4. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 519; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Hartmann v. Greenhow*, 102 U. S. 672; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Cooley's Const. Lim.* (6th ed.), p. 329; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 5.

In *Fletcher v. Peck*, 6 Cranch (U. S.) 87, Marshall, C. J., said: "If, under a fair construction of the constitution, grants are comprised under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between

**V. ACTIONS—1. By a State—*a*.** IN STATE COURTS.—A state of the Union, as a political corporation, has the right to institute suit whether it be required by its pecuniary interests or the general public welfare, and, for this purpose, its own courts<sup>1</sup> as well as those of a sister state,<sup>2</sup> are open to it. A state, like other parties to actions, must show an interest in the subject-matter of litigation in order to entitle it to prosecute a suit and demand relief; private wrongs are remediable at the suit of the parties injured, and state interference in such controversies, either directly, or upon the relation of private parties, should not be allowed.<sup>3</sup> In the absence of a statute authorizing a suit in such form, a suit

two individuals but excluding from the inhibition contracts made with itself? The words themselves contain no such distinction. They are general and are applicable to contracts of every description." And in *New Jersey v. Wilson*, 7 Cranch (U. S.) 164, the same learned judge observed: "In the case of *Fletcher v. Peck*, it was decided in this court on solemn argument and much deliberation, that the provision of the constitution extends to contracts to which a state is a party, as well as to contracts between individuals."

In *Georgia Penitentiary Co's v. Nelms*, 71 Ga. 301, the court, by Stewart, J., said: "A state being sovereign in the eye of the law is presumed to be the embodiment of all the wisdom, honor, justice, and virtue of its citizens, and how could this great commonwealth lay claim to such a high standard of excellence if she should break her contracts with impunity? If there be reason and justice in the rule that the obligations of contracts between citizens should not be impaired by legislative act, when the state is a party to the contract, is it not a greater reason why the rule should be maintained and upheld?"

**Estoppel.**—A state, as well as individuals, may be estopped by its acts, conduct, silence and acquiescence. *State v. Flint*, etc., R. Co., 89 Mich. 481; *Com. v. Anare*, 3 Pick. (Mass.) 224; *Com. v. Pejepscut Proprietors*, 10 Mass. 155; *State v. Bailey*, 19 Ind. 452; *Cahn v. Barnes*, 5 Fed. Rep. 326; *Indiana v. Milk*, 11 Fed. Rep. 389; *Enfield v. Permit*, 5 N. H. 280. But see *Candler v. Lunsford*, 4 Dev. & B. (N. Car.) 407.

1. *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225; 41 Am. Dec. 549; *State v. Grant*, 10 Minn. 39; *Peo-*

*ple v. St. Louis*, 10 Ill. 351; 48 Am. Dec. 339.

Under a statutory provision of *Alabama* (*Alabama Code*, §§ 2573, 960, Subd. 4), the state may sue in all cases where under like circumstances an action would lie between individuals, may maintain an action of ejectment, and may sue in the name of a township for school lands belonging to it. *Gaston v. State*, 88 Ala. 459.

The territory of *Montana* is a body politic, or artificial person, a corporation, and as such may sue upon contracts without any statute empowering it to do so. *Territory v. Hildebrand*, 2 Mont. 426.

**Set-off by the State.**—The sinking fund of the state of *Mississippi* is the property of the state, therefore a person indebted to that fund is indebted to the state, and such indebtedness is subject to be set off against any indebtedness of the state to such person for his salary or otherwise under the statute. *State v. Dickinson*, 12 Smed. & M. (Miss.) 579.

2. *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Indiana v. Woram*, 6 Hill (N. Y.) 33; 40 Am. Dec. 378; *Spencer v. Brockway*, 1 Ohio 259; 13 Am. Dec. 615.

3. *State v. Shiveley*, 10 Oregon 267; *State v. Parkeville*, etc., R. Co., 32 Mo. 496; *State v. Bradish*, 34 Vt. 419.

A civil action for the recovery of money due the state is properly brought in the name of the state. *State v. Poulterer*, 16 Cal. 514; *Fry v. State*, 27 Ind. 348. And the state should be plaintiff in a suit to set aside a grant from the state. *Parker v. Hughes*, 25 Ga. 374.

To authorize the institution of a suit in the name of a state to forfeit a charter of a corporation under a statute declaring such forfeiture, it is not



instituted by a "prosecuting attorney for the state in behalf of the people of the state" should be dismissed for want of proper parties.<sup>1</sup> A suit, the subject-matter of which is local, must be commenced by the state in the county of the locality, unless a

necessary that the legislature should by some general or special statute have authorized the suit to be brought; the forfeiture is a right in which the state is interested and suit may be brought on the motion of the attorney-general. *State v. Southern Pac. R. Co.*, 24 Tex. 80. The state is the real plaintiff where the treasurer sues and recovers judgment for its use. *Com. v. Baldwin*, 1 Watts (Pa.) 54; 26 Am. Dec. 33.

The state, and not the trustees of the school district, is the proper party plaintiff in a suit for delinquent school taxes under § 35, *Nevada Act of March 20, 1865* (Stats. 1864-1865, 419), relating to schools. *State v. First Nat. Bank*, 4 Nev. 706.

In *Davis v. Mayor, etc., of N. Y.*, 2 Duer (N. Y.) 663, it was held that when the act of a municipal corporation, against which relief is sought, affects injuriously the whole community over which the corporate jurisdiction extends, the attorney-general is a necessary party to the prosecution of the suit. The doctrine of this case has been approved in *People v. Mayor of N. Y.*, 9 Abb. Pr. (N. Y.) 253; *People v. Mayor of N. Y.*, 10 Abb. Pr. (N. Y.) 144; *People v. Tweed*, 13 Abb. Pr. N. S. (N. Y.) 25 (but this last case is questioned in *New York v. Tweed*, 13 Abb. Pr. N. S. (N. Y.) 152); *State v. Saline Co. Ct.*, 51 Mo. 350. And there are *dicta* to the same effect in *People v. Mayor, etc., of N. Y.*, 32 Barb. (N. Y.) 102; *Roosevelt v. Draper*, 7 Abb. Pr. (N. Y.) 108. And in *People v. Lowber*, 7 Abb. Pr. (N. Y.) 158, *Ingraham, J.*, intimates a similar opinion.

But in *People v. Miner*, 2 Lans. (N. Y.) 396, it was held that the attorney-general has not the power either by the common law, or under *New York Code*, §§ 430, 432, to prosecute an action in the name of the people against commissioners to restrain them from issuing town bonds under an act of the legislature for railroad purposes. And *Mullen, J.*, for the court, in referring to *Davis v. Mayor, etc., of N. Y.*, 2 Duer (N. Y.) 663, observes: "I think it will be found, upon an examination

of the cases from which he deduces the rule, that they do not authorize the inference, and that there are but two classes of cases in which the attorney-general is a necessary party; one is where the unauthorized act of the corporation will produce a public nuisance; the other is when it tends to, or is a breach of, some trust for charitable uses." This was reaffirmed in *People v. Albany, etc.*, R. Co., 5 Lans. (N. Y.) 25; 57 N. Y. 161, and followed in *State v. Parkville, etc.*, R. Co., 32 Mo. 496; *Attorney-Gen'l v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *People v. Clark*, 53 Barb. (N. Y.) 172; *People v. Booth*, 32 N. Y. 397; *People v. Law*, 34 Barb. (N. Y.) 494, it being held in the last two cases that the people cannot maintain an action in respect to property belonging to the city of New York. And in *People v. Ingersoll*, 58 N. Y. 1; 17 Am. Rep. 178, where it was held that where the right to the proceeds of the suit is vested in a county, the suit may not be brought in the name of the people. But it has been held that an action for unlawfully obstructing a public street by means of telegraph poles may be brought in the name of the people. *People v. Metropolitan Teleph., etc., Co.*, 31 Hun (N. Y.) 596.

The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river, is by injunction at the suit of the people by the attorney-general; for all the people of the state are interested in the matter and entitled to use all bays and navigable streams within the state. *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 84 Am. Dec. 351; *affirming* 38 Barb. (N. Y.) 282; 24 How. Pr. (N. Y.) 301; *People v. Macy*, 62 How. Pr. (N. Y.) 65; *Attorney-Gen'l v. Cohoes Co.*, 6 Paige (N. Y.) 133; 29 Am. Dec. 755.

The people of a territory may sue upon bonds given by defendants in criminal proceedings. *People v. Bugbee*, 1 Idaho 89; *People v. Slocum*, 1 Idaho 62.

1. *Patterson v. Temple*, 27 Ark. 202.

By statute in *Indiana*, in actions to recover money due the state from a

special statute authorizes it to be instituted elsewhere.<sup>1</sup> A statute authorizing suits to be brought in the name of the state on the written direction of the governor to the attorney, "without giving bond or security, or causing affidavit to be made, though the same may be required in actions between private citizens," is not dispensing with "due process of law," nor violative of any constitutional provision, state or federal.<sup>2</sup>

*b. IN UNITED STATES COURTS.*—(See also UNITED STATES COURTS).—The Federal Constitution authorizes a suit by a state against a citizen of another state in the United States Supreme Court, by reason of the character of the parties,<sup>3</sup> but not a suit by a state against its own citizens.<sup>4</sup> A state, as plaintiff, cannot maintain a suit in the circuit court of the United States on the ground of the character of the parties, as such jurisdiction is vested in the Supreme Court.<sup>5</sup> A suit in the Supreme Court in the nature of a *quo warranto*, brought in the name of the state on the relation of certain persons, is not to be regarded as a suit by the state itself so as to entitle the cause to be advanced for hearing.<sup>6</sup> The governor of the state ordinarily represents the state, and when it is plaintiff the suit may be in form a suit by

county treasurer and his sureties, the auditor of public accounts and not the state treasurer should be the relator. *Pepper v. State*, 22 Ind. 399; 85 Am. Dec. 430. And a suit upon the bond of a commissioner to sell real estate in partition, is properly brought in the name of the state on the relation of the parties interested. *Owen v. State*, 25 Ind. 107. So with a suit on the bond of an assignee in trust for creditors. *Jackson v. Rounds*, 59 Ind. 116. But in a suit by the state for its own use, upon a bond payable to the state, no relator need be named. *Fry v. State*, 27 Ind. 348.

1. *People v. St. Louis*, 10 Ill. 351; 48 Am. Dec. 339.

2. *Ex parte Macdonald*, 76 Ala. 603.

3. *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

Where a state owned bonds of a railway company, the interest whereon was guaranteed by the trustees of an internal improvement fund, which fund was created under an act of the legislature by the conveyance to the trustees of state lands, and the bonds were also a lien upon the road, it was held, that the state, both by virtue of her interest in the lands composing the fund, and by virtue of her possession of the bonds, might bring an original bill in the United States Supreme Court against citizens of other

states to protect her interests; and that the objection that she had not such an interest in the subject-matter of the suit as to give her a standing in court, and that the trustees of the improvement fund, who could not bring an original bill in the supreme court, were the only parties legally interested, could not be maintained. *Florida v. Anderson*, 91 U. S. 675.

A state, *Pennsylvania*, having constructed lines of canal and railroad, and other means of transportation and travel, which would be injured in their revenues by the obstruction in the Ohio river caused by the bridge at Wheeling, erected by a corporation of another state, has a sufficiently direct interest to sustain an application to the supreme court in the exercise of original jurisdiction for an injunction to remove the obstruction. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518.

An injunction will be granted by the U. S. Supreme Court in behalf of a state, to stay the payment to others of a debt confiscated to the state until it is adjudged to whom the money belongs. *Georgia v. Brailsford*, 2 Dall. (U. S.) 402, 415.

4. *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553.

5. *Wisconsin v. Duluth*, 2 Dill. (U. S.) 407.

6. *Miller v. State*, 12 Wall. (U. S.) 159.

him as governor in behalf of the state.<sup>1</sup> And he may authorize an attorney to institute suit in the name of the state.<sup>2</sup>

**2. Against a State—*a*.** IN STATE COURTS.—A state of the Union is not liable to suit in its own courts or those of another state without its express consent.<sup>3</sup> This principle is absolute, and may not be overthrown by indirection, as, for instance, by the institution of suits against state officers, when in effect, they

1. *Kentucky v. Dennison*, 24 How. (U. S.) 66.

When an officer of the state is the party prosecuting the suit for the state, the citation to appear in the United States Supreme Court must be served on him, as he is the "adverse party," and not the state, and the party to the record under rule 10 of that court, and chapter 20 of the Judiciary Act of 1789. *Poydras v. Treasurer of Louisiana*, 17 How. (U. S.) 1.

2. A suit brought in the name of the state of *Texas* in the U. S. Supreme Court by an attorney, the bringing and prosecution of which have been sanctioned successively by a provisional governor of the state appointed by the president after the conclusion of the war in 1865, by a governor elected by the people in 1866 under the constitution adopted in that year, and by a governor subsequently appointed by the military commander of the district acting under the reconstruction acts, is to be considered as instituted and prosecuted by competent authority. *Texas v. White*, 7 Wall. (U. S.) 700.

3. *Beers v. Arkansas*, 20 How. (U. S.) 527; *Board of Liquidation v. McComb*, 92 U. S. 531; *Briscoe v. Bank of Kentucky*, 11 Pet. (U. S.) 257; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446; *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372; *Sharp v. Contra Costa County*, 34 Cal. 284; *People v. Miles*, 56 Cal. 401; *People v. Dennison*, 84 N. Y. 272; *Gan v. Bright*, 1 Barb. Ch. (N. Y.) 157; *Kiersted v. People*, 1 Abb. Pr. (N. Y.) 392; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *Williamsport, etc., R. Co. v. Com.*, 33 Pa. St. 288; *Pattison v. Shaw*, 6 Ind. 377; *Raymond v. State*, 54 Miss. 562; 28 Am. Dec. 382; *Tate v. Salmon*, 79 Ky. 540; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336; *Hosner v. De Young*, 1 Tex. 764; *Moore v. Tate*, 87 Tenn. 725; 10 Am. St. Rep. 712. And a territory of the United States is not liable to suit by one of its citizens.

*Langford v. King*, 1 Mont. 38; *Fisk v. Cuthbert*, 2 Mont. 593.

But it has been held that if the state asserts a claim against an individual for the purchase money of property sold him by the state, upon which there is an incumbrance, which the state is bound in equity to remove, such individual may deny his liability for the whole amount and insist upon his right to retain a sum sufficient to remove the incumbrance. *Sinking Fund Com'rs v. Northern Bank*, 1 Metc. (Ky.) 176.

And when the state sues to recover property the defendant may file a cross complaint and have the title litigated and quieted. *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *State v. Washington County*, 101 Ind. 69.

But the immunity of the state from suit and indictment does not pass to the vendees of its property or rights. *Delaware Division Canal Co. v. Com.*, 60 Pa. St. 367; 100 Am. Dec. 570; *Pennsylvania R. Co. v. Duquesne Borough*, 46 Pa. St. 223. The fact that a state is not subject to an action on behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him, but only that there is no proper tribunal to try the claim, and no remedy. *Coster v. Mayor, etc., of Albany*, 43 N. Y. 399. Her creditors have nothing to rely upon except her good faith, and she has equally the power to postpone the time of payment or to refuse to pay at all. *Hunsaker v. Borden*, 5 Cal. 288; 63 Am. Dec. 130. The remedy of a party upon a contract with the state is by appeal to the legislature, who, it is fair to presume, will make provision for its full execution, and do ample justice. *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225; 41 Am. Dec. 549.

**Consent of State Officer Not Sufficient.**—The mere consent of an officer of the state, the attorney-general, for instance, by appearing and answering in

are suits against the state.<sup>1</sup> If the state consents to abrogate this prerogative of sovereignty, it may prescribe the terms and

the name of the state, does not bind it by the judgment or decree which may be the result of the suit. *Ex parte Dunn*, 8 S. Car. 207; *Dabney v. Bank of S. Car.*, 3 S. Car. 124. See also *Adams v. Bradley*, 5 Sawy. (U. S.) 217.

**The legislature is the proper body to authorize suits against the state**, and it may act in this matter by joint resolution as well as by bill. *St. Paul, etc., R. Co. v. Brown*, 24 Minn. 517.

Services performed for the state under an unauthorized contract with the governor or attorney-general may be the subject of relief at the hands of the legislature, but do not constitute a legal cause of action against the state. *People v. Talmage*, 6 Cal. 256. And if an illegal tax has been paid into the state treasury, the persons paying the tax are the creditors respectively of the state to the amount of illegal tax which each has paid, and, like other creditors of the state, their remedy is to ask the law-making power to make the proper appropriations. *Shoemaker v. Grant County*, 36 Ind. 175.

1. *Shoemaker v. Grant County*, 36 Ind. 175; *State v. Burke*, 33 La. Ann. 498; *Taylor v. Hall*, 71 Tex. 206. Where an insurance company was required to make a deposit with a state treasurer for the benefit of its policyholders, but the statute failed to provide for further disposition of the fund, no suit can be maintained against the state treasurer to recover or dispose of the fund until the legislature shall direct in what manner, and in what court it may be brought. *Tate v. Salmon*, 79 Ky. 540.

The salary of a state officer cannot be attached, because the state is a necessary party to the proceeding, and it cannot be sued. *Rodman v. Musselman*, 12 Bush (Ky.) 354; 23 Am. Rep. 724; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 440; 18 Am. Dec. 194; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336. But it seems that creditors of the state, for whom appropriations have been made by statute, may maintain mandamus against the auditor and treasurer to compel them to pay the money out of the treasury. *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 440; 18 Am. Dec. 194. An application to the court by mandamus to compel a district surveyor to make a survey of a certain tract of

land, by virtue of a land certificate, is in effect a suit against the state, and cannot be maintained. *Hosner v. De Young*, 1 Tex. 764. See also *Marshall v. Clark*, 22 Tex. 23.

So also is an application for mandamus by a county to compel the auditor-general to pay funds collected by the state for the several townships of the county. *Ottawa County v. Aplin* (Mich. 1888), 36 N. W. Rep. 702.

Mandamus will not issue on the application of an individual to any officer of the government, commanding him to make a contract, entered into with that individual by public officers, binding upon the state. *People v. Canal Board*, 13 Barb. (N. Y.) 432.

A suit, the object of which is to test the constitutionality of certain statutes supposed to affect individual rights, and which is brought against a public officer in the form of an application for a mandamus to compel him to perform official acts which the legislature has forbidden, is in effect a suit against the state, and is an attempted evasion of the well established principle that the sovereign authority cannot be sued in its own courts without its express consent. *League v. De Young*, 2 Tex. 497.

The provision of the *Illinois* constitution, art. 4, § 26, that the state "shall never be made a defendant in any court of law or equity," prohibits the courts from enforcing the performance of a contract, made by the penitentiary commissioners for convict labor by mandamus, as its effect would be to give an action against the state. *People v. Dulaney*, 96 Ill. 503.

A proceeding by mandamus to compel an officer of the state to do that which the legislature has prohibited him from doing, for example, to compel a tax collector to receive certain obligations of the state in payment of taxes, is, in effect, a suit against the state, and not maintainable. *State v. Sneed*, 9 Baxt. (Tenn.) 472.

Where an executive council of a state gives a contract to a certain party, it is not competent for an unsuccessful bidder to sue the executive council to enjoin the contract with that party and compel the giving of the contract to him. *Mills Pub. Co. v. Larrabee*, 78 Iowa 97.

conditions upon which it may be sued, and the manner in which the suit shall be conducted,<sup>1</sup> all of which must be strictly complied with.<sup>2</sup> It seems that the state may also withdraw its consent, and, in exercising this power, does not violate the prohibition of the Federal Constitution against the impairment of the obligation of contracts;<sup>3</sup> and further, that such withdrawal has the effect of

But a bill to enjoin the funding board, created by the *Tennessee* Act of 1881, from funding the bonded indebtedness of the state, is not a suit against the state. *Lynn v. Polk*, 8 Lea (Tenn.) 121.

In *Board of Public Works v. Gannt*, 76 Va. 455, it was held that suits against agents and officers of the government in possession of specific property under a void title, may be maintained by the true owner; and it is no answer for them to say that the state has an interest in or claim to the property. But no decision has gone to the extent of affirming that such suit can be maintained for the recovery of money or property belonging to the state because it happens to be found in the possession of its ministerial officers or agents.

In a case where a bank indebted to a state conveyed to it, in satisfaction of such indebtedness, certain property on a certain condition, the court held that specific performance of that condition could not be enforced against the state, although it could control an improper use of the property in the hands of state officers. *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225; 41 Am. Dec. 549.

An action on the case will lie against a public officer for a false and fraudulent representation made by him in relation to property sold by him, and it is no answer that the sale was made in his official capacity. *Culver v. Avery*, 7 Wend. (N. Y.) 379; 22 Am. Dec. 586.

1. *Beers v. Arkansas*, 20 How. (U. S.) 527; *DeSaussure v. Gaillard*, 127 U. S. 216; *Hosner v. DeYoung*, 1 Tex. 764. The new constitution of *North Carolina*, art. 4, § 11, provides that "the supreme court has original jurisdiction to hear claims against the state; but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next general assembly for its action." By this it was probably intended that such hearing shall be chiefly of the law involved in any such claim, in-

cluding only such general observations upon the facts as may be required to render the rules of law laid down intelligible in their special application. At all events it must be so in the absence of further legislation providing the court with the proper machinery for deciding issues of fact. *Bledsoe v. State*, 64 N. Car. 392. Upon the decision of the court in favor of the plaintiff upon a claim preferred against the state, the proper course is for the clerk to transmit the proceedings in the cause, together with the judgment of the court, to the governor, to be by him communicated to the general assembly. *Clements v. State*, 77 N. Car. 142.

2. *Raymond v. State*, 54 Miss. 562; 28 Am. Rep. 382. Where a statute permits actions against a state on such claims as are presented to the auditor of public accounts, and in whole or in part rejected, no claim that has not been so presented and rejected can be sued for. *State v. Stout*, 7 Neb. 89; *Owen v. State*, 7 Neb. 108; *Bradford v. State*, 7 Neb. 109; *State v. White*, 7 Neb. 113; *State v. Lancaster Co. Bank*, 8 Neb. 218. The effect of *Wisconsin* Rev. Stats., § 3200, providing for suits against the state, is to make the refusal of the legislature to allow a claim a condition precedent to the right of the claimant to maintain suit, and the complaint in an action against the state is bad on general demurrer unless it shows that the claim sued upon has been presented to, and disallowed by, the legislature. *Chicago, etc., R. Co. v. State*, 53 Wis. 509.

3. *Beers v. Arkansas*, 20 How. (U. S.) 527; *In re Ayers*, 123 U. S. 443; *Board of Public Works v. Gannt*, 76 Va. 455; *State v. Hill*, 54 Ala. 67; *State v. Bank of Tennessee*, 3 Baxt. (Tenn.) 365; *State v. Sneed*, 9 Baxt. (Tenn.) 476; *Horne v. State*, 84 N. Car. 362; *Baltzer v. State*, 104 N. Car. 265. "If a state furnishes a remedy by process against itself or its officers, that process may be pursued because it has consented to submit itself to

abating pending suits.<sup>1</sup> A constitutional provision that suit may be brought against the state in such manner as the legislature thereof may direct, does not compel that body to act; until a statute has been passed agreeably to such provision, the state retains its immunity from suit.<sup>2</sup> An act authorizing suits against the state, being in derogation of its sovereignty, must be construed strictly; thus the privilege must be confined to those by whom it was clearly intended that it should be enjoyed;<sup>3</sup> and to such claims as are clearly comprehended by the act;<sup>4</sup> and if the state is made liable to suit in a certain court, it may not be sued in another court.<sup>5</sup>

Such a statute does not have the effect of creating liabilities on the part of the state, or of subjecting it to liabilities which did not exist, or could not arise under the laws already existing; as, for instance, liability for the tortious acts or conduct of the officers or agents employed in the administration of public affairs.<sup>6</sup>

*b. IN UNITED STATES COURTS—(1) Generally.*—A state of

that extent to the jurisdiction of the courts, but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit which belongs to it as a political community, responsible to no superior." Per Matthews, Bradley, and Gray, JJ., in *Antoni v. Greenhow*, 107 U. S. 769. And in *Ex parte State*, 52 Ala. 231, it was said by Brickell, C. J., "Legal remedies or their efficacy in enforcing the obligation or liability are not contemplated as in cases of contracts between individuals. These are vain and useless against the state without the concurrence of the legislative power. Statutes are often passed permitting suits against the state. Such statutes are matters of grace, confer privileges, they do not create rights, and are always construed like other statutes conferring privileges or exemptions on the citizen. The power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn the citizen is remitted to the condition in which he stood when it was conferred." But compare *Hancock v. Walsh*, 3 Woods (U. S.) 351; *Clark v. State*, 7 Coldw. (Tenn.) 306; *Danolds v. State*, 89 N. Y. 36; 42 Am. Rep. 277; *Dabney v. Bank of S. Car.*, 3 S. Car. 167; and dissenting opinions of Justices Field and Harlan, in *Antoni v. Greenhow*, 107 U. S. 769, and *State v. Jumel*, 107 U. S. 711.

The right to sue which the State of

*Tennessee* once gave its creditors, was not in legal effect a judicial remedy for the enforcement of its contracts, and the obligation of its contracts was not impaired, within the meaning of the prohibitory clause of the United States Constitution, by taking away what was thus given. *Memphis, etc., R. Co. v. Tennessee*, 101 U. S. 337.

1. *Ex parte State*, 52 Ala. 231; *Horne v. State*, 84 N. Car. 362. See also *South & N. Ala. R. Co. v. Alabama*, 101 U. S. 832.

2. *Galbes v. Girard*, 46 Fed. Rep. 500; *Turner v. State*, 27 Ark. 337; *People v. Talmage*, 6 Cal. 256; *Sinking Fund Com'rs v. Northern Bank*, 1 Metc. (Ky.) 175; *Williams v. Register of West Tenn.*, Cooke (Tenn.) 218; *Chicago, etc., R. Co. v. State*, 53 Wis. 509; *State v. Stout*, 7 Neb. 89.

3. *Rose v. Governor*, 24 Tex. 496.

4. *Chicago, etc., R. Co. v. State*, 53 Wis. 509. In this case it is held that *Wisconsin Rev. Stats.*, § 3200, relative to suits against the state, applied only to claims, which, if allowed by the legislature, render the state a debtor to the claimant, and does not authorize an equitable action directly against the state to restrain it from perpetrating a threatened injustice.

5. *Ex parte Greene*, 29 Ala. 52.

6. *State v. Hill*, 54 Ala. 67; *Clark v. State*, 7 Coldw. (Tenn.) 306; *Green v. State*, 73 Cal. 29; *Todhunter v. State* (Cal. 1887), 14 Pac. Rep. 615.

the Union is not subject to suit in the Federal courts by its own citizens notwithstanding there may be involved a question under the Federal Constitution or laws.<sup>1</sup> But it has been adjudged recently that the General Government may sue a state in the Supreme Court.<sup>2</sup> In a suit, otherwise well brought, in which a state has sufficient interest to entitle it to become a party defend-

1. *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22. See *infra*, this title, *Eleventh Amendment to Constitution*.

2. U. S. v. *Texas*, 143 U. S. 621. The facts of this case were as follows: When the act was passed to provide a temporary government for the Territory of *Oklahoma*, in May, 1890, a question arose as to the boundary between the territory and the State of *Texas*. In the southwest corner of the tract, claimed by the United States as public land, and which it was proposed to erect into a territory, lay Greer county. The title to this land had always been in dispute, on account of the indefinite character of the boundary of the State of *Texas*. Congress, in order to quiet the title to the disputed tract, incorporated in the *Oklahoma* bill a section authorizing the attorney-general "to commence in the name and on behalf of the United States, and prosecute to a final determination, a proper suit in equity in the Supreme Court of the United States against the State of *Texas*, setting forth the claim and title of the United States to the tract of land . . . designated . . . as Greer county;" and directing that the case should be "advanced on the docket of said court, and proceeded with as rapidly as the nature and circumstances of the case permit." Acting on this authority, the attorney-general began suit, and the State of *Texas* put in a demurrer, claiming that the United States could not, under the Constitution, sue a state. The demurrer, however, was overruled, and Harlan, J., in speaking for the court, said: "We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies capable of judicial solution might arise be-

tween the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust, so momentous, be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice, and insure domestic tranquillity, have constituted with authority to speak for all the people and all the states, upon questions before it to which the judicial power of the nations extends?"

Referring to the exemption of a state from suit by individuals without its consent, and the reasons, the opinion continues as follows: "The question as to the suability of one government by another government rests upon wholly different grounds. *Texas* is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states. The submission to judicial solution of controversies arising between these two governments, each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The states of the Union have agreed in the Constitution that the judicial power of the United States shall extend to all cases arising under the Constitution, laws, and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, 'in which a state shall be a

ant, its appearance in a court of the United States is a voluntary submission to the jurisdiction;<sup>1</sup> but it is otherwise where the state expressly declines to become a party, and appears merely to protest against the exercise of jurisdiction by the court.<sup>2</sup> In suits against a state in the Supreme Court, service of process should be made on the governor and attorney-general,<sup>3</sup> and service on one only is not sufficient.<sup>4</sup> If the state neglects to appear after due notice, no coercive measures will be employed to compel appearance, but the complainant will be permitted to proceed *ex parte*.<sup>5</sup> The rules which govern courts of equity as to allowance of time for filing an answer, in suits between individuals, will not be applied by the Supreme Court in controversies between states.<sup>6</sup>

(2) *Eleventh Amendment to Constitution*.—Under the Federal Constitution as first adopted, the judicial power of the United States was construed to extend to a suit prosecuted against a state by a citizen of a sister state;<sup>7</sup> but the authority of the case so deciding was abrogated by the Eleventh Amendment, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or

party,' without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one state against another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a territory of the United States and that state, so far from infringing in either case upon the sovereignty, is with the consent of the state sued. Such consent was given by *Texas* when admitted into the Union upon an equal footing in all respects with the other states. We are of the opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and *Texas*." Mr. Chief Justice Fuller and Mr. Justice Lamar dissented.

1. *Clark v. Barnard*, 108 U. S. 436.

2. *Georgia v. Jesup*, 106 U. S. 458.

3. *Chisholm v. Georgia*, 2 Dall. (U. S.) 419; *Grayson v. Virginia*, 3 Dall. (U. S.) 320; *New Jersey v. New York*, 3 Pet. (U. S.) 461; 5 Pet. (U. S.) 284; *Kentucky v. Dennison*, 24 How. (U. S.) 66.

Subpoena in an equity suit against a state was held to have been well served upon the governor by leaving a copy at his house, and then showing the original to the secretary of state. *Hu-*

*ger v. South Carolina*, 3 Dall. (U. S.) 339.

And in a suit by one state against another, service of the process of the Supreme Court sixty days before the return day is a sufficient service in point of time. *New Jersey v. New York*, 5 Pet. (U. S.) 284.

4. *New Jersey v. New York*, 3 Pet. (U. S.) 461.

5. *Massachusetts v. Rhode Island*, 12 Pet. (U. S.) 755. And in this case it was further decided that proceeding *ex parte* will likewise be allowed where appearance is withdrawn.

A demurrer filed in a case by the attorney-general of a state, who is a practitioner of the court, is considered as an appearance for the state. *New Jersey v. New York*, 6 Pet. (U. S.) 323.

**Judgment by Default.**—Judgment may be entered against a state for default of appearance. *Oswald v. New York*, 2 Dall. (U. S.) 415; *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.

6. *Rhode Island v. Massachusetts*, 13 Pet. (U. S.) 23. In this case the State of *Massachusetts* was allowed one year to put in an answer to the amended bill of the State of *Rhode Island*. The reason assigned for the indulgence was that states, in the nature of things, were incapable of acting with the promptness of individuals.

7. *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.



equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.”<sup>1</sup> The words “commenced” and “prosecuted” are construed as not only preventing the institution of new suits, but also as superseding depending suits.<sup>2</sup> The inhibition applies only to citizens or subjects, and does not extend to suits by a state, or by foreign states or powers.<sup>3</sup> But one state cannot create a controversy with another state so as to bring the case within the jurisdiction of the United States courts by assuming the prosecution of debts owing by the other state to its citizens.<sup>4</sup>

The doctrine once held by the United States Supreme Court, that whether or not a suit is against the state must be determined by the fact whether or not the state is the nominal defendant of record,<sup>5</sup> has been qualified in some of the later decisions of that court, and now it is settled that whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the whole case.<sup>6</sup> A suit against the

1. The decision in *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, gave rise to the Eleventh Amendment. It is obvious that the framers of the Constitution did not suppose that the grant of the judicial power of the United States to cases “between a state and citizens of another state” gave the right to these parties to sue the state. Its object was to give to the state power and authority to sue these parties, and to the Federal courts jurisdiction over such causes. See 81st article of the *Federalist* (by Alexander Hamilton); and 3 *Elliott's Debates* (Va. Const. Convention), 2d ed. 533, containing the arguments of Madison and Marshall, the latter maintaining that it was irrational to put any other construction upon the grant than the above. But notwithstanding this, the United States Supreme Court, in the case just cited, did put this irrational construction upon it, and hence the necessity for this amendment to give to it the true construction, for it will be observed that the amendment declares that the judicial power, etc., shall not be construed to extend to such cases, thus showing that in the opinion of the people and of Congress an improper construction had been given it.

2. *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378.

3. 1 *Kent's Com.* (13th ed.), p. 297; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *New Jersey v. New York*, 5 Pet. (U. S.) 284.

4. *New Hampshire v. Louisiana*, 108 U. S. 76; *New York v. Louisiana*, 108 U. S. 76.

5. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738. The opinion in this case was delivered by Marshall, C. J., in the course of which he observed: “It may, we think, be laid down as a general rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a state by citizens of another state or by aliens.” This is followed in *Louisville, etc., R. Co. v. Letson*, 2 How. (U. S.) 497. And in *Davis v. Gray*, 16 Wall. (U. S.) 203, following *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738, it was held that in deciding who are the parties to the suit, the court will not look beyond the record: making a state officer a party does not make the state a party, although its law may have prompted his action, and the state may stand behind him as the real party to the record.

6. *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446; *Chicago, etc., R.*

officers of a state to compel them to do acts which constitute a performance by the state of its contract, is, in effect, a suit against the state itself;<sup>1</sup> and the converse of this proposition must be equally true, viz., that it is a suit against the state to seek to

*Co. v. Dey*, 35 Fed. Rep. 866; *In re Ayers*, 123 U. S. 443; *Pennoyer v. McConnaughy*, 140 U. S. 1. In *New Hampshire v. Louisiana*, 108 U. S. 76, there was upon the face of the record nominally a controversy between two states, which, according to the terms of the Constitution, was within the judicial power of the United States. So far as could be determined with reference to the parties named in the record, the suits were within the jurisdiction of the Supreme Court, but on examination of the cases as stated in the pleadings, it appeared that the state which was plaintiff was suing not for its own interest and use, but for the use and on behalf of certain individual citizens thereof, who had transferred their claims to the state for the purposes of suit. It was accordingly unanimously held by the court that it would look behind and through the nominal parties on the record to ascertain who were the real parties to the suit.

In *Poindexter v. Greenhow*, 114 U. S. 270, the following were suggested as tests for determining when a suit would be considered as brought against the state. That would be a suit against the state: (1) Where the state is named as a party on the record. (2) Where the action is brought directly upon the state's contract. (3) Where the suit is brought to control the discretion of an executive officer of the state. (4) Where the suit is brought for the purpose of administering funds actually in the public treasury. (5) Where the suit is in effect an attempt to compel officers of the state to do acts which constitute a performance of its contract by the state. (6) Where the suit brought is such that the state is a necessary party in order that the defendant may be protected from liability to it.

1. *Pennoyer v. McConnaughy*, 140 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22; *Louisiana v. Steel*, 134 U. S. 230; *Louisiana v. Jumel*, 107 U. S. 746. This was a case of mandamus and injunction against officers of the State of *Louisiana*, constituting the state board of liquidation, to compel

them to carry out a contract with the state for the payment of coupons on its bonds repudiated by a subsequent constitutional amendment, and to apply funds in the treasury already collected, to the redemption of bonds contracted to be redeemed, and to execute generally the act embodying the contract. The court denied relief on the ground that it was an attempt to control the discretion of the state's executive officers and to compel them to do acts constituting a performance of the state's contract, and to administer funds actually in the public treasury.

The principle of this case was applied in *Hagood v. Southern*, 117 U. S. 52. The object of the suit, which was against officers of the State of *South Carolina*, was to obtain on behalf of the complainants by judicial process, the redemption by the state of certain scrip of which they were holders, but the relief sought was denied, and the identification of officers of the state with the state itself is thus expressed: when a suit is brought in a court of the United States against officers of a state, to enforce performance of a contract made by the state and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the state, and the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the state, the state is the real party against whom the relief is sought, and the suit is substantially within the inhibition of the Eleventh Amendment.

An exhaustive treatment of the subject is to be found in *In re Ayers*, 123 U. S. 443, and *Matthews, J.*, in delivering the opinion of the court, said: "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting the state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union invested with that large residuum of sovereignty which had not been delegated to the

restrain state officers by judicial process from doing acts required of them by state laws, which, when performed, would constitute a breach of the state's contract.<sup>1</sup>

There are certain cases, however, in which the state, though affected by the decision, is not a necessary party so as to defeat jurisdiction. Thus, the court will take jurisdiction against individuals sued in tort for acts injurious to the persons or property of others, although their defense is that they acted under the orders of government;<sup>2</sup> the court will enforce the performance

United States, should be summoned as defendants to answer the complaint of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment, requires that it should be interpreted not literally and too narrowly, but fairly and with such breadth and largeness as to effectually accomplish the substance of its purpose. In this spirit it must be held to cover not only suits brought against a state by name, but those also against its officers, agents and representatives where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law and the act to be done or omitted is purely ministerial in the performance or omission of which the plaintiff has a legal interest."

1. *In re Ayers*, 123 U. S. 443. This case came before the U. S. Supreme Court on *habeas corpus*, on the petition of the attorney-general of the state of Virginia, who was committed for contempt for disobedience of a restraining order of the circuit court of the United States for the eastern district of Vir-

ginia. The order was made by way of final decree on a bill in equity filed by aliens against the attorney-general, auditor, and other officers of the state, to restrain them from instituting and prosecuting in the name and for the use of the state, as required by a statute of the state, suit against certain parties who, in payment of taxes, had tendered coupons of a class already adjudged by the supreme court to be receivable for taxes under a prior contract of the state. The petitioner was released on the ground that the suit in which the restraining order had issued was in effect against the state.

2. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738. was a suit in equity brought in the circuit court of the United States for the State of Ohio by the president, directors and company of the Bank of the United States to restrain Osborn, auditor of the State of Ohio, from executing a law of that state which was in violation of, and destructive to, the rights and privileges conferred upon the complainants by the bank's charter and by the Federal Constitution. One of the leading enquiries in the case was, whether an injunction could be issued to restrain a person who is a state officer from performing an official act enjoined by the statute of the state. The question presented by that enquiry was discussed on the assumption that the statute of the state was unconstitutional, and it was held that in such a case, grounds of equity interposition existing, injunction would lie. With regard to the objection that if any case was made by the bill for the interference of chancery, it was against the State of Ohio, and therefore was within the prohibition of the Eleventh Amendment, the court held that exemption of the state from suit could not be pleaded by its officers, when they were proceeded against for executing an unconstitutional law of the state. This

question was discussed most thoroughly in the light of the other provisions of the Constitution relating to jurisdiction of the Federal courts, and the conclusion arrived at thus announced: "It was proper then to make a decree against the defendants in the circuit court, if the law of the State of *Ohio* be repugnant to the Constitution or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took or to those who received the money for which the suit was instituted." The statute of *Ohio* in which the defendant was acting was then examined and was found to be unconstitutional.

The doctrine as thus declared has never been departed from, but on the contrary has been recognized and enforced in a number of cases. Thus in *Pennoyer v. McConnaughy*, 140 U. S. 1, it was held that a suit in equity against the board of land commissioners of the State of *Oregon* brought by a purchaser of swamp and overflowed lands, under the act of October 26, 1870, in order to restrain the defendants from doing acts which the bill alleges are violative of the plaintiff's contract with the state when he purchased the lands, and which are unconstitutional, destructive of the plaintiff's rights and privileges, and which it is alleged will work irreparable damage to his interest and property rights so acquired, is not a suit against the state within the meaning of the Eleventh Amendment to the Constitution of the United States. And *Hancock v. Walsh*, 3 Woods (U. S.) 351; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods (U. S.) 223; *Preston v. Walsh*, 10 Fed. Rep. 315; *Pick v. Chicago & N. W. R. Co.*, 6 Biss. (U. S.) 177; *Chicago, etc., R. Co. v. Dev*, 35 Fed. Rep. 866. are to the same effect.

The most notable application of the principle is found in the *Virginia* coupon cases (so called), reported in 114 U. S. 270 *et seq.* The first and leading case is *Poindexter v. Greenhow*, 114 U. S. 270, which was an action in detinue against the treasurer of the city of *Richmond, Virginia*, for the recovery of an office desk which he had seized for delinquent taxes in payment for which the plaintiff had duly tendered coupons cut from bonds issued by the State of *Virginia*, under the funding act of March 30, 1871, and

by that act made receivable for all state taxes. The defendant, under color of office as tax collector and acting in the enforcement of the statutes passed in 1882, which forbade the receipt of coupons for taxes, refused to receive such tender and made the seizure complained of. It was held that the act of the general assembly passed in 1882 was unconstitutional and void, because it was an impairment of the contract entered into between the state and its bondholders by the act of 1871; that being unconstitutional it afforded no protection to the defendant, that the action was properly maintainable against him as a wrongdoer, and that it was not an action against the state in the sense of the Eleventh Amendment. The whole question was discussed by Mr. Justice Matthews, both on principle and authority, and the following from the opinion of the court delivered by Mr. Justice Miller in *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, quoted with approval: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to persons or property, to which his defense is that he has acted under orders of the government. In these cases he is not sued as or because he is the officer of the government but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 309; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311, were decided at the same time as the foregoing case and upon the authority thereof.

The first and second of these cases were actions of trespass *de bonis asportatis* for offenses of a character like that of *Poindexter v. Greenhow*, 114 U. S. 270; in the third, an injunction was granted to prevent the state auditor from seizing certain personal property of the complainant in satisfaction of taxes alleged to be due, for the payment of which the railroad company had tendered tax-paying coupons.

**Ex parte Ayers and Virginia Coupon Cases Distinguished.** — In *Ex parte Ayers*, 123 U. S. 443, it was sought to prevent state officers from instituting suits as required by a valid state law, and the action was not maintainable. This is

and enjoin the violation of ministerial duties of such officers;<sup>1</sup> the court will determine the rights of the parties to suits as to

quite different from bringing against the officer a bill for injunction to preserve, or detain to restore, the *status quo*, or trespass for unwarranted interference with property under color of an unconstitutional law, which were allowed in *Virginia* Coupon cases. This distinction is expressed by Bradley, J., in delivering the opinion of the court in *McGahey v. Virginia*, 135 U. S. 662, as follows: "No proceedings can be instituted by any holder of state bonds or coupons against the Commonwealth of *Virginia*, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the state. Any lawful holder of the tax receivable coupons of the state issued under the act of 1871, or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues, and demands due from him to the state, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues, or demands, and may vindicate such right in all lawful modes of redress—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking, where it would be attended with irremediable injury, or by a defense to a suit brought against him for his taxes or other claims standing against him."

1. But in all such cases, from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial and must involve no element of discretion to be exercised by the officer. It has, however, been insisted that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with the plaintiff's rights in the premises. Perhaps the strongest assertion of this doctrine is found in *Davis v. Gray*, 16 Wall. (U. S.) 203. In that case the State of *Texas* having made a grant of the al-

ternate sections of land, along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the land commissioner and the governor of the state were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court of the United States enjoined them from doing this by its decree, which was affirmed in the supreme court. Judge Hunt did not sit in the case and Justice Davis, and Chief Justice Chase dissented on the ground that it was a suit against the state. Referring to this case, Mr. Justice Miller, in the opinion of the court in *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, observes "that in enjoining the governor of the state in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further." But at the same time, he points out that in the case no affirmative relief was granted, and that the governor and land commissioner were not compelled to perform any act towards perfecting the title of the company, and this may perhaps be regarded as the saving feature of the decision; for in *McCauley v. Kellogg*, 2 Woods (U. S.) 13, it was held that a suit to compel state officers to do any affirmative official act, is in effect a suit against the state; and it is there said that a Federal court will not take upon itself to administer a state government.

In *Board of Liquidation v. McComb*, 92 U. S. 531, the board was charged by a statute of *Louisiana* with certain duties in regard to issuing new bonds of the state in place of old ones which might be surrendered for exchange by the holders of the latter. The amount of new bonds to be issued was limited by a constitutional provision. *McComb*, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would be rendered less valuable. The Supreme Court

property of the state, or property in which the state has an interest, so long as it is not necessary to take property forcibly from the possession of the government.<sup>1</sup>

And the fact that a state is interested in a bank in the capacity of sole proprietor,<sup>2</sup> or indeed in that of corporator and stockholder

affirmed the decree of the circuit court enjoining the board from exceeding its power in taking up by the new issue a class of such indebtedness not within the provision of the law on that subject. In the opinion in that case the following language used by Mr. Justice Bradley well expresses the rule and its limitations: "The objections to proceeding against state officers by mandamus or injunction are: first, that it is in effect proceeding against the state itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A state, without its consent, cannot be sued as an individual; and a court cannot substitute its discretion for that of its executive officers in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." See also *Rolston v. Crittenden*, 120 U. S. 390.

It is believed that this is as far as the Supreme Court of the United States has gone in granting relief in this class of cases. *Louisiana v. Jumel*, 107 U. S. 746, and *Elliott v. Wiltz*, 107 U. S. 711. In the first of these cases the owners of the new bonds mentioned in *McComb's* case just cited, brought their bill in equity in the circuit court of the United States to compel the state auditor and treasurer to pay out of the state treasury the overdue interest coupons upon their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of the government. They at the same time applied to the state court for a writ of mandamus to the same officers, which

suit was removed into the circuit of the United States. In this they asked that these officers be commanded to pay out of the moneys in the treasury the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose for others by the officers of the government. The circuit court refused the relief asked in the case, and the Supreme Court affirmed the judgment of that court.

1. In *U. S. v. Peters*, 5 Cranch (U. S.) 115, a mandamus was required to be issued to the representatives of Rittenhouse, treasurer of the State of *Pennsylvania*, commanding them to pay to certain libellants the proceeds of the sale of a vessel to which it had been adjudged that the latter were entitled. And it was then said that the state treasurer or his representatives, sued individually for the detention of funds, could not shield themselves behind the state's exemption from suit, when the funds were never in the state's possession. And in *Clark v. Barnard*, 108 U. S. 436, the State of *Rhode Island*, appearing as claimant to a fund in court, assignees in bankruptcy of other parties claiming the fund were permitted to file a bill in chancery against the treasurer of the state to restrain him from collecting the same.

But on the other hand, where a libel and claim exhibited a demand for money actually in the state treasury, and for property in the possession of the government, acquired by lawful means, the courts of the United States have no jurisdiction, under the Eleventh Amendment. *Sundry African Slaves v. Madrazo*, 1 Pet. (U. S.) 110.

2. *Bank of Kentucky v. Wistar*, 2 Pet. (U. S.) 318; *Briscoe v. Bank of Ky.*, 11 Pet. (U. S.) 257.

**Subrogation to Rights of a State.**—The State of *Alabama* indorsed the bonds of a railroad company and was indemnified against loss on account of the indorsement by a statutory mortgage on the company's property. It was held that the fact of the state's

combined,<sup>1</sup> does not have the effect of making a suit against the corporation a suit against the state.

In one instance it was contended that a case brought on writ of error or appeal to the Supreme Court from a lower court, where the state had been plaintiff, and the plaintiff in error defendant, was, under the Constitution, a suit against the state, but the contention was negated by a unanimous court.<sup>2</sup>

**3. Set-Off Against a State**—(See also SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 22, p. 272).—The preponderance of authority is to the effect that a set-off cannot be maintained against a state, in the absence of express consent, for the same reasons that forbid an original suit.<sup>3</sup> But it seems that the defendant may plead and prove all matters properly defensive, so far as they are dependent on, connected with, or grow out of, the

immunity from suit was no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state, and have the benefit of the security. *Young v. Montgomery, etc., R. Co.*, 2 Woods (U. S.) 606.  
1. *Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 904.

2. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264.

3. *People v. Miles*, 56 Cal. 401; *White v. Governor*, 18 Ala. 767; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *State v. Northern Cent. R. Co.*, 18 Md. 193; *People v. Dennison*, 84 N. Y. 272; *People v. Corner*, 59 Hun (N. Y.) 299; *Com. v. Matsack*, 4 Dall. (Pa.) 303; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372; *Borden v. Houston*, 2 Tex. 594; *State v. Leckie*, 14 La. Ann. 636; *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673.

*Chevallier v. State*, 10 Tex. 315, was a suit by the state on a written acknowledgment of indebtedness to the Republic of Texas. In sustaining a demurrer to a plea by way of set-off of certain claims against the state, the court, by Hemphill, C. J., observed: "It is only necessary to refer to the admitted principle that no action can be instituted on a claim against the government at the instance of an individual, either directly, or indirectly by way of set-off, unless by the sanction of express law to that effect."

In *Wait's Actions and Defenses*, vol. 7, p. 477, it is said: "And it is laid down as a rule that a claim is available in set-off at law only when it is a debt on which the defendant could maintain an action at law against the

plaintiff." See generally SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 22, p. 209.

And in *Battle v. Thompson*, 65 N. Car. 406, it was held that a party sued on a single bill, payable to the state treasurer, given for cotton sold by that officer, could not plead by way of set-off to the action, valid coupons, taken from the bonds of the state. And *Pearson. C. J.*, speaking for the court, said: "The test of a set-off or counterclaim under the statute is this: could the defendant maintain an action against the plaintiff? Tried by this test the defense fails, for a citizen cannot maintain an action against the state."

In *Bates v. The Republic*, 2 Tex. 616, it was said that a set-off, though not denominated a suit, is in the nature of a cross-action. Being then but another name for an action, it cannot be instituted or set up against the government without its consent. The proposition that the government is above the reach of judicial authority by direct action, but within its control and coercive power by indirect suit, is a solecism and absurdity in its very terms.

The drawer of a bill of exchange, accepted by the drawees for his accommodation, and by the drawer delivered to the state in payment for a debt owed by him to it, cannot maintain a bill in chancery against the state and the acceptors to set off against the demand of the state an indebtedness by it to him growing out of a distinct transaction. *Raymond v. State*, 54 Miss. 562; 28 Am. Rep. 382.

A sheriff and *ex officio* tax collector is not entitled to deduct from amounts

transaction which constitutes the subject-matter of the suit; this, however, is distinguishable from set-off, and is on the ground that the claim is in the nature of a payment or credit or recoupment to which the defendant is entitled, and that the demand of the state is in fact for the balance.<sup>1</sup> In some of the states, there are statutes authorizing set-off to be employed in actions by the state, but a defendant must, in order to avail himself of the privi-

due the state for taxes and licenses collected by him, the cost of deeds and copies charged to the state in cases of purchases of lands sold for taxes and bought by the state. Such a demand is reconventional in character, and in the absence of statute is not pleadable against the state. *State v. Bradley*, 37 La. Ann. 623.

And in *Tennessee* it is held that a sister state, when plaintiff in the courts of that state, will be allowed the same exemption from set-off that the State of *Tennessee* enjoys when plaintiff. *Moore v. Tate*, 87 Tenn. 725; 10 Am. St. Rep. 712.

**Contra Cases.**—There are cases in which a defendant has been permitted to plead a set-off against the state's demand. Thus, in *Powers v. Central Bank*, 18 Ga. 658, it was held that an attorney who has collected money for a bank whose assets have been transferred to the state treasury, upon being ruled by the bank for the amount in his hands, may plead by way of set-off, a sum due him from the state for professional services which has been audited and liquidated.

And in *Harlan v. Lumsden*, 1 Duv. (Ky.) 86, it is held that the sheriff's claim on his deputy is a chose in action on which the commonwealth, having obtained judgment against the sheriff, has a lien; but where the deputy is also surety of the sheriff, and has been compelled as such to pay money for the latter before the commonwealth's lien attached, the sum so paid is a valid set-off against the commonwealth. But the court says, had the deputy made the payment after the lien upon his debt to the sheriff attached in favor of the commonwealth, it is doubtful whether such payment would give him a valid set-off against the commonwealth.

*State v. Gaillard*, 1 Bay. (S. Car.) 500, is very brief and seems to rest upon an amercement act which it is impossible to understand from the meager reference to it. In the opinion

there is no discussion and no authority cited. It is virtually a set-off allowed against the state, however.

This case, though not referred to, is virtually overruled by *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372.

In *State v. Franklin Bank*, 10 Ohio 91, set-off was maintained against the state. But this was an agreed case, where the state, by its attorney, consented to try the question of set-off to the claim for taxes.

*Com. v. Owensboro, etc.*, R. Co., 81 Ky. 573, has been supposed to be a *contra* case, and the court does say, that "when the state undertakes to litigate with a citizen the latter may, by way of set-off or counterclaim, make such defense as will defeat the recovery, but is not entitled to a judgment over against the state in the absence of some legislative enactment authorizing the recovery." But the case contains no discussion of the question of set-off and cites no authority; it is simply a suit for taxes, and it was adjudged that no taxes were due, so that at best the observation is a mere *dictum*.

Nor can *Sinking Fund Com'rs v. Northern Bank*, 1 Metc. (Ky.) 174, be properly placed in the category of *contra* cases.

It is true that the defendant was permitted to plead a set-off, but the case was not a suit by the state, but by a corporation created by the state subject to sue and be sued. (See *Com'rs of Sinking Fund v. Theobald*, 17 B. Mon. (Ky.) 476.) And even had the suit been by the state, the set-off interposed was that of an incumbrance on the property bought by the defendant. It grew out of the same transaction and would have been admissible under the doctrine of the cases cited in the note next succeeding in reference to credits, etc.

1. *Raymond v. State*, 54 Miss. 562; 28 Am. Rep. 382; *Battle v. Thompson*, 65 N. Car. 406. See also *Moore v. Tate*, 87 Tenn. 725; 10 Am. St. Rep. 712.



lege, strictly comply with the requirements of the statute. Thus, if the requirement that the claim shall be presented to a certain state officer for his examination and allowance does not appear to have been conformed to, the claim will not be available in set-off.<sup>1</sup>

**VI. PRIORITY OF STATE AS CREDITOR**—(See also DEBTS OF DECEDENTS, vol. 5, p. 206; UNITED STATES).—In nearly all of the states there are statutes giving preference to taxes, rates, and other debts due the state over the debts of the citizens;<sup>2</sup> but in one instance, the statute directs that debts due the state shall be paid last.<sup>3</sup> Whether a state, in the absence of positive enactment, is entitled to the priority claimed by the crown under the common law, appears to be not well settled.<sup>4</sup> The language "debts due to the public" in a statute giving priority to the state

1. *Biscoe v. State*, 19 Ark. 559. And the same is true when it is made a condition precedent that the claim shall be presented to a certain officer for his examination and by him disallowed in whole or in part. *Frier v. State*, 11 Fla. 300.

2. See various state statutes.

3. *Bright* *Purd. Dig.* (Pa.), p. 525, § 94. Unless secured by judgment. *Ramsey's Appeal*, 4 Watts (Pa.) 73.

4. See 16 Albany L. J. 298.

*Maryland*.—The priority of the state in the payment of its claim against a debtor was recognized and enforced in *Maryland* as early as 1787 in *State v. Rogers*, 2 Har. & M. (Md.) 198. And again in *Murray v. Ridley*, 3 Har. & M. (Md.) 171.

The same question arose in *Contee v. Chew*, 1 Har. & J. (Md.) 417, and this right of the state was again announced. And in *Smith v. State*, 5 Gill (Md.) 45, it was held that as between the state and the other general creditors of a deceased debtor, whose lands were sold for the payment of debts in consequence of the insufficiency of his personal property, neither having a lien, the state is entitled to priority of payment out of the proceeds thereof over such other creditors. Again, in *Green's Estate*, 4 Md. Ch. 349, two judgments were rendered against a party contemporaneously, one at the suit of the state, the other at the suit of a private citizen, that of the state standing first upon the docket, and priority was given to it. And it was there said that whenever the state and a citizen have claims in equal degree and a conflict arises by death or act of the party, not having enough to pay his debts, the claim of the citi-

zen must yield to the right of the state.

The subject is treated at considerable length in the opinion of the court in *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; 26 Am. Dec. 561, delivered by Buchanan, C. J., and the conclusion arrived at is in favor of the state's priority as a prerogative right derived from the common law, entitling it to be first paid, except where some antecedent lien stands in the way. And this was followed in *Orem v. Wrightson*, 51 Md. 34; 34 Am. Rep. 286.

The priority of the state is lost, however, by a valid assignment of the debtor's (in this case a banking corporation's) property in trust for the equal benefit of all his creditors and the state can only come in with the other creditors. *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; 26 Am. Dec. 561. But where the state and other parties are creditors under the same bond of the same party, who has conveyed his property by deed of trust to indemnify his sureties on the bond, the state by virtue of its prerogative is entitled to priority of payment out of the proceeds of the property sold by the trustee in the deed under the direction of a court of equity. *State v. Mayor, etc., of Baltimore*, 10 Md. 504. See the opinion in this case for the grounds upon which it is distinguished from the case just preceding.

If a judgment be obtained against one in his lifetime, his executor or administrator is bound to satisfy it in preference to a debt passed to the state after such judgment. *Hollingsworth v. Patten*, 3 Har. & M. (Md.) 126.

Under *Maryland Rev. Code*, art.

as a creditor, does not comprehend a debt due to an incorporated bank, notwithstanding the entire interest in the corporation is owned by the state;<sup>1</sup> but it is otherwise in the case of a debt due by a surety, at the time of his death, on a county treasurer's bond for a default of his principal.<sup>2</sup> It has been held that a state does not lose its general priority in cases to which it is entitled by law, by taking special security.<sup>3</sup>

**VII. STATE BONDS.**—Parties dealing in the bonds of a state must rely upon the sense of justice and good faith of the state, the judiciary of the state not being authorized to enforce them, without the consent of the state, and the Federal courts being expressly prohibited from exercising such a jurisdiction.<sup>4</sup> Bonds of a state issued for a purpose contrary to the United States Constitution are not a valid consideration for a promissory note, and this is not altered by the fact that they were employed as a circulating medium in the state.<sup>5</sup> And bonds which constitute a debt in excess

64, § 36, the state has a lien on the lands of a person indebted to it from the commencement of a suit for such indebtedness. Under the similar act of 1779, ch. 9, it was held in *Davidson v. Clayland*, 1 Har. & J. (Md.) 546, that if the lands of a debtor be sold under a *fiери facias*, issued on a judgment obtained by an individual before the commencement of suit by the state, the surplus money remaining in the hands of the sheriff after satisfying such prior lien is subject to attachment issued on its judgment by the state, in preference to a prior attachment issued by a private creditor on a judgment rendered at the same term. See also *Jones v. Jones*, 1 Bland Ch. (Md.) 446; 18 Am. Dec. 327; *Hodges v. Mullikin*, 1 Bland Ch. (Md.) 515. This lien, however, is for the benefit of the state alone and cannot be called into action to subserve the purposes of an individual who institutes a suit against one bound only nominally as a debtor of the state, but in reality upon a contract intended to operate as a mere private security. *Ridgely v. Iglehart*, 3 Bland Ch. (Md.) 544.

**South Carolina.**—Com'rs of Pub. Accounts *v. Greenwood*, 1 Desaus. (S. Car.) 450, denied that the general common law prerogative of the king to be paid in preference to his subjects had any application to the state. And in *State v. Harris*, 2 Bailey (S. Car.) 598, it was held that the priority of the state applied only to such demands as constituted specific liens, as taxes, for instance. And in *Klinck v. Keckley*, 2 Hill Eq. (S. Car.)

250, the common law right of the state to priority was denied, and it was said that the right depended altogether on the statute law of the state.

**Georgia.**—The sovereign right of the state to priority of payment out of the effects of an insolvent, is based upon the common law and was adopted by the act of 1784, which introduces into the jurisprudence of *Georgia* the whole body of the common law, not inconsistent with the new frame of government, and subject, of course, to legislative modification. It does not exist here, however, with all the incidents of the royal prerogative right in *England*; we have not the writ of protection, nor the extent in chief, nor in aid; the priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid where the individual creditor has no antecedent lien overreaching it. *Robinson v. Bank of Darien*, 18 Ga. 65.

**Virginia.**—In *Leake v. Ferguson*, 2 Gratt. (Va.) 419, and *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57; 4 Am. Dec. 488, the right was doubted.

1. *Bank of South Carolina v. Gibbs*, 3 McCord (S. Car.) 377. And so with the phrase "debts and arrearages due the state." *Fields v. Wheatley*, 1 Sneed (Tenn.) 351.

2. *Baxter v. Baxter*, 23 S. Car. 114.

3. *Lenoir v. Winn*, 4 Desaus. (S. Car.) 65; 6 Am. Dec. 597.

4. *Bank of Washington v. Arkansas*, 20 How. (U. S.) 530. See also *supra*, this title, *Actions Against a State*.

5. So decided in the case of bonds

of the amount which a state may constitutionally create, are void.<sup>1</sup> When a state borrows money on bonds issued by it for that purpose and pledges a certain fund for the payment of the interest to accrue thereon, such pledge is a part of the contract with the holders of the bonds, and the diversion of the fund to other purposes is an impairment of the contract, and prohibited by the Federal Constitution.<sup>2</sup> And when a state issues bonds with coupons receivable "at and after maturity for all taxes, debts, dues, and demands due the state," a subsequent act of the state forbidding the receipt of the coupons for such purposes impairs the obligation of the contract and is void.<sup>3</sup> An offer on the part of a state to issue new bonds for all its valid outstanding bonds, whenever the holders thereof choose to accept the terms on which the exchange is to be made, is, before acceptance, not a contract, but a mere proposal, which may be withdrawn.<sup>4</sup> A *bona fide* holder of invalid state bonds is not entitled to the benefit of a scheme of compromise which the state offers to holders of its securities that were valid in the hands of the first takers.<sup>5</sup> No recovery can be had on state bonds negotiable in form, even in favor of innocent holders, into whose hands they came, after having been fraudulently reissued from the treasurer's office.<sup>6</sup> But if the legislature recognizes the legality of bonds, which have been put into circulation improperly, upon condition that certain secu-

of the state of *Arkansas*, issued for the purpose of aiding the Southern cause in the war between the states. *Hanauer v. Woodruff*, 15 Wall. (U. S.) 439.

1. By an amendment to the constitution of *Louisiana*, adopted in 1870, no debt could be created for twenty years, which, added to the then existing state debt, would swell the total above a certain amount; in 1871, after the limit had been reached, certain bonds were authorized to be issued by an act of the legislature, which act, and the bonds issued thereunder, were adjudged void. *Williams v. Louisiana*, 103 U. S. 637.

**Indorsement of State Bonds—Effect of.**—Where a railroad company put on the market and sold bonds of a state indorsed by the company with its certificate that the state held the first mortgage bonds of the company for a like amount as security to the holder, it was held that although the state was not liable upon its bonds because they were unconstitutional, this certificate was equivalent to an acknowledgment by the company that the bonds, so far as the security was concerned, were valid obligations of the state. *Florida Cent. R. Co. v. Schutte*, 103 U. S. 118. See also *Tompkins v. Little Rock*, etc.,

*R. Co.*, 15 Fed. Rep. 6; *Williams v. Little Rock*, etc., *R. Co.*, 18 Fed. Rep. 344.

2. Under an act of the legislature of *South Carolina* (14 Stat. at L. 385), bonds of the state were issued to raise money to be used in the purchase of land to be sold to settlers thereon, and the interest on the purchase money of the lands when sold, to be applied by the treasurer of the state to the payment of the interest on the bonds issued under the act. It was held that the act constituted part of the contract between the state and the holders of the bond, and that the state had no right to divert the fund arising from the interest on the purchase money of the land from the payment of the interest on the bonds. *State v. Cardozo*, 8 S. Car. 71; 28 Am. Rep. 275. See also *supra*, this title, *Contracts*.

3. *Antoni v. Greenhow*, 107 U. S. 769; *Poindexter v. Greenhow*, 114 U. S. 270; *Royall v. Virginia*, 116 U. S. 572.

4. *Durkee v. Board of Liquidation*, 103 U. S. 646.

5. *New York Guaranty, etc., Co. v. Board of Liquidation*, 105 U. S. 622.

6. *Pugh v. Moore* (La. 1892), 10 So. Rep. 710; *Herwig v. Richardson* (La. 1892), 11 So. Rep. 135.

rities shall be given, and directs that they may be sold in open market, the state may not afterwards repudiate them.<sup>1</sup> When a state lends its own bonds, taking back security for their payment, the presumption is strong that it intends, by means of such security, to indemnify itself against loss by reason of the loan of its credit, rather than to protect those who may subsequently become holders of such bonds against the consequences of its own repudiation or inability to pay.<sup>2</sup>

**VIII. STATE BOUNDARIES.**—(See also JURISDICTION, vol. 12, p. 244; BOUNDARIES, vol. 2, p. 495.)

The right of the several states of the Union to establish and fix the disputed boundaries between their respective limits is recognized by the Constitution, and is guarded in its exercise by a single limitation or restriction, requiring the consent of Congress; and the boundaries so established and fixed by compact, become conclusive upon all the citizens of the states concerned, and bind their rights.<sup>3</sup>

The Supreme Court of the United States has jurisdiction of a bill filed by one state against another to ascertain and establish the boundary between them;<sup>4</sup> and this jurisdiction is not defeated because in deciding that question the court must examine and

1. *Butler v. Dubois*, 29 Ill. 105.

2. *Stevens v. Memphis, etc., R. Co.*, 114 U. S. 663. In this case this presumption was held to be supported by certain provisions of the statutes under which the bonds were issued, and it was decided that the statutory lien with which the State of Tennessee was invested, upon the issue of its bonds to railroad companies under the "Internal Improvement Acts," was created solely for the state's security, and the holders of the bonds are not entitled to the benefit thereof. *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, was upon statutes and facts similar to the case just preceding, and it was held that where a state has loaned its bonds to a corporation, and received a conveyance of lands as indemnity, the bondholders have no equity for the application of the lands in the hands of the state's grantees to the payment of the bonds.

3. The constitution declares that no state shall, without the consent of Congress, enter into any agreement or compact with another state. U. S. Const., art. 1, § 10, cl. 3. Thus admitting that with such consent it may be done. *Poole v. Fleeger*, 11 Pet. (U. S.) 185; *Rhode Island v. Massachusetts*, 11 Pet. (U. S.) 226. And the requisite consent of Congress to an agreement between two states fixing

their boundaries may be given subsequently, or may be implied from subsequent action of Congress itself towards the states, and the agreement, when thus made and thus assented to, is valid. *Virginia v. Tennessee*, 148 U. S. 503. See *infra*, this title, *Compacts Between States*.

This provision is obviously intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states which might affect injuriously the interests of the others. And the right and duty to protect these interests are vested in the general government. Accordingly, where a bill is filed by one state against another to establish a disputed boundary, the attorney-general of the United States, on his application, may intervene and appear in behalf of the United States and adduce evidence, and be heard in argument, without making the United States a party in the technical sense of the term. He will, however, have no right to interfere in the pleading, or evidence, or admissions of the states, or either of them. The judgment can be neither for nor against the United States. *Florida v. Georgia*, 17 How. (U. S.) 478.

4. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Florida v. Georgia*, 17 How. (U. S.) 478; *Virginia v. West*

construe compacts or agreements between the states concerned, or because its decision may affect the territorial limits of the political jurisdiction and sovereignty of those states.<sup>1</sup>

When a river is the boundary between two states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream; but when one state is the original proprietor and grants territory on the one side only, it retains the river within its domain and the granted territory extends to the river only.<sup>2</sup>

The period of time which in equity constitutes a bar is held not to apply to the case of a disputed boundary between two states, especially where the boundary is in a wild and unsettled country; but it seems that long possession under a claim of title will be protected, especially where there is not clear proof of mistake.<sup>3</sup>

The court does not act differently in deciding on boundaries between states than on lines between separate tracts of land. Thus, if there is uncertainty or confusion as to the lines, it is a case appropriate for equity: an issue at law is directed, and a commission of boundary awarded: or, if the court is satisfied without either, it decrees what and where the boundary is and shall be.<sup>4</sup>

In a suit between states on the question of boundary, a bill and cross bill are deemed the most appropriate mode of proceeding, as thus is afforded an opportunity to the court of making an affirm-

Virginia, 11 Wall. (U. S.) 39; Virginia v. Tennessee, 148 U. S. 503.

But a question arising in a state court in regard to the construction of a compact between two states as to the boundary line between them, is one of which the Supreme Court of the United States has no jurisdiction under the 25th section of the judiciary act. *New York v. Central R. Co.*, 12 Wall. (U. S.) 455.

1. *Virginia v. West Virginia*, 11 Wall. (U. S.) 39; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 724; *Missouri v. Iowa*, 7 How. (U. S.) 660; *Florida v. Georgia*, 17 How. (U. S.) 478.

2. *Handly v. Anthony*, 5 Wheat. (U. S.) 379; *Howard v. Ingersoll*, 13 How. (U. S.) 381; *The Pea Patch Islands*, 1 Wall. Jr. (C. C.) Appendix ii; *Indiana v. Kentucky*, 136 (U. S.) 479.

3. *Virginia v. Tennessee*, 148 U. S. 503. The State of *Rhode Island* filed a bill against the State of *Massachusetts*, setting forth that the boundary called for by the charter of the latter was three miles south of the Charles river, and the parties intended to mark a line in that place more than one hundred years

ago, but by mistake marked it four miles further south, thereby encroaching on the territory of the former; and the complainant was led into the mistake of confiding in representations of the commissioners of the defendant. It was held that the possession of *Massachusetts* was not such as to give a title by prescription, nor the laches of *Rhode Island* such as to forfeit her right to the interposition of a court of equity, and the demurrer was accordingly overruled. *Rhode Island v. Massachusetts*, 15 Pet. (U. S.) 233. Upon the final hearing of the cause it was held that *Rhode Island* would be bound even if the call of the charter had been deviated from; and that a mistake was not clearly established, and even if it had been, it would be difficult to disturb so long a possession. *Rhode Island v. Massachusetts*, 4 How. (U. S.) 591. See also *Phillips v. Payne*, 92 U. S. 130, holding that the doctrine of prescription is applicable to states and governments as well as to individuals.

4. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657.

ative decree for the one side or the other, and establishing by its authority the disputed line, and of having it permanently marked by a commissioner of its own appointment, if necessary.<sup>1</sup>

The boundary of a state, when a material question in the determination of the extent of the jurisdiction of a court, is not a simple question of law, but the application of the evidence in the ascertainment of it belongs to the jury.<sup>2</sup>

1. *Missouri v. Iowa*, 7 How. (U. S.) 660.

2. *United States v. Jackalow*, 1 Black (U. S.) 484. And upon questions of boundaries on rivers and similar matters, the testimony of living witnesses as to matters within their memory is to be preferred to evidence derived from early maps and the reports of early explorers and travelers. *Missouri v. Kentucky*, 11 Wall. (U. S.) 395.

*Certain State Boundaries—Georgia and Alabama.*—It was decided that the river Chattahoochee was within the State of Georgia, and the line of division between the two states is not the high or low water mark but the water line impressed upon the bank by the flow of water at its usual and accustomed stage. *Howard v. Ingersoll*, 13 How. (U. S.) 381; *Alabama v. Georgia*, 23 How. (U. S.) 505. And see *Handly v. Anthony*, 5 Wheat. (U. S.) 374.

*Missouri and Iowa.*—In a suit to fix the boundary between *Missouri* and *Iowa*, it appeared that the general government before the State of *Iowa* was formed had recognized the Osage or Indian boundary of 1816 as the true northern boundary of *Missouri* by treaties with the Indian tribes by its action through the land department and by the organization in 1834 of a territorial government bounded by that line. It was held, that *Iowa* was bound by this action of the general government and could not maintain a claim to territory south of that line. Also, that the claim of *Missouri* to extend its boundary to "Brown's" line which purports to start from the rapids of the river Des Moines could not be upheld, since reliable surveys showed that there were no rapids of any magnitude at said starting point and since the State of *Missouri* herself recognized for ten years after coming into the Union, the Indian lines north and west as her proper boundaries. *Missouri v. Iowa*, 7 How. (U. S.) 660.

*Missouri and Kentucky.*—In a controversy between these two states

touching the possession of Wolf Island in the Mississippi river, it was held that as the middle of the river was the boundary between the British and French possessions in North America, recognized by various treaties, and had been the western boundary of *Virginia* both as a colony and as a state; and as the State of *Kentucky* when created succeeded to the right and possession of *Virginia*, the middle of the Mississippi river became her western boundary and continued to be such when *Missouri* was admitted to the Union in 1820. If, therefore, in 1763 or 1820 or any intermediate period the island was east of the middle channel of the river, the jurisdiction of *Kentucky* attached to it, and if the river subsequently changed its course or ran east of the island, it would not affect the ownership which was before fixed. *Missouri v. Kentucky*, 11 Wall. (U. S.) 395.

*Missouri and Kansas.*—The act of Congress issued January 7, 1836, ceding to the State of *Missouri* the land known as the "Platte" purchase provided that when the Indian title to all lands lying between the State of *Missouri* and the Missouri river shall be extinguished, the jurisdiction over such lands shall be hereby ceded to the State of *Missouri*, and the western boundary of said state shall then be extended to the Missouri river. Under this act, it was held that the western boundary of *Missouri* was thereby fixed in the center of the channel of said river and not at the eastern bank. *St. Joseph, etc., R. Co. v. Devereux*, 41 Fed. Rep. 14.

*Louisiana and Mississippi.*—The line of demarkation fixed by Ellicott and Dunbar, commissioners on the part of the United States and Spain respectively, in 1798 was the true boundary line between the territory of those two nations prior to its purchase by the United States, and has ever since been the boundary between *Mississippi* and *Louisiana* irrespec-

**IX. COMPACTS BETWEEN STATES.**—The states are authorized by the Federal Constitution to enter into compacts with each other, subject to the qualification of Congressional sanction for their absolute validity.<sup>1</sup> No provision is made respecting the mode or form in which the assent of Congress is to be signified, and it has been adjudged that it need not be an express and formal statement

tive of any mistakes in marking such line. *Jenkins v. Trager*, 40 Fed. Rep. 726.

*New York and Connecticut.*—By any just construction of the three great muniments of title upon which the territorial limits and jurisdiction of the colonies of *New York* and *Connecticut* rested; viz., the Warwick patent of 1631 and the charter of *Connecticut* of 1662 and the patent of Charles II. 1664, the islands including Goose Island, lying easterly of the land boundary between *Connecticut* and *New York* and adjacent to the *Connecticut* shore, are within the jurisdiction of *Connecticut*. *Keyser v. Coe*, 9 Blatchf. (U. S.) 32.

*New Jersey and Delaware.*—The territory of *New Jersey* only extends to low water mark on the Delaware river; the territory of *Delaware*, on the contrary, includes part of the Delaware river by express words of the deed from the Duke of York to Penn., conveying the town of Newcastle and all that tract of land lying within a circle of twelve miles to be the same, situate on the river Delaware, all islands in the said river and the said river and soil thereof lying north of the southern part of said circle. The rights of the two colonies thus fixed remain unchanged vesting in *Delaware* the title to an island known as Pea Patch Island, which sprung up in the river within the twelve mile circle some time after 1870. The Pea Patch Island, 1 Wall. Jr. (C. C.) Appendix ii.

*New York and New Jersey.*—The boundary line is the middle of the Hudson river, of the bay of New York, of the waters between Staten Island and *New Jersey*, and of Raritan Bay, except as otherwise particularly mentioned in the agreement of September 16, 1833. A vessel afloat in the Kill Van Kull, between Staten Island and *New Jersey* at the end of the dock at Bayonne, at a place about three hundred feet below low water mark, is within *New Jersey*. *In re Devoe Mfg. Co.*, 108 U. S. 401.

*Indiana and Kentucky.*—The waters of the Ohio river when *Kentucky* became a state flowed in a channel north of the tract known as Green River Island, and the jurisdiction at that time extended, and ever since has extended, to what was then low water mark, on the north side of that channel, and the boundary between *Kentucky* and *Indiana* must run on that line as nearly as it can now be ascertained after the channel has been filled up. *Indiana v. Kentucky*, 136 U. S. 479.

1. U. S. Const., art. I, § X, cl. 3. And provision is also there made for compacts and agreements between states and foreign powers, subject to the same qualification.

In *Virginia v. Tennessee*, 13 Sup. Ct. Rep. 728, it was held that the mere selection of parties to settle a boundary line between two states, and the legislative adoption of their report by one of the states, does not amount to a "compact" or "agreement" between states, which they are forbidden by the United States Constitution to make without the consent of Congress, until the one state has adopted the report in consequence of its adoption by the other, nor even then unless the boundary established leads to the increase or decrease of the political power or influence of the states concerned.

See *supra*, this title, *State Boundaries*.

*Compact Between Virginia and Kentucky—Affecting Jurisdiction of United States Courts.*—The jurisdiction of the United States courts extends by the Constitution to cases where a caveat had been entered according to the laws of *Virginia*, in existence before the erection of the part of her territory into the State of *Kentucky*, in which the lands in controversy were situated, on which caveat a judgment had been entered, although by the law of *Virginia* the judgment was declared to be final and the compact between *Virginia* and *Kentucky* contained a stipulation that rights acquired according to the laws in exist-

of every proposition of the compact, and of its consent thereto, but may be shown by clear and satisfactory inference from an act which necessarily implies such consent.<sup>1</sup> In a compact between two states, the states in their character as states are the parties, and not the individual citizens, though the latter are bound as well as the contracting parties, and the same power which establishes the compact may modify or annul it.<sup>2</sup> The conditions of a compact which has received the sanction of Congress may be enforced by the courts without further legislation.<sup>3</sup> A compact affecting commerce, though entered into before the adoption of the Constitution, is subordinate to the provisions of that instrument on that subject.<sup>4</sup> A compact between members of the Union is a contract within the meaning of the Constitution, and when a state law impairs the obligation thereof, the Supreme Court is authorized to declare such law unconstitutional.<sup>5</sup> A question arising under and to be decided by a compact between two states

ence at the time the compact was made. *Wilson v. Mason*, 1 Cranch (U. S.) 45.

*Compact Between New Jersey and Pennsylvania — Right of Fishery.* — The compact between *New Jersey* and *Pennsylvania* recognizes the right of fishery in riparian owners on the Delaware river. *Bennett v. Boggs*, 1 Baldw. (U. S.) 60.

1. *Virginia v. West Virginia*, 11 Wall. (U. S.) 39; *Green v. Biddle*, 8 Wheat. (U. S.) 1. And an act of Congress, which, after recognizing the conditions upon which alone one of the states agrees to a compact, assents to the compact by express declaration, necessarily includes an assent to these conditions and is sufficient to satisfy the constitutional requirement. *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. (U. S.) 518; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

2. Mayor, etc., of *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91. See also *Fleeger v. Pool*, 1 McLean (U. S.) 185.

3. *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. (U. S.) 518.

4. The compact between *South Carolina* and *Georgia*, made in 1787, by which it was agreed that the boundary between the two states should be the northern branch of the Savannah river, and that the navigation of the river along a specified channel should forever be equally free to the citizens of both states, and exempt from hindrance, interruption, or molestation, attempted to be enforced by one state on the citizens of the other, has no effect upon the subsequent constitu-

tional provision that Congress shall have power to regulate commerce between the several states. Congress has the same power over the Savannah river that it has over the other navigable waters of the United States. *South Carolina v. Georgia*, 93 U. S. 4.

The compact between *Virginia* and *Kentucky* cannot restrict the power of Congress to regulate commerce between the states, and an act of Congress declaring a bridge across the Ohio river to be a lawful structure, although it does in fact interfere with commerce, is valid. *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. (U. S.) 518.

5. *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. (U. S.) 518. The act of *Kentucky* of 1812, superseding that of 1797, on the same subject, and providing, that occupying claimants in good faith of lands from which they might be evicted by a better title, should have a right to compensation for improvements, and be exempt from liability for rents and profits to the time of rendition of judgment against them, is unconstitutional and void because it violates the clause of the compact of 1789, providing that the right in lands, existing at that date, should be determined by the then existing laws of *Virginia*. *Green v. Biddle*, 8 Wheat. (U. S.) 1.

To bring a case within the protection of this clause, it must be shown that the title to the land asserted is derived from the laws of *Virginia* prior to the separation of the two



partakes of an international character, and the adjudications of either state are not controlling as a rule of decision in the Federal courts.<sup>1</sup>

**X. STATE OFFICERS—1. Introduction; Definition.**—It is not proposed here to treat comprehensively the subject of state officers, the principles applicable having been set forth and elaborated elsewhere.<sup>2</sup> At the same time there are numerous recent cases dealing with the duties, rights, and liabilities of various state officers which may well be set forth in this connection. A state officer is one whose duties concern the state at large or the general public.<sup>3</sup> An officer appointed for a particular locality, but whose duties are essentially of a public or general nature, is

states. *Fisher v. Cockerell*, 5 Pet. (U. S.) 248.

The Limitation act of *Kentucky*, commonly known by the epithet of the "seven years" law, does not impair the compact between the states of *Virginia* and *Kentucky*. *Hawkins v. Baney*, 5 Pet. (U. S.) 457.

1. *Marlatt v. Silk*, 11 Pet. (U. S.) 1.

2. See PUBLIC OFFICERS, vol. 19, p. 378.

3. *Burch v. Hardwicke*, 30 Gratt. (Va.) 24; 32 Am. Rep. 640.

In *Britton v. Steber*, 62 Mo. 370, it is said "that a state officer may be connected with some of the municipal functions, but he must derive his powers from a state statute, and execute his powers in obedience to a state law." See also *State v. Valle*, 41 Mo. 29.

**Mayor.**—The mayor of a city in *Indiana* is not an officer of the state. *Waldo v. Wallace*, 12 Ind. 569. So of *Missouri*. *Britton v. Steber*, 62 Mo. 370.

A member of the state legislature is a state officer. *Morril v. Haines*, 2 N. H. 246.

The office of city clerk is not an office "under the state" within the meaning of *Indiana* Const., § 16, art. 7. *Mohan v. Jackson*, 52 Ind. 599.

The office of councilman in a city is an office purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state. *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239.

**Police Commissioner.**—A police commissioner is a mere local district officer and not a state officer within the meaning of the term as used in the *New York* statute of 1851. *New York, etc., R. Co. v. Mayor, etc.*, of *New York*, 1 Hilt. (N. Y.) 584.

The office of levee commissioner under statute of *Mississippi* (acts 1854, p. 186) is a "civil officer under the state," within the meaning of the state constitution declaring that "no senator or representative shall be appointed to any civil office of profit under the state." *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169.

Constables are held to be state, not municipal officers. *State v. McKee*, 69 Mo. 504.

Certain commissioners appointed by an act of the legislature of *Missouri* (May 13, 1861, entitled "An act for the relief of the city of St. Louis") to sign city treasury warrants, which were to be delivered to the city treasurer and issued by the city to circulate as money, were held to be state officers. *Garnier v. St. Louis*, 37 Mo. 554.

A sheriff is a state officer. *State v. Finn*, 4 Mo. App. 347.

But he is not a state officer within the meaning of art. 6, § 15, *Missouri* Const., and the constitutional amendment of 1884, conferring on the supreme court jurisdiction of appeals and writs of error "in cases . . . where any state officer is a party." *State v. Dillon*, 90 Mo. 229.

The language "officers of the commonwealth" means "state officers," and does not include commissioners of a county. *Com. v. Neely*, 3 Pittsb. (Pa.) 527.

**Trustees of State Agricultural College.**

—A trustee of the State Agricultural College, appointed by the board of regents of education, as provided by *South Dakota* Const., art. 14, § 4, is not a state officer within the meaning of art. 16, § 3, of that instrument, providing that state officers are liable to impeachment. The term "state officers" in this connection includes only such

a state officer, whether the legislature makes the appointment or delegates its authority to the municipality.<sup>1</sup>

**2. Election and Appointment.**—A constitutional provision authorizing the legislature to create state offices and to prescribe the manner of choosing the officers, does not confer upon that body the power to elect.<sup>2</sup> When an office is created in pursuance of such authority, to be filled immediately, and no legitimate mode is provided for filling the same, and the office belongs to a class made elective by the people, the governor, by virtue of a constitutional provision enjoining upon him the duty of seeing to the faithful execution of the laws, may fill the vacancy until a general

officers as immediately belong to one of the three constituent branches of the state government, and not those who are appointed by other officers or boards for subordinate administrative purposes. *State v. Hewitt* (S. Dak. 1892), 52 N. W. Rep. 875.

**Auditor's Agent.**—The auditor's agent to attend to revenue matters, whose appointment is authorized by *Kentucky* act of April 29, 1880, is a mere subordinate, and not an officer within the meaning of the constitution, and there was no necessity for limiting his term of office. *Hoke v. Com.*, 79 Ky. 567.

**State Depository.**—A bank which is a depository of state moneys, under *Georgia* act of 1879 (Code, § 943, a, to 943, g), is not an officer of the state within the meaning of *Georgia* Code, §§ 148-171, fixing the relations between the state and its officers. *Colquitt v. Simpson*, 72 Ga. 501.

**Chief of Bureau of Statistics.**—In *Indiana*, the office of chief of the bureau of statistics, a department created by an act of the general assembly for the purpose of gathering, systematizing, and distributing statistical information and details relating to agriculture, manufacturing, mining, commerce, education, labor, social conditions, etc., is a state office and the chief is a state officer. *State v. Peelle*, 121 Ind. 495.

**Superintendent of Fisheries.**—The superintendent of fisheries is not an officer within the meaning of the constitution and law of the State of *Michigan*, but is an employe of the state board of fish commissioners and is removable at their pleasure. *Portman v. State Board of Fish Com'rs*, 50 Mich. 258.

**1. Police Officers.**—The chief of police of a city in *Virginia* is an officer of the state and not subject to removal

by the mayor. *Burch v. Hardwicke*, 30 Gratt. (Va.) 24; 32 Am. Rep. 640.

In *People v. Hurlbut*, 24 Mich. 103; 9 Am. Rep. 103, Cooley, J., said: "For those classes of officers whose duties are general—such as judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called—provision has, to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers where the nature of their duties is essentially general."

Police officers appointed by a city are not its agents or servants, so as to render it liable for their negligent or unlawful acts in discharge of their duties. While thus engaged they represent the authority and dignity of the state, and not that of the municipality. *Buttrick v. Lowell*, 1 Allen (Mass.) 172; *Cobb v. Portland*, 55 Me. 381; 92 Am. Dec. 598; *Farrell v. Bridgeport*, 45 Conn. 191; 2 Dill. Munic. Corp. (4th ed.), § 773.

**2. Constitution of Indiana**, § 1, art. 15, provides that "all officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is or may hereafter be prescribed by law." The general assembly created the office of chief of the bureau of statistics. It was held under this clause that the legislature had authority to prescribe the manner of electing an officer to fill the office of chief of the bureau of statistics, but not the power itself to elect. *State v. Peelle*, 121 Ind. 495. See also *State v. Denny*, 118 Ind. 382; *State v. Kennon*, 7 Ohio St. 547.

election by the people.<sup>1</sup> If an office is, by the statute creating it, authorized to be filled by appointment of the governor, and is made elective by a subsequent statute, the governor is authorized to fill a vacancy occurring between the time fixed for the general election and the expiration of the term of the present incumbent.<sup>2</sup>

**3. Official Bonds**—(See also BONDS, vol. 2, p. 466f; PUBLIC OFFICERS, vol. 19, p. 442; SURETYSHIP).—Where a state officer is appointed for a limited time, the sureties on his official bond are not liable for his defaults beyond the term of his appointment or commission under which the bond was furnished.<sup>3</sup> The dereliction of a prescribed duty on the part of one state officer, whereby another is enabled to appropriate state funds to his own use, and to conceal the fact, does not release the sureties on the latter's official bond.<sup>4</sup>

1. *State v. Gorby*, 122 Ind. 17.

2. The legislature of *Alabama* passed an act in 1886, creating the office of commissioner of agriculture. The statute provided that it should be filled by appointment of the governor. In 1891, a statute was passed making the office elective, which provided that at the general election in 1892 and every two years thereafter, there should be elected one commissioner of agriculture whose term of office should be two years. All laws and parts of laws in conflict with the act were repealed. It was held that the specific provision of 1891 ordering the election in 1892, controlled the general rule of law as declared by the supreme court of *Alabama*, that statutes take effect from the date of their enactment; and that, therefore, on the expiration of the term of the incumbent in September, 1891, the governor, under the authority conferred on him by the statute of 1886, had the power to appoint a successor to hold the office until the general election of 1892. *Lane v. Kolb*, 92 Ala. 636.

3. *State v. Powell*, 40 La. Ann. 241.

**Succeeding Terms—Liability of Sureties.**—By the constitution of *Maryland*, art. 6, § 1, the term of the state treasurer is two years "and until his successor shall qualify;" he must take an oath and give bond. By art. 1, § 6, and Pub. Gen. Laws, art. 95, § 2, he may not enter on the duties of his office until he has given the bond and taken the oath. A. was appointed state treasurer and duly qualified. At the expiration of his term he was re-appointed, but failed to give a new bond or to take the oath until more than a year thereafter, but fulfilling

the duties of the office meanwhile. It was held that the original bond was liable for all defalcations made by him before the new bond was given. *Archer v. State*, 74 Md. 410.

*Maryland* constitution, § 5, requires the state treasurer to qualify within one month from his appointment. Art. 1, § 7, provides that "every person hereafter elected and appointed to an office in this state who shall refuse or neglect to take . . . the prescribed oath, shall be considered as having refused to accept said office, and a new election or appointment shall be made," etc. A. was appointed to succeed himself as treasurer but neglected for more than a year to take the oath. It was held that his qualification by taking the oath after that time was of no effect to induct him into the office under the second appointment, and that his new bond, approved by the governor and filed at that time, was not binding. *Archer v. State*, 74 Md. 443.

In *State v. Churchill*, 48 Ark. 426, a state treasurer was delinquent in his accounts at the expiration of his second term of office, and upon entering on his third term, he simply charged the deficit against himself, instead of paying it up. It was held that this did not have the effect of releasing the sureties on his bond for the second term from liability for such deficit, and imposing it on the sureties for his third term.

4. *Com. v. Tate*, 89 Ky. 608.

**State Treasurer—Ex Officio Insurance Commissioner.**—In *Tennessee* the state treasurer's bond does not cover, and his sureties thereon are not bound for, that officer's acts or defaults as *ex officio*.

4. **Salaries.**—If the constitution of a state declares that a specified salary "shall be received" by an officer, no legislative act making an appropriation for such salary is necessary.<sup>1</sup> But in the absence of some such provision a specific appropriation by the legislature seems necessary before payment by the custodian of the public funds can be authorized.<sup>2</sup>

An appropriation of an official salary may be prospective and payable periodically out of any funds in the treasury not otherwise appropriated at the time when the services are performed, and the periodical payments become due, and the appropriation may be made in any form of words expressing the intention of the legislature to provide for the payment of the salary as it accrues.<sup>3</sup>

In most of the states there are constitutional provisions relative to increasing or decreasing the salaries of state officers.<sup>4</sup>

The legislature of a state may increase or diminish the salary of a state officer unless there be a constitutional prohibition to the contrary.<sup>5</sup> But it has been held that the appropriation of a

commissioner of insurance. *State v. Thomas*, 88 Tenn. 491.

1. *State v. Hickman*, 9 Mont. 370; *Thomas v. Owens*, 4 Md. 189; *State v. Weston*, 4 Neb. 216; *Green v. Purnell*, 12 Md. 333.

When the amount of an officer's salary is prescribed by the constitution, and the legislature appropriates a sum more than sufficient to pay it and other salaries of the same class, the comptroller neither errs in his judgment nor transcends his authority in refusing to allow such officer a different amount than that prescribed by the constitution, when that instrument imposes upon him the duty of auditing the officer's claim and deciding upon the amount payable to him as a salary. *State v. Barnes*, 25 Fla. 75.

Under the state constitution of *Missouri* of 1875, and the statutes enacted thereunder, officers of the executive department are entitled to compensation for services rendered by them as members of the state board of equalization. *State v. Walker*, 97 Mo. 162, *overruling State v. Holladay*, 67 Mo. 64.

2. *State v. Hickman*, 9 Mont. 370; *Myers v. English*, 9 Cal. 348; *Thomas v. Owens*, 4 Md. 189; *State v. Weston*, 6 Neb. 16.

**Priority of Payment of Salaries of State Officials.**—In *Louisiana*, warrants for the salaries of constitutional officers, the amounts of which salaries are fixed by the constitution of the state, are

entitled to payment from the general fund of the state by preference and priority over all other warrants drawn against that fund. *State v. Burke*, 34 La. Ann. 404.

**Appropriation for Several Offices in Solido.**—By *Nevada* act February 17, 1883, the lieutenant-governor was made *ex officio* state librarian, and *ex officio* adjutant-general, and an appropriation *in solido* made for his salary as such. A vacancy arose in the office of state librarian, which was filled, and the appointee sought to recover his salary out of the appropriation—but relief was denied on the ground that the appropriation had become inoperative. *State v. Hallock*, 19 Nev. 371.

3. *Humbert v. Dunn*, 84 Cal. 57. In this case the salary of certain state officers was, by the act creating the offices, made "payable monthly" and "out of any money in the state treasury not otherwise appropriated," and this language was construed to mean that the salaries should be paid when the services were performed and the monthly payment became due, and not as indicating an intention on the part of the legislature to postpone the payment of the salaries until the next session of that body, as was contended.

4. See **PUBLIC OFFICERS**, vol. 19, p. 525 *et seq.*, where the subject is discussed at length.

5. *Farwell v. Rockland*, 62 Me. 296.

See *Collins v. State* (S. Dak. 1892),

less sum than that fixed by general law as the salary of a state officer does not operate as a repeal or amendment of the act fixing the salary.<sup>1</sup> If the compensation be diminished during the official term, such diminution is prospective only.<sup>2</sup>

The subsequent repeal of a legislative act creating a public office, providing for the appointment of the officer, and making an appropriation to pay his salary, terminates both the office and the right of the appointee to any salary not already earned at the time of such repeal.<sup>3</sup>

**5. Different Officers—***a. GOVERNOR.*—(See GOVERNOR, vol. 8, p. 1400.)

*b. SECRETARY OF STATE.*—A secretary of state may not intrust to a deputy the performance of official acts when the statute prescribing the duties of the former clearly contemplates that he himself shall perform such acts.<sup>4</sup> When the secretary is forbidden to exercise judicial functions, his decision upon a claim against the state presented to him for allowance, is not conclusive upon the rights of the parties in a collateral proceeding.<sup>5</sup> It is held that when the secretary's power of appointment to an office depends

51 N. W. Rep. 776; *Butler v. Pennsylvania*, 10 How. (U. S.) 402; *Loving v. Auditor*, 76 Va. 947.

An attorney-general of *Virginia* was, under the law existing at the time of his election, entitled to a salary of \$3,500 *per annum*. This salary was reduced to \$2,500 *per annum* by the legislature during his term. Const. of *Virginia*, § 8, art. 6, provides that the attorney-general shall receive such compensation "as may be prescribed by law." Art. 4, § 12, provides that the salary of the secretary, treasurer and auditor of the state "shall be determined by law." It was held that the words "prescribe" and "determine" do not admit of a wide distinction and the duty of prescribing the salary of the attorney-general was legislative; and there being no limitation of its exercise, the general assembly could pass an act diminishing his salary during his term. *Field v. Auditor*, 83 Va. 882.

The legislature of *Kentucky* has no power to authorize a deduction from the salary of a circuit judge during the period for which he was elected, except for neglect of official duty, as authorized by § 13, art. 8, *Kentucky* constitution. *Garrard v. Nuttall*, 2 Metc. (Ky.) 106.

**Unauthorized Increase.**—When the constitution provides that an officer's salary shall not exceed a specified amount, the legislature may not au-

thorize an increase thereof under the guise of clerk hire or traveling expenses not incurred. *State v. Cunningham* (Wis. 1892), 51 N. W. Rep. 1133.

**Increase or Decrease of Salary of Secretary of State by Special Law.**—The *New Jersey* legislature is forbidden by the constitution of the state from increasing or decreasing the compensation due the secretary of state during his term of office by an act applicable to him alone, such an act being a special law, and as such unconstitutional. *State v. Kelsey*, 44 N. J. L. 1.

1. *State v. Cook*, 57 Tex. 205; *State v. Steele*, 57 Tex. 201. And in the latter case it was further held that the acceptance of an amount less than the salary under an appropriation of such less sum, does not estop the officer from claiming the full amount of the salary, in a suit allowed by legislative act, to ascertain what, if any, may be owing such officer.

2. *Farwell v. Rockland*, 62 Me. 296.

3. *Hall v. State*, 39 Wis. 79.

4. *Beam v. Jennings*, 96 N. Car. 82; *State v. Hastings*, 10 Wis. 518.

5. *State v. Brown*, 10 Oregon 215.

In *Wisconsin* it is held that if the secretary of state allows a claim which may in law be a proper claim, the court will not examine into it; but if he allows a claim against the law, his decision is not final. *State v. Hastings*, 10 Wis. 461.

upon some precedent or concurrent action of other persons or officers, the power of removal by him from such office is not a necessary incident to such power of appointment.<sup>1</sup>

c. TREASURER.—In some of the states the treasurer is made absolutely responsible for funds received in his official character. When this is the case no degree of care will excuse him in the event of loss by theft, fire, or insolvency of the banks selected as depositories;<sup>2</sup> but it seems that he is not, in the absence of statute, liable for interest received on money deposited in banks.<sup>3</sup>

Where it is the duty of the treasurer to receive from his predecessor in office the moneys and securities of the state in his hands, and from other officers the amount due from them, he is liable if he accepts in lieu thereof the receipt or check of a depository with whom the moneys and securities were left by such officers.<sup>4</sup>

If the state treasurer pays an appropriation in advance of the time of payment appointed by law, or if he pays it without the warrant required by law, he will be liable for any damages resulting to the state from such irregular payment.<sup>5</sup> And he and his sureties are chargeable with moneys collected by him in advance, which fall due during his incumbency, and during the period for which the sureties are responsible.<sup>6</sup>

1. Carr v. State, 111 Ind. 101.

**Custodian of Public Records.**—In *South Carolina* the secretary of state is a mere custodian of public records, and subject to the will of the state, allowing any person the right of access to them. *Pinckney v. Henegan*, 2 Strobb. (S. Car.) 250.

2. *People v. Walsen* (Colo. 1892), 28 Pac. Rep. 1119; *In re* House Resolution, 12 Colo. 395. And where a treasurer's bond was conditioned for the true and faithful discharge of "all the trusts and duties enjoined and required by law," and one of such trusts and duties was that he should account for and pay over to his successors all moneys received by him in his official capacity, a failure to pay over moneys which had been lost by a failure of the bank in which they were deposited, payable on demand, and which at the time of deposit was entirely sound, is a breach of the condition of the bond. *Baily v. Com.* (Pa. 1887), 10 Atl. Rep. 764.

**Entitled to Control of Fund.**—It has been held that when by the constitution the treasurer is absolutely liable, the legislature cannot directly or indirectly divest him of his general control of the custody of the public moneys, before disbursement or investment—responsibility and control for safe keeping belonging naturally together—

hence an act authorizing the governor to dictate the particular banks in which such moneys shall be deposited is invalid. *In re* House Resolution, 12 Colo. 395.

3. *People v. Walsen* (Colo. 1892), 28 Pac. Rep. 1119. See also *Shelton v. State*, 53 Ind. 331; 21 Am. Rep. 197.

4. *State v. Newton*, 33 Ark. 276.

5. *State v. Baltz*, 44 Wis. 624. But it was further held that where such a payment of a legislative appropriation for the state hospital for the insane was made to the treasurer of such hospital, who was the person appointed by law to receive it, and was receipted for by him in his official character, and used by him to pay claims against the hospital for the payment of which the money was appropriated, and the amount paid was placed to the credit of the treasurer in the books of the secretary of state (even if irregularly), the state treasurer after the money became by law due and payable to the hospital treasurer, was not bound to refund the amount to the state treasurer, and his failure to pay over the same to his successor in office was not a breach of his official bond.

6. *Sooy v. State*, 41 N. J. L. 395.

**Fines and Penalties Due to State—Treasurer's Interest Therein.**—In *Connecticut*, the state treasurer has no legal interest in fines due to the state,

*d. AUDITOR.*—In many of the states there are constitutional provisions forbidding the auditor from drawing warrants upon the state treasury, except in pursuance of a specific appropriation first made.<sup>1</sup> In such a case, when an appropriation made by the legislature for any specific purpose has been exhausted, the action of the auditor in refusing to draw further warrants for that specific purpose is proper and right.<sup>2</sup> It is likewise the auditor's duty to refuse to issue his warrant for money that is to be used for an unconstitutional purpose.<sup>3</sup>

until they are received by him; therefore an action in his name will not lie to recover fines imposed by a judgment of court, although by the terms thereof the fines are payable to the treasurer for the use of the state. *Bissell v. Spencer*, 9 Conn. 267; 23 Am. Dec. 336. And in *Spencer v. Huntington*, 6 Conn. 312, it was held that an action of debt in the name of the state treasurer for a penalty arising from the violation of the statute regulating the sale of spirituous liquors, the penalty being for the use of the state, cannot be sustained.

**Excessive Warrants.**—In *Michigan*, the state treasurer can make no payment on a warrant that is admitted to be excessive; and if the auditor-general issues a warrant that is found to be excessive, it should be returned to him and a new one taken out instead of drawing the proper amount on the original warrant. *People v. State Treasurer*, 40 Mich. 320.

**Regular Warrant.**—In *California*, the state treasurer must pay a warrant regularly drawn on him, without stopping to enquire whether the persons on account of whose claims the warrant was drawn have been paid or not.

*National Bank v. Herold*, 74 Cal. 603.

**State Treasurer Applying Funds of**

**Levee Board to State Indebtedness.**—Under the Appropriation Act of 1884, of *Mississippi*, the state treasurer, who was also treasurer of the Levee board, was not authorized to apply money of the board to state indebtedness. It was not a "special fund" within the meaning of § 2 of the act which authorized the use of money of the general, or any special fund in payment of state warrants. *Board of Levee Com'rs v. Hemingway*, 66 Miss. 289.

**Refusal of Treasurer to Pay Warrant**

**— Punishment by Fine.**—Under § 3784 Rev. Stats. *Louisiana*, which provides for the punishment of the state treas-

urer by fine, etc., for refusing to pay warrants in certain cases, upon conviction thereof, etc., means a conviction in a regular criminal proceeding. Such conviction is a condition precedent under the statute to the recovery of the penalty. *Tissot v. Dubuclet*, 33 La. Ann. 703.

**False Voucher.**—In *State v. Cardoza*, 11 S. Car. 195, the state treasurer made a false voucher to cover an illegal abstraction of state funds in his hands, and it was held that such an act was the very essence of deception and thereby the state was cheated and defrauded.

1. Under the provision of the constitution of the State of *Nebraska* that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law," the auditor of public accounts has no authority to draw a warrant upon the treasurer for commissions due county treasurers for money collected by them and paid into the treasury, unless a specific appropriation has been made for that purpose. *State v. Babcock*, 18 Neb. 221.

The *Nebraska* act of February 28, 1823, entitled "an act making appropriations for the current expenses of a state government," etc., does not appropriate any money for the purpose of returning prisoners from the penitentiary to the counties in which they were convicted, for retrial. *State v. Wallichs*, 15 Neb. 457.

2. *Collins v. State* (S. Dak. 1892), 51 N. W. Rep. 776.

3. *State v. Hallock*, 16 Nev. 373. In this case an application was made for mandamus to compel the controller to audit an account, and to issue his warrant on the state treasurer for the amount of same in favor of the petitioner, the Nevada Orphan Asylum, said account having been apportioned and allowed by a majority of the board of asylum commissioners, for the sup-

The auditor has no power to extend the time fixed by law for the settlement of state tax collectors, who are defaulters from the moment they fail to make their settlements at the time fixed by law.<sup>1</sup>

Where the auditor is forbidden to exercise any powers belonging to the judicial department, his disallowance of a claim is reviewable by the court, although he is authorized in the auditing of claims to compel the attendance of witnesses as a court of record may compel their attendance.<sup>2</sup>

The failure of the auditor, in settling with a public officer, to include items with which he is properly chargeable, will not debar the state from an appropriate action against the officer.<sup>3</sup>

In common with other state officers, the auditor, in a proper case, is subject to a writ of mandamus.<sup>4</sup>

*e.* ATTORNEY-GENERAL.—(See ATTORNEY-GENERAL, vol. 1, p. 974.)

**6. Impeachment and Removal.**—(See IMPEACHMENT, vol. 9, p. 951.)

port and maintenance of orphans, under and in accordance with the *Nevada* act approved March 3, 1881 (Stat. 1881, 122) entitled, "An act to appropriate funds for the relief of the several orphan asylums of the state."

The controller refused to audit the account, or to issue his warrant therefor, upon the ground that the petitioner was a sectarian institution, and that under the state constitution (§ 10, art. 11) no public funds could be used for sectarian purposes. The asylum was held to be sectarian, and the controller's refusal right and proper.

**Withholding Warrant from Defaulting Official.**—It is the fact of default by a public officer, and not the ascertainment by suit, that makes it the duty of the state auditor, under Code of *Alabama*, 1876, § 596, to withhold a warrant from such defaulter for money due him by the state, and the default sufficiently appears, if shown by the books and records in the auditor's office. *State v. Brewer*, 62 Ala. 215.

1. *State v. Lanier*, 31 La. Ann. 423.

**Auditor—Ex Officio Commissioner of Land Office.**—By *Minnesota* Gen. Stats., ch. 38, § 2, the auditor is *ex officio* commissioner of the land office, and authorized to settle with trespassers for damages to state lands, occasioned by cutting and carrying away timber, and to state an account therefor, and also to defer or extend the time of payment of the amount of such account. *State v. Galusha*, 26 Minn. 238.

2. *State v. Burdick*, 3 Wyo. 588.

3. But the error must be established as in other cases of mistake in accounting; it may not be proved or shown, *prima facie*, by a re-statement by a succeeding auditor. *State v. Brewer*, 61 Ala. 318.

4. *State v. Burdick*, 3 Wyo. 588. In *Indiana*, when the amount of a claim against the state has been ascertained as prescribed by law, and money in the treasury has been appropriated to pay it, the auditor may be compelled by mandamus to issue a warrant therefor, but not otherwise. *Rice v. State*, 95 Ind. 33.

In *Alabama*, mandamus will lie to compel the auditor to allow a tax-collector or his attorney to inspect the collector's account with the state, as kept in the auditor's office. *Brewer v. Watson*, 61 Ala. 310.

Where the legislature of *Montana* has made an appropriation for a claim against the state, and the same has been examined, approved, and transmitted to the auditor by the state board of examiners, and the taxes levied for the year are less than the total appropriations, a *mandamus* will lie to compel the auditor to issue his warrant on the treasurer for the claim—he may not refuse on the ground that there are no funds in the treasury for the immediate payment of the claim. *State v. Kenney*, 10 Mont. 488.

Under a statute directing the auditor of state to cause the publication "in the two leading daily newspapers of the state having the largest circula-



**STATIONARY.**—See note 1.

**STATIONERY.**—Stationery means such articles as are usually sold by stationers—paper, ink, quills, etc.<sup>2</sup>

therein, of the semi-annual statements of foreign insurance companies doing business in the state," it was held that *mandamus* would lie to compel him to proceed to exercise the authority thus conferred.

But his selection of such newspapers is final and he cannot be compelled to select any particular paper in which to make such publication. *Holliday v. Henderson*, 67 Ind. 103.

The law of *Nebraska* (Sess. Laws *Nebraska*, 1877, 202), gives an adequate remedy by appeal from the decision of the state auditor in the examination and adjustment of claims against the state; accordingly a *mandamus* will not issue to compel him to draw a warrant for the payment of a claim which has been disallowed by him upon such examination and adjustment. *State v. Babcock*, 22 Neb. 38.

For other instances in which *mandamus* has issued against a state auditor, see *Wolfe v. State*, 90 Ind. 16; *State v. Kenney*, 9 Mont. 223; *People v. Schuyler*, 79 N. Y. 189; *State v. Brewer*, 62 Ala. 215.

See also *MANDAMUS*, vol. 14, p. 88.

**Acting by Deputy or Clerk.**—In *Indiana* a state auditor may act by deputy on a sale of lands mortgaged to trust funds. *Bansemmer v. Mace*, 18 Ind. 27; 81 Am. Dec. 344.

A settlement of an account for state tax on gross receipts, due by a corporation under *Pennsylvania* act of June 7, 1879, upon the basis of a report furnished by the corporation to the auditor-general, is a ministerial act which need not be performed by the auditor-general in person, but may be performed by clerks acting respectively under the direction and by the authority of the auditor-general and state treasurer. *Philadelphia, etc., R. Co. v. Com.*, 104 Pa. St. 86. See also *Com. v. Aurand*, 1 Rawle (Pa.) 282.

*Nebraska* Constitution, § 26, art. 5, prohibits the creation of a new executive department, but does not prohibit the appointment of a deputy by the auditor, treasurer, secretary of state, or commissioner of public lands and buildings. *In re Appropriations*, 25 Neb. 662.

The *Kentucky* act, approved April 23 C. of L.—8

29, 1880, authorizing the auditor to appoint agents to attend to certain revenue matters, is constitutional. *Hoke v. Com.*, 79 Ky. 567.

**Bond Payable to Governor—Action Thereon by Auditor.**—An action may be maintained by the auditor upon a bond payable to the governor, under the statute authorizing actions for the collection of money due the state to be brought in his name. *Auditor v. Woodruff*, 2 Ark. 73; 33 Am. Dec. 368.

**Special Judge—Auditor Cannot Question Services of.**—The auditor of the State of *Arkansas* may not inquire into the amount of service rendered, or the degree of fidelity with which a special judge acts. *Brizzolari v. Crawford*, 38 Ark. 218.

**Real Estate Owned by State—Power of Auditor with Reference Thereto.**—When the state sues for the recovery of real estate owned by it, and the defendant relies upon an alleged agreement with the state auditor in defense of the suit, unless it appears that the latter was expressly authorized to make the agreement, it is absolutely void as against the state. *McCaslin v. State*, 99 Ind. 428.

1. To be "stationary," within art. 9 of the *English* regulations of 1863 for preventing collisions at sea, a fishing vessel must not have more way on than is necessary to keep her under command whilst attached to her nets. If it is necessary, even for the purpose of rendering her fishing more effective, that she should have more way on, she is not "stationary," and must carry the lights of a vessel under way. *The Dunelm*, 9 P. D. 164.

A trawler proceeding at the rate of a quarter of a knot an hour with her trawl down, is "stationary." *The Edith*, Ir. Rep., 10 Eq. 345. The court said: "A perfectly stationary condition probably could not, from the very nature of the element of water, last beyond a mere *punctum temporis*." See generally *NAVIGATION*, vol. 16, p. 270.

2. *Arapahoe Co. v. Koons*, 1 Colo. 160; *Knox Co. v. Arms*, 22 Ill. 175.

**Printed Blanks.**—The term includes printed blanks for the use of public officers. So held when a statute pro-

**STATIONS (RAILROAD).**—(See also DEPOT, vol. 5, p. 622; FENCES, vol. 7, p. 889; FRANCHISES, vol. 8, p. 604; RAILROADS, vol. 19, p. 817; UNION DEPOT COMPANIES.)

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| <p>I. Definition, 114.<br/>         II. Establishment and Maintenance, 115.<br/>         III. Contracts Concerning Location, 120.<br/>         IV. Rules and Regulations, 124.<br/>             1. <i>In General</i>, 124.<br/>             2. <i>Admission to Station Premises</i>, 125.<br/>             3. <i>Exclusive Privileges to Hackmen</i>, 126.</p> | <p>V. Injuries at and around Stations, 128.<br/>             1. <i>In General</i>, 128.<br/>             2. <i>Duty of the Company</i>, 128.<br/>             3. <i>Persons to Whom Duty Is Due</i>, 132.<br/>             4. <i>Negligence</i>, 133.<br/>             5. <i>Assault by Station Servants</i>, 137.<br/>         VI. Condemnation of Land, 138.</p> |
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**I. DEFINITION.**—A railroad station is a place where railroad trains regularly come to a stop for the convenience of passengers, taking in fuel, discharging freight, and the like. It is to be distinguished from "depot," which is a term properly used to designate the buildings at the station.<sup>1</sup>

vided that the counties should be liable for "stationery" furnished clerks of court. *Knox Co. v. Arms*, 22 Ill. 175; *Commissioners' Court v. Goldthwaite*, 35 Ala. 704. *Contra Arapahoe Co. v. Koons*, 1 Colo. 160.

1. Webster's Dict.; where it is also said that, "It is unfortunate that, in the United States, the stopping-places on railways first received the name of depot—a gross misapplication of the term, since it means simply a storehouse or magazine. In *England*, the name has always been station or station-house, and there is now a growing tendency to adopt this in the United States, as the only proper word."

**Meaning in Particular Cases.**—Within the meaning of the *New Hampshire* statute prohibiting the expulsion of any person from the cars for non-payment of fare except at a passenger station, it has been held that the station must at least be a stopping place where passenger tickets are ordinarily sold. *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596; 37 Am. & Eng. R. Cas. 126. See also *RAILROADS*, vol. 19, p. 908. In *Illinois Cent. R. Co. v. Lattimer*, 128 Ill. 171, under a similar statute, the court said: "The instructions given for the plaintiff defined the term 'regular stations,' to mean 'the place on the railroad where passenger trains usually stop for the purpose of having passengers get on and off such trains,' while several instructions, asked by

defendant and refused, defined such term to mean 'the town or village in which a railroad company may have its passenger depot building,' and not 'the depot platform of a railroad company.' We think the definition laid down in the given instructions was substantially correct, and in accord with the decisions of this court." The court in this connection cited *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 465; 68 Am. Dec. 562; *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188; 74 Am. Dec. 96.

A statute of *Connecticut* provided that no railroad corporation should abandon any depot or station on its road after the same had been established for twelve months, except by approval of the railroad commissioners. In *State v. New Haven, etc., Co.*, 37 Conn. 153, it appeared that the defendant company, after constructing its road, leased it for twenty years to a New York railroad company. This latter company soon after taking possession built a platform for the accommodation of passengers at a place on the road which was thereafter called "Brooks' Station," and placed upon it an old baggage car which served as a shelter for passengers waiting at the station. No agent was ever placed there and no tickets were sold there, nor was freight way-billed to or from that station, but to and from an-

**II. ESTABLISHMENT AND MAINTENANCE.**—There is no question as to the power of legislatures to compel and regulate, either directly

other station in the same town. But tickets were sold at other stations to passengers for that station, trains were stopped to take up passengers, trains carrying the mail also stopped regularly, and freight was deposited there as a place of deposit. It was held that this "Brooks' Station" was a depot or station within the meaning of the statute.

In *State v. New Haven, etc., R. Co.*, 41 Conn. 134, under the same statute, the case just set forth was distinguished. The court, by Park, C. J., said: "In the case of *State v. New Haven, etc., Co.*, 37 Conn. 153, the court considered themselves as going to the verge of the law in holding that the place called Brooks' Station was a station within the meaning of the statute. In that case much reliance was placed upon several important facts, none of which appear in the case under consideration." After enumerating the facts just stated, the court went on to say: "These were important facts and distinguished that case from the present one. The railroad never treated this place as a station. It never appeared on any of their timetables or lists of stations; and passengers were never ticketed to it, but always to the station beyond. No transactions at this place appeared on the books of the company, but all dealings with it were regarded as having taken place at the station beyond, and so appeared on their books."

Under the *North Carolina* statute designating the place where freight must be tendered in order to make the carrier liable for not transporting it, the words "regular depot or station" mean a certain place situated alongside of or near to a railroad, fitted up by it with suitable buildings, erections, appliances, and conveniences for carrying on generally and continuously in an orderly manner the business of transporting freight; and the fact that a mail train stopped regularly at a certain place to deliver mail, and that such place was set down in the circulars and orders of the company as a station, does not necessarily make it a regular station. *Land v. Wilmington, etc., R. Co.*, 104 N. Car. 48; 40 Am. & Eng. R. Cas. 18. Under the same statute it is held that a place at

which there has never been any station, or where no tickets have ever been kept or sold, or where there is no agent's office and where no bills of lading or receipts are given, but where the conductors sometimes stop trains and take on freight and passengers, is not a regular depot or station. *Kellogg v. Suffolk, etc., R. Co.*, 100 N. Car. 158; 35 Am. & Eng. R. Cas. 529. See also *Kansas City, etc., R. Co. v. Lilly (Miss.)*, 45 Am. & Eng. R. Cas. 379; *Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643. As to what is a depot or station under the fencing statutes, see *infra*, this title, *Duty of the Company*.

In *Denver, etc., R. Co. v. Pickard*, 8 Colo. 163; 18 Am. & Eng. R. Cas. 284, one sued for damages for injuries received in an attempt to board a moving train; and claimed that the point at which he attempted to get on was a regular station and that the train was bound to stop for him. He had no ticket. It was held that he could not recover; that the mere fact that the place was put down in a timetable which expressly stated that it was for the government employes only, did not make such place a regular station. *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239; 9 Am. & Eng. R. Cas. 307.

See also *U. S. v. Caldwell*, 19 Wall. (U. S.) 264, where, in a contract for the transportation of government supplies, the words "posts, depots, or stations" were held not to include railroad depots or stations, but merely military posts or stations.

**Depot.**—The word depot properly indicates the building at a station used to receive deposits of freight, either after or before delivery, and which also contains accommodations for passengers, where tickets are bought and sold, etc., and where the offices of the agents are. See also *DEPOT*, vol. 5, p. 622; *Abb. Law Dict.*; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 520; 6 Am. Rep. 128.

**A Depot Not a Fixture.**—A depot placed upon land by the consent of the owner is not a fixture, and may be removed by the railroad company. *Western N. Car. R. Co. v. Deal*, 90 N. Car. 110.

or indirectly, or through railroad commissioners, the establishment and maintenance of stations;<sup>1</sup> but the power of courts is not so extensive in the absence of statutes. The power has been exercised by the court, and its exercise supported, but the weight of authority is against it.<sup>2</sup> If, however, the legislature declares the

1. *Com. v. Eastern R. Co.*, 103 Mass. 258; 4 Am. Rep. 555; *Railroad Com'rs v. Portland, etc.*, R. Co., 63 Me. 270; 18 Am. Rep. 208; *RAILROADS*, vol. 19, p. 884. Such statutes are regarded as a legitimate exercise of the police power. *State v. Kansas City, etc.*, R. Co., 32 Fed. Rep. 722.

The only limitation as to the right of the legislature in this regard is found in the principle that the legislature cannot pass a statute which would be an impairment of the obligations of the charter contract. See *FRANCHISES*, vol. 8, p. 620 *et seq.*; *RAILROADS*, vol. 19, p. 891.

2. In support of the exercise of the power is *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 500; 52 Am. Rep. 424; *affirmed* on rehearing in 18 Neb. 512. The court, by Cobb, C. J., said: "At common law, it was the duty of a common carrier by land to deliver freight personally to the consignee: but when railways took the place of conveyances drawn by animals, necessity required the relaxation of this rule so as to allow of the substitution, in place of personal delivery, of a delivery at the warehouse or depot provided by the companies for the storage of goods. *Vincent v. Chicago, etc.*, R. Co., 49 Ill. 33. Is it too much to say that this relaxation of the above rule in favor of railway companies as common carriers imposed upon them the duty of providing suitable depots for the purpose of such delivery? This duty is so intimately connected with the business for which railways are built and managed that motives of self-interest almost always secure its observance. But when, for any reason, it is neglected or refused, may it not be enforced the same as any other public duty? . . . In the use of such franchises all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property at the discretion of the recipi-

ent; but, to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality."

In *People v. Chicago, etc.*, R. Co., 130 Ill. 182; 40 Am. & Eng. R. Cas. 355, *reversing* 35 Am. & Eng. R. Cas. 462, a *mandamus* was granted. The petition for the writ alleged specific facts making out a clear and strong case of public necessity; and also alleged that the accommodation of the public living in or near the town required and had long required the establishment of a station within the town. A demurrer to the petition admitting all the allegations was overruled. The court, by Bailey, J., said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants and amenable as such. This doctrine has been repeatedly announced by this and other courts. . . . It cannot be admitted that the discretion vested in the defendant in the matter of establishing and maintaining its freight and passenger stations, extends so far as to justify such manifest and admitted disregard of its duties to the public." See this language approved in *Mobile, etc.*, R. Co. v. *People*, 132 Ill. 571; 42 Am.

& Eng. R. Cas. 679; 22 Am. St. Rep. 556. See also Northern Pac. R. Co. v. Territory, 3 Wash. 303.

In *Northern Pac. R. Co. v. Washington*, 142 U. S. 492; 48 Am. & Eng. R. Cas. 475, reversing 3 Wash. Ter. 303, it appeared that the charter gave the road a discretion as to the location of its route, and imposed no specific duties as to the establishment of stations. When the road was first constructed, the company stopped its trains at a place known as Y., it being the county-seat and principal town of the county, but built no depot there. When the road was completed four miles further on, it reached the town of North Y., which had been laid out by the railroad company on its own land. The company then established a freight and passenger station at that place and ceased to stop its trains at Y. Mandamus was applied for to compel it to build and maintain a station at Y. Before the suit was determined, Y. rapidly retrograded and the town of North Y. rapidly increased in size at its expense, and became the principal town of the county and was made the county-seat. It appeared also that there were other stations on the road which furnished sufficient facilities for the country south of North Y., and that a station at Y. would not pay expenses, the earnings of this division of the road being insufficient to pay the running expenses; that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated at North Y. than at Y. It was held that the mandamus should not issue, since it was not shown that the duty was imposed upon the railroad company by statute, and because the duty did not exist independently of statute. The opinion of the majority of the court, delivered by Gray, J., was an elaborate one. It began with the premise that "A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." The court, after adverting to *York, etc., R. Co. v. Reg.*, 1 El. & Bl. 858; 72 E. C. L. 856; *Com. v. Fitchburgh R. Co.*, 12 Gray (Mass.) 180; *State v. Southern Minn. R. Co.*, 18 Minn. 40, in support of the doctrine that where a railroad charter simply

authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, the corporation cannot be compelled by mandamus to complete or maintain its road to that point when it would not be remunerative, said: "The difficulties in the way of issuing a mandamus to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself, are much increased when it is sought to compel the corporation to establish or to maintain a station, and to stop its trains at a particular place on the line of its road. The location of stations and warehouses, for receiving and delivering passengers and freight, involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty than by the ordinary judicial tribunals. . . . To hold that the directors of this corporation, in determining the number, place and size of its stations and other structures, having regard to the public convenience as well as its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases." The court cited *People v. New York, etc., R. Co.*, 104 N. Y. 58; 29 Am. & Eng. R. Cas. 480; 58 Am. Rep. 485; *Com. v. Eastern R. Co.*, 103 Mass. 254; 4 Am. Rep. 555; *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. Div. 586, and disapproved the decision cited above, viz.: *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 500; 52 Am. Rep. 424, declaring that decision to be inconsistent with *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; 16 Am. & Eng. R. Cas. 57. Justices Brewer, Field, and Harlan dissented, Brewer, J., saying: "A railroad company has a public duty to perform as well as a private interest to subserve; and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty

duty, the courts may enforce it.<sup>1</sup> In many jurisdictions, however, statutory regulations as to the establishment and erection of depots at proper places along the route of the road exist.<sup>2</sup> There are, also, in some of the States, statutes forbidding the

of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more a public duty than that of placing its depots and stopping its trains at those places which would best accommodate the public? If the State of *Indiana* incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the court may compel the road to receive passengers and transport freight, but, in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts."

1. See *Bonham v. Columbia, etc., R. Co.*, 26 S. Car. 353; 30 Am. & Eng. R. Cas. 177; *People v. Chicago, etc., R. Co.* (Ill.), 35 Am. & Eng. R. Cas. 462; *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. Div. 586; 29 Moak's Rep. 724; *People v. New York, etc., R. Co.*, 104 N. Y. 63; 29 Am. & Eng. R. Cas. 484; 58 Am. Rep. 485. In this last case the court, by Danforth, J., said: "No doubt the court may by mandamus act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation. . . . Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case (that is, to erect a depot) is not of that character. Nor can it by any fair or reasonable construction be implied." The application for mandamus was therefore denied, though it was admitted in the opinion of the court that "a plainer case could hardly be presented of a deliberate and intentional disregard of the pub-

lic interest and the accommodation of the public."

A statute of *South Carolina* provided that the railroad commission of the State might suggest to a railroad company to make enlargements and improvements in its stations and station houses, and if their suggestions were not complied with, they were authorized to take such legal proceedings as they should deem expedient, but provided no fine or forfeiture or mode of redress. It was held that the court could not enforce the suggestions of the commission requiring a larger depot, and that the only remedy lay in an appeal to the legislature. *Bonham v. Columbia, etc., R. Co.*, 26 S. Car. 353; 30 Am. & Eng. R. Cas. 177.

2. **Statutory Regulation.**—Thus, in *Missouri* a statute exists requiring that wherever two railroads intersect, passenger waiting-rooms shall be erected and maintained. Such a statute is held to be a proper exercise of police power and not unconstitutional. *State v. Wabash, etc., R. Co.*, 83 Mo. 144; 25 Am. & Eng. R. Cas. 133. A similar statute exists in *Texas*. *San Antonio, etc., R. Co. v. State*, 79 Tex. 264; 45 Am. & Eng. R. Cas. 586. See also *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; 16 Am. & Eng. R. Cas. 57; *State v. St. Paul, etc., R. Co.*, 40 Minn. 353.

Under such statutes neither company is released from its obligation by the default of the other, and a prosecution may be instituted against one without joining the other. *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722. And the fact that the roads had established separate depots in the town before the passage of the act will not excuse their failure to erect a depot at the point of intersection, as required by the act. *San Antonio, etc., R. Co. v. State*, 79 Tex. 264.

In other cases statutory provisions exist requiring that a railroad company shall furnish sufficient accommodations at such stations as their trains stop at. Such a statute applies only to such stations as are already established, and does not authorize a court

abandonment of stations once established by the company, without authority from the railroad commissioners.<sup>1</sup>

Where once a specific duty in regard to stations or depots is shown to exist, mandamus will lie to enforce its performance.<sup>2</sup> In such case, the right of any particular community to demand a

to compel the establishment of new stations. *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 500; 52 Am. Rep. 424; *People v. Chicago, etc., R. Co. (Ill.)*, 35 Am. & Eng. R. Cas. 462.

A railroad company cannot be subjected to the penalty named in a statute for neglecting to comply with an order of the railroad commissioners to erect a new depot, where the order fails to "prescribe the number and dimensions of the rooms therein for passengers," as required by the statute. *State v. Alabama, etc., R. Co.*, 67 Miss. 647; 42 Am. & Eng. R. Cas. 681.

1. See *State v. New Haven, etc., R. Co.*, 37 Conn. 153; *State v. New Haven, etc., Co.*, 41 Conn. 134; 42 Conn. 56; *New Haven, etc., Co. v. Hamersley*, 104 U. S. 1; 2 Am. & Eng. R. Cas. 418; *Attorney Gen'l v. Eastern R. Co.*, 137 Mass. 45; 21 Am. & Eng. R. Cas. 237 (facts showing re-location instead of abandonment).

A statute of *Mississippi* forbids the abolishment or disuse of any depot once established, without the consent of the railroad commission. Changing the site of a depot from one place to another in the same town is not an abolishment or disuse within the meaning of the statute. But such a change can only be made when the interests of the railroad company and the public concur in demanding it, and when the new site is not inconvenient or inaccessible. *State v. Alabama, etc., R. Co.*, 68 Miss. 653. And the relocation and consolidation of two stations at one point in one proceeding is not an abandonment of a station, within the meaning of *Massachusetts* Pub. Stats., ch. 112, where § 157 authorizes a railroad company to relocate its passenger stations with the approval of the board of railroad commissioners, etc., and § 156 prohibits the abandonment of a passenger station which has been maintained five years. *Cunningham v. Board of Railroad Com'rs* (Mass. 1893), 32 N. E. Rep. 959.

**Enjoining Abandonment of Station Once Established.**—No authorities have been found as to whether in the ab-

sence of statutory provision a railroad company may be enjoined from abandoning a station once established. It would seem, however, that where property has been purchased, investments made, and business undertakings begun upon the faith of such an establishment, an injunction would lie to prevent the abandonment, since irreparable injury might follow the denial of the remedy. Damages for injuries received in consequence of an abandonment have been allowed. See *Rich v. New York Cent., etc., R. Co.*, 87 N. Y. 382; 11 Am. & Eng. R. Cas. 594; *Houston, etc., R. Co. v. Molloy*, 64 Tex. 607; 25 Am. & Eng. R. Cas. 244.

See, in this connection, *Baltimore, etc., R. Co. v. Compton*, 2 Gill. (Md.) 20, where the party through whose land a railroad had been located and constructed was allowed to recover damages for injuries sustained by the company's abandonment of the location. Compare *Kinealy v. St. Louis, etc., R. Co.*, 69 Mo. 658, holding that where the construction and maintenance of a railroad are authorized by the legislature solely for the public benefit, no contract or duty to maintain its road or continue to run its trains will be implied on the part of the company in favor of a private citizen who has bought and improved lots along the line of the road under the belief that it will continue to be maintained and operated.

In *Mobile, etc., R. Co. v. People*, 132 Ill. 559; 42 Am. & Eng. R. Cas. 671; 22 Am. St. Rep. 556, a mandamus to compel the reestablishment of a station was refused where it appeared that the new station was more convenient than the old for a majority of the residents of the community.

**2. Mandamus to Compel Establishment of Station.**—That mandamus is the proper remedy, see *MANDAMUS*, vol. 14, p. 162; *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 500; 52 Am. Rep. 424; *People v. Chicago, etc., R. Co.*, 130 Ill. 175; 40 Am. & Eng. R. Cas. 352. The only question arising in such cases is as to the existence of the duty; the

station must depend upon circumstances, among which are to be considered the amount of railroad business to be done there, or the proximity of other stations.<sup>1</sup>

**III. CONTRACTS CONCERNING LOCATION.**—The validity of contracts designed to influence the site or location of stations has been questioned and denied frequently.<sup>2</sup> Sometimes such contracts have been held objectionable in providing that no other station should be located near by; a contract of this nature is void, as having a tendency to prevent the corporation from discharging properly its duty to the public at large.<sup>3</sup> Sometimes contracts have been made with an officer of the railway, or some person supposed to be influential with the corporation, and he has agreed,

cases denying a mandamus when applied for have all done so on the ground that no specific legal duty was shown to exist. See *Northern Pac. R. Co. v. Washington*, 142 U. S. 492; 48 Am. & Eng. R. Cas. 475, reversing 3 Wash. Ter. 303. See also on the general subject *Nashua, etc., R. Co. v. Derry*, 58 N. H. 65 (notification of election equivalent to a request); *Ohio, etc., R. Co. v. People*, 120 Ill. 200; 30 Am. & Eng. R. Cas. 509.

In *Nebraska*, where by statute the railroad commission is authorized and required to examine into all cases presented and to report as to the necessity of a station asked for, a party desiring to have a station created must first go to the commission. *State v. Chicago, etc., R. Co.*, 19 Neb. 476. The case of *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 500; 52 Am. Rep. 424, was decided before this act took effect. *State v. Chicago, etc., R. Co.*, 19 Neb. 476.

1. See note in 22 Am. & Eng. R. Cas. 513 *et seq.*, where decisions by railroad commissions relative to the necessity of stations at particular points are set out. See also RAILROAD COMMISSIONERS, vol. 19, p. 689.

In *State v. Republican Valley R. Co.*, 17 Neb. 647; 22 Am. & Eng. R. Cas. 500; 52 Am. Rep. 424, a town of fifteen hundred inhabitants, with an ordinary amount of business, was allowed a station, though there was another station on the same road at a town only one mile distant, and there was another road serving the town.

In *St. Louis, etc., R. Co. v. Adcock*, 52 Ark. 406; 40 Am. & Eng. R. Cas. 682, it was held to be not an unreasonable regulation for a railroad company to refuse to designate as a flag station

for through trains an unincorporated town, situated within three miles of a regular station, and containing only a few residences.

It is not a misuser for a railroad company to use land acquired by it for a right of way for the erection of a freight depot and other structures, for it may make any use of such land which contributes to the safe and efficient operation of the road, and does not interfere with the rights of property pertaining to adjacent lands. *Elyton Land Co. v. South & North Ala. R. Co.* (Ala. 1891), 10 So. Rep. 270.

2. See RAILROADS, vol. 19, pp. 816, 817.

3. The rule applies whether the contract exists specially, or as a condition in a deed of conveyance. *Marsh v. Fairbury, etc., R. Co.*, 64 Ill. 414; 16 Am. Rep. 564; *St. Louis, etc., R. Co. v. Mathers*, 71 Ill. 592; 22 Am. Rep. 122; 104 Ill. 257; 9 Am. & Eng. R. Cas. 600; *Mobile, etc., R. Co. v. People*, 132 Ill. 559; 42 Am. & Eng. R. Cas. 671; 22 Am. St. Rep. 556; *Williamson v. Chicago, etc., R. Co.*, 53 Iowa 126; 26 Am. Rep. 206; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kan. 602; 15 Am. Rep. 357. See also *Pacific R. Co. v. Seely*, 45 Mo. 212; 100 Am. Dec. 369.

In *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55; 24 Am. & Eng. R. Cas. 644; 55 Am. Rep. 719, the court, by Mitchell, J., said: "Railroad corporations are regarded as public agencies, owing duties to the public generally. They are therefore not authorized to make any contract which may prevent them from discharging their duties efficiently to the public, and for that reason they cannot contract that the company will not locate a station or erect a depot at a place where the demands of business or con-



for a consideration, to secure the location of a desired station; such a contract is void, as against public policy.<sup>1</sup> But where the contract is with the railroad company, that it shall furnish a station at the place desired, in consideration of a donation of money or grant of land, and there is no restriction or prohibition against the location of other stations, there is no rule of law or policy violated, and such contracts are usually upheld.<sup>2</sup> And, therefore, where such a contract exists, damages may be recovered for a failure by the company to perform its obligations.<sup>3</sup>

centration of population may at some time in the future require it. Such a contract is void as against public policy."

In *Tucker v. Allen*, 16 Kan. 312, one of the conditions of the deed was that no railroad depot should be built at a certain place within one year. No depot was built at such place within that time, and all the other conditions were strictly fulfilled; nor was there anything to show that injury or inconvenience ever resulted to any person or to the public generally because no depot had been built at the place designated. It was held that neither the grantor in the said deed, nor any person claiming under him, could avoid the deed merely because of the supposed illegality in inserting the condition as to not building a depot.

See, however, *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437, in which a stipulation that "but one other depot" should be allowed between certain points was not objected to by court or counsel.

1. *Fuller v. Dame*, 18 Pick. (Mass.) 472 (leading case); *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 60; 24 Am. & Eng. R. Cas. 644; 55 Am. Rep. 719; *Holladay v. Patterson*, 5 Oregon 177.

See also in this connection *Houston, etc., R. Co. v. McKinney*, 55 Tex. 176; 8 Am. & Eng. R. Cas. 723, holding that an agent of a railroad company, acting under a general power to procure a right of way for the road, has no authority to contract that the company will locate its stations at particular places. *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309; *Workman v. Campbell*, 46 Mo. 305.

2. *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55; 24 Am. & Eng. R. Cas. 644; 55 Am. Rep. 719; *Atchison, etc., R. Co. v. Jefferson Co.*, 21 Kan. 309; *McClure v. Missouri River, etc., R. Co.*, 9 Kan. 373; *Vicksburg, etc., R.*

*Co. v. Ragsdale*, 54 Miss. 200; *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263; 22 Am. & Eng. R. Cas. 54; 54 Am. Rep. 97; *Texas, etc., R. Co. v. Robards*, 60 Tex. 549; 48 Am. Rep. 268; *Nottawasaga Tp. v. Hamilton, etc., R. Co.*, 16 Ont. App. Rep. 52; 38 Am. & Eng. R. Cas. 677.

See also as establishing a similar rule in regard to contracts to influence the location of the road, *Pixley v. Gould*, 13 Ill. App. 565; *First Nat. Bank v. Hendrie*, 49 Iowa 402; 31 Am. Rep. 153. See RAILROADS, vol. 19, p. 837.

3. **Damages for Failure to Maintain Station.**—In *St. Thomas v. Credit Valley R. Co.*, 12 Ont. App. Rep. 273; 36 Am. & Eng. R. Cas. 473, it appeared that the main consideration of a bonus to a railroad company was the bringing of its line to a certain town, and the establishment of a station at a certain location within its corporate limits. In an action for damages for breach of the contract by failure to locate the station, it was held that it was proper to consider in estimating the damages the depreciation in value of the property around the station by reason of such failure, as showing how much less benefit has been derived by the city from taxes on the area affected by the station. It was held also that the city was not a trustee for individuals who suffer loss or inconvenience from the abandonment of the station, and could not therefore recover damages for their use. See also *Notawasaga Tp. v. Hamilton, etc., R. Co.*, 16 Ont. App. 52; 38 Am. & Eng. R. Cas. 677 (agreement to "establish" held not to mean to "maintain forever").

The case of *Houston, etc., R. Co. v. Molloy*, 64 Tex. 607; 25 Am. & Eng. R. Cas. 244, was a suit for damages for removing a railroad depot from the location in which it had been for years. It appeared that the depot had been erected at that particular spot

The most common form of contract concerning the location of stations is seen in conditions or covenants contained in grants of a right of way to the railroad company. The validity and construction of these conditions are governed by the ordinary rules of law.<sup>1</sup>

upon the first construction of the road in consideration of donations by the citizens of the surrounding locality. It was held that the plaintiff might recover, and that in proof of damages he might show depreciation in the value of his property adjacent, diminution in business to which the property was adapted, or diminution in other like things resulting from the unlawful act. See also *In re Ruthin*, etc., R. Act, 32 Ch. Div. 438; 27 Am. & Eng. R. Cas. 434.

But ordinarily the mere fact that the property owner's land has diminished in value by the discontinuance of a station on the land of another person does not authorize a recovery of damages. *Pittsburgh Southern R. Co. v. Reed* (Pa.), 28 Am. & Eng. R. Cas. 233.

In *Watterson v. Allegheny Valley R. Co.*, 74 Pa. St. 208; 8 Am. Ry. Rep. 30, the measure of damages for failure to locate depot as agreed was said to be "the additional value that would have accrued to plaintiff's land had the depot been erected." The profits of business could not be considered. *Westchester*, etc., R. Co. v. *Broomal* (Pa.), 26 Am. & Eng. R. Cas. 591; *Hubbard v. Kansas City*, etc., R. Co., 63 Mo. 68; *Louisville*, etc., R. Co. v. *Sumner*, 106 Ind. 55; 24 Am. & Eng. R. Cas. 641; 55 Am. Rep. 719. See also *Griswold v. St. Louis*, etc., R. Co., 8 Mo. App. 582; 1 Am. & Eng. R. Cas. 626. See RAILROADS, vol. 19, p. 853.

In *International*, etc., R. Co. v. *Dawson*, 62 Tex. 260, where land was conveyed to a company under a parol agreement that the company would locate permanently its depot at a certain point, the grantor was allowed to recover the land upon the company's removal of the depot to another point. Such a removal was merely a breach of a condition subsequent which defeated the estate of the grantee. *Cleveland*, etc., R. Co. v. *Coburn*, 91 Ind. 557; 17 Am. & Eng. R. Cas. 37.

In *Close v. Burlington*, etc., R. Co., 64 Iowa 149; 17 Am. & Eng. R. Cas. 33, the grant of land was conditioned on the permanent location of a depot

at a certain point. The depot was erected, but was burned down soon after. It was held that the grantors were not entitled to damages for failure by the company to erect another depot, but were entitled to the notes given to the company, and to a release by it of its right to the lands.

**Failure to Locate May Amount to a Tort.**—In *Rich v. New York Cent.*, etc., R. Co., 87 N. Y. 382; 11 Am. & Eng. R. Cas. 594, the railroad company, in consideration of the grant of certain riparian rights, agreed to locate and maintain its depot at a certain point. It appeared that unless the depot was so located the lands of the plaintiff, R., would be sold under foreclosure, and that he would be seriously injured financially. After the making of the contract, the company refused to locate the depot, though it had full knowledge of the consequences which would result. It was held that the breach of contract by the company, the time, circumstances, and conditions being considered, constituted a tort, and the plaintiff might recover damages therefor.

**Specific Performance of Contract to Locate.**—Specific performance of a contract by a railroad company with a land owner to erect a station at a certain point is properly denied by a court of equity, where it appears that such point is on the side of a steep mountain, in a sparsely settled district, and approached by a steep grade; that the station could only be constructed at a considerable expense; and that the public travel would be delayed by the stoppage of the trains, and the public convenience would not be promoted. *Conger v. New York*, etc., R. Co., 120 N. Y. 29; 43 Am. & Eng. R. Cas. 643.

1. See the subject discussed generally in RAILROADS, vol. 19, p. 847-855. See also *Cleveland*, etc., R. Co. v. *Coburn*, 91 Ind. 557; 17 Am. & Eng. R. Cas. 37; *Louisville*, etc., R. Co. v. *Sumner*, 106 Ind. 55; 24 Am. & Eng. R. Cas. 641; 55 Am. Rep. 719; *Louisville*, etc., R. Co. v. *Moore*, 106 Ind. 600; *Crow v. Owensboro*, etc., R. Co., 82 Ky. 134; 17 Am. & Eng. R. Cas. 31;

What is a sufficient compliance with conditions or covenants to locate stations and erect depots must depend largely upon the circumstances of each particular case.<sup>1</sup>

*Jones v. St. Louis, etc., R. Co.*, 79 Mo. 92; 20 Am. & Eng. R. Cas. 371; *Westchester, etc., R. Co. v. Broomal* (Pa.), 26 Am. & Eng. R. Cas. 591; *Wooters v. International, etc., R. Co.*, 54 Tex. 294; 4 Am. & Eng. R. Cas. 100; *Galveston, etc., R. Co. v. Pfeuffer*, 56 Tex. 66; 11 Am. & Eng. R. Cas. 373; *Miller v. Gulf, etc., R. Co.*, 65 Tex. 659; 24 Am. & Eng. R. Cas. 158; *Homer v. Chicago, etc., R. Co.*, 38 Wis. 165 (grant of land "only for depot and other railroad purposes," held a condition subsequent).

If the depot is to be erected on the land granted, the granting of the land is a condition precedent to the right to demand the depot; so that if the intended grantor disables himself to make the conveyance, he can maintain no action for a failure to erect the depot. *Sayre v. New York, etc., R. Co.*, 3 Duer (N. Y.) 57.

In *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. (N. Y.) 221; 47 Am. Dec. 320, it was held that an agreement made by a railroad company with a person owning land adjacent to the road to establish and maintain a permanent turnout track and stopping place at a particular point in the neighborhood of his property, and to stop there with the freight and passenger trains of the company, is, in substance, the grant of an easement or servitude binding upon the property of the railroad company as the servient tenement for the benefit of the owner of such adjacent property and those who succeed him in his estate.

See also *New York, etc., R. Co. v. Providence*, 16 R. I. 746, where it is held that the consent of the city to the location and construction of a railroad and depot buildings within the city on condition that the company fill certain tide flowed lands, is not a grant, but only a permission to occupy the land on compliance with the condition; so that the forfeiture of a deposit for breach of condition could not be exacted.

1. **What Is Sufficient Performance of Contract to Maintain Station.**—The mere erection of buildings, without providing the necessary agents and employes at a station, is not a compliance with

an agreement to erect, maintain, and equip a permanent freight and passenger station at a certain place. *Wallace Tp. v. Great Western R. Co.*, 25 Grant Ch. 86; 3 Ont. App. Rep. 44. So an expressed condition in a note payable to a railroad company, "that a depot be constructed within eighty rods of the present town of W." is not fulfilled by the building of a depot within eighty rods of the limits of the town as extended after the note was given. *Davenport, etc., R. Co. v. Rogers*, 39 Iowa 298.

Where by the terms of a contract granting to the company certain franchises, the company were to build or allow "but one other depot" between certain points, it was held that a station at a coal bank where trains merely stopped to take or leave cars, was not a depot within the meaning of the contract. *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437.

In *Hood v. Northeastern R. Co.*, L. R., 5 Ch. 525, the railroad company covenanted with a land owner that the land purchased should thereafter be used as a first class station. The company was afterwards made part of a company operating a much longer line. Twenty-one years after the date of the conveyance the land owner filed a bill to compel the company to build a larger station and stop all of their trains at that station. It was held that the existing station had not been objected to and had remained for many years, and as it did not appear that the passengers were numerous, the court would not compel the erection of a larger station; but that as many trains as stopped at any other station between the termini of the original railway, excepting mail, express and special trains, must stop at that station.

See generally RAILROADS, vol. 19, p. 848.

**Length of Time Station to be Maintained.**—In *Jeffersonville, etc., R. Co. v. Barbour*, 89 Ind. 375; 14 Am. & Eng. R. Cas. 466, the deed contained this clause: "The above ground is deeded to the State of Indiana expressly for the use and purpose of depot grounds for the Madison & Indianapolis Rail-

**IV. RULES AND REGULATIONS—1. In General.**—Subject to the limitation that its regulations shall not be unreasonable, a railroad company has the right to make and enforce rules and regulations regarding its stations, as to who shall enter upon the premises, and as to how those allowed to enter shall conduct themselves while there.<sup>1</sup>

road. Now if the State shall fail to erect buildings and occupy such ground for the use and purpose above mentioned, then the above specified ground shall revert back to the donors." The railroad company took possession immediately and erected depot buildings, which they continued to use for thirty years. They then removed the buildings and established a depot elsewhere. It was held that no specific time being mentioned in the deed a reasonable time was meant, and that thirty years was such reasonable time, so that on the removal of the depot the land did not revert to the donors.

So in *Nottawasaga Tp. v. Hamilton, etc.*, R. Co., 16 Ont. App. Rep. 52; 38 Am. & Eng. R. Cas. 677, the agreement was to establish a station. It was held that the word "establish" did not in itself mean to "maintain and use forever," and that in view of the seven years' limitation in contracts concerning other stations, the company was not bound to maintain the particular station after seven years.

In *Jessup v. Grand Trunk R. Co.*, 28 Grant Ch. 583, it was held that where the grant was made "in consideration of the company's placing the station for P. upon his land," the grantor was entitled to damages or to restitution of the land upon the removal of the station to a point some distance away, even though it had been maintained at the proper place for over twenty years. The case of *Indianapolis, etc., R. Co. v. Hood*, 66 Ind. 580, holding that a station must be maintained permanently, is based upon the ground that the terms of the contract evidently intended a permanent location.

1. See RAILROADS, vol. 19, p. 820 *et seq.*; *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547; *Summitt v. State*, 8 Lea (Tenn.) 413; 9 Am. & Eng. R. Cas. 302, 304, note; 41 Am. Rep. 637; *Com. v. Power*, 7 Met. (Mass.) 506; 41 Am. Dec. 465. In this last case the court, by Shaw, C.J., said: "Railroad corporations, both as the owners and proprietors of the houses and build-

ings connected with the railroad, and as carriers of passengers, have authority to make reasonable and suitable regulations in regard to passengers intending to pass and repass on the road in the passenger cars, and in regard to all other persons making use of such houses and buildings. This authority is incident to such ownership of the real estate, and to their employment as passenger carriers; and all such regulations will be deemed reasonable which are suitable to enable them to perform the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers. The reasonableness of such regulations must in some measure be judged of with reference to the particular depot for which they are adopted."

In *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433; 45 Am. & Eng. R. Cas. 596, the company had a rule requiring persons passing through its gates for the purpose of taking trains, to exhibit their tickets to the gate-keepers and have them punched by them; also, one providing that no passenger should be allowed to board any train while in motion. It was held that these rules were reasonable, and that all persons intending to take trains, and knowing, or having reasonable opportunity to know, of them, were bound to comply with them; also, that the company had a right to enforce them, or to prevent a violation of them, and to employ such force as might be necessary for that purpose. The company, therefore, was not liable for an assault where its agent seized hold of a passenger and detained him to prevent him from boarding a train in motion.

But a railroad company cannot compel a passenger to present his ticket to a ticket receiver to have its validity passed upon where the gate-keeper has refused to allow him to pass because the date was illegible, if in the same condition as when received from

A disregard of proper regulations by one who knew, or ought to have known, of them, may constitute contributory negligence on his part such as to bar a recovery in an action for damages for injuries sustained by him.<sup>1</sup>

A State may pass a law compelling railroad companies to place a bulletin board in each passenger station, on which shall be posted, before the schedule time for the arrival of each passenger train stopping at such station, the fact whether such train is on schedule time or not.<sup>2</sup>

**2. Admission to Station Premises.**—A regulation prohibiting all persons from entering the station premises except those having lawful business there is not unreasonable, and may be enforced by the company, if it is uniform in its operation and not used to

the agent. *Northern Cent. R. Co. v. O'Conner* (Md. 1892), 24 Atl. Rep. 449.

Where a gateman wrongfully refuses to allow a passenger to pass to a train, he can only recover such damages as were the immediate and necessary consequences resulting from the wrongful act of the gateman, unless malice or circumstances of aggravation be shown. *Northern Cent. R. Co. v. O'Conner* (Md. 1892), 24 Atl. Rep. 449.

**1. Willful Disregard of Regulations Contributory Negligence.**—Thus in *Pennsylvania R. Co. v. Zeb*, 33 Pa. St. 327, a passenger on leaving a station left it on the opposite side, instead of leaving by the platform provided for the egress of passengers. It was held that the company was not liable for injuries sustained by him in being struck by a locomotive in leaving. The court, by Thompson, J., said: "A voluntary disregard of regulations providing for their safe exit by the platform, was a disregard of their obligations to the company; and if this were so, the plaintiff ought not to recover. We hold, on these principles, that the company's liability could not be fixed for the injury consequent on the choice of the passenger in disregard of the provisions made by them for his safety and convenience. It was, we think, error in the court to submit the questions of the rights of the parties to leave the cars at either side, in the absence of proof of a justifying necessity for so doing. It was not negligence on the part of the company that it did not, by force or barriers, prevent the parties from leaving at the wrong side." The same views are supported in *Bancroft v. Boston*, etc., R. Co., 97 Mass. 275; *Michigan Cent. R.*

*Co. v. Coleman*, 28 Mich. 440, and numerous cases cited; *Pastoris v. Baltimore*, etc., R. Co. (Pa. 1892), 24 Atl. Rep. 283.

The carrier is not required to have the side opposite the platform lighted, even though parties have been in the habit of getting on and off there as a matter of convenience to themselves. *Louisville*, etc., R. Co. *v. Ricketts* (Ky. 1892), 19 S. W. Rep. 182.

**2. State v. Indiana, etc., R. Co. (Ind. 1892), 32 N. E. Rep. 817. In this case a statute had been passed requiring such a blackboard to be placed in every passenger depot located at any station in the state at which there was a telegraph office, and providing that for each violation in failing to report, or making a false report, the railroad company should be subject to a penalty of \$25; and it was held that the company was liable for the penalty for failing to make such report, though no blackboard had been put up and though no penalty had been provided for a failure to put up a blackboard; that such statute was not class legislation because it only applied to stations where there were telegraph offices, since it applied alike to all persons operating railroads and to the same class of stations; that such statute was a proper police regulation and not void as a regulation of interstate commerce because the company was compelled to bring into use knowledge possessed by it or its servants situate in another State; and that under such statute a railroad company was liable for one penalty for each train, during each trip, at each station where there was a failure to comply with its provision, and was not limited to a single penalty for its violation.**

make unjust discrimination.<sup>1</sup> Common instances of such regulations are seen in rules forbidding hackmen, hotel drummers, or loiterers, from entering the depot premises to solicit patronage or annoy passengers.<sup>2</sup>

**3. Exclusive Privileges to Hackmen.**—Discriminations are made sometimes in favor of certain hackmen. So far as such regulations have for their object the comfort and convenience of passengers and the avoidance of the presence and clamor of competing hackmen, it would seem, both upon principle and authority, that they are valid. The difficulty arises on the contention that a regulation of this sort, in the particular instance, may constitute an unfair and unjust discrimination.<sup>3</sup>

1. *Summitt v. State*, 8 Lea (Tenn.) 413; 9 Am. & Eng. R. Cas. 302; 41 Am. Rep. 637; *Fluker v. Georgia R.*, etc., Co., 81 Ga. 461; 38 Am. & Eng. R. Cas. 379; 12 Am. St. Rep. 328. In this latter case for nine years and without objection from the company, a person had exercised the privilege of entering the station and supplying the passengers with lunches. The company then notified him that he could no longer enjoy the privilege, it having been leased to another. He insisted upon exercising it, however, and was ejected by the company's servant with no greater violence than was actually necessary. In an action by him for damages for an assault the court held that the company had a right to revoke the implied license to him and to exclude him from the station; and the expulsion having been done properly it was not liable for assault. See also *INNS AND INNKEEPERS*, vol. 11, pp. 35-36; *Jincks v. Coleman*, 2 Sumn. (U. S.) 221; *Barker v. Midland R. Co.*, 18 C. B. 46; 86 E. C. L. 45 (refusal to allow hack owner to drive his vehicle within station grounds).

2. Thus in *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547, it was held that the company had a right forcibly to eject from its station premises a hotel runner, who came there to solicit patronage, in violation of a regulation of which he might be ignorant. In *Com. v. Power*, 7 Met. (Mass.) 596; 41 Am. Dec. 465, a hotel man who had entered the depot frequently for the purpose of soliciting patronage received notice from the station superintendent that he would be allowed to do so no longer. Notwithstanding, he entered the depot repeatedly in violation of the order. On one occasion he entered, and purchased a ticket with the *bona fide*

intention of taking passage in the cars. The superintendent, believing that he was there merely to secure patrons, ordered him to leave, and, in his refusing to do so, proceeded to eject him. He did not show his ticket or give any notice of his real intention. The expulsion having been done without undue violence he was not allowed to recover. The opinion, by Shaw, C. J., states the law at length. See also *Hall v. Power*, 12 Met. (Mass.) 482; 46 Am. Dec. 698; *Howell v. Jackson*, 6 C. & P. 723; 25 E. C. L. 617.

One who desires to remain on the depot premises in order to take passage on the train must exercise his right to do so in conformity with the regulations of the company as to his conduct while there; and the purchase of a ticket does not entitle a person to occupy the depot for an unreasonable time before or after the arrival of his train; and if he attempts to remain longer than a reasonable time he may be ejected. *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337.

**Intoxicated Persons.**—The company may enforce a regulation against the admission of intoxicated persons to its accommodations, and may expel such persons if they persist in entering. See *RAILROADS*, vol. 19, p. 904, note 2; *Pittsburg, etc., R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424; *Johnson v. Chicago, etc., R. Co.*, 51 Iowa 25. It may also expel a prostitute, but only when she conducts herself in an unseemly or improper manner. *Beeson v. Chicago, etc., R. Co.*, 62 Iowa 173; 13 Am. & Eng. R. Cas. 45; *Brown v. Memphis, etc., R. Co.*, 7 Fed. Rep. 51; 1 Am. & Eng. R. Cas. 247.

3. In *Cravens v. Rodgers*, 101 Mo. 247; 42 Am. & Eng. R. Cas. 656, a railroad company gave to the owner

of one of several competing omnibus lines the exclusive privilege of approach to the most desirable and advantageous part of its platform for securing the patronage of passengers. The owner of the line at his own expense made an approach to the platform and erected an additional platform for the convenience of those taking passage upon his vehicles. In an action to enjoin other lines from using this platform it was held that the railroad company had no power to grant such an exclusive privilege, and that the grant was therefore void. The decision rested upon the constitutional provision prohibiting "discrimination in charges or facilities in transportation . . . between transportation companies and individuals, or in favor of either." *Missouri Const.*, art. 12, § 23. The court, by Brace, J., arguing that the competing omnibus lines were all common carriers, said: "On the other hand, if better facilities are afforded to one carrier than another by the connecting carrier (that is, the railroad company), competition is discouraged, a monopoly created, and the traveling public are apt to receive slow, uncomfortable, slovenly, negligent, and expensive service. Monopolies are obnoxious to the spirit of our laws and ought to be discouraged." The same view was taken in *McConnell v. Pedigo* (Ky. 1892), 18 S. W. Rep. 15.

So in *Montana Union R. Co. v. Langois*, 9 Mont. 419; 18 Am. St. Rep. 745; 42 Am. & Eng. R. Cas. 646, the company granted to a single hack-owner, and to the exclusion of all others, the right to receive and discharge passengers at its station platform. It was held that such a grant could not be upheld—that the railroad company had no power to make such a regulation. Again, in *Kalamazoo Hack, etc., Co. v. Sootsma*, 84 Mich. 194; 47 Am. & Eng. R. Cas. 445; 22 Am. St. Rep. 699, note, the railroad company leased a portion of its ground, constituting the only point of easy access to the depot, to the owner of a certain hack line, practically giving him the exclusive right to occupy a place upon the depot grounds where he could comfortably discharge his passengers and seek patronage from incoming passengers. The court held that the lease was an unjust discrimination, tending to defeat competition and to create a monopoly, and was

void under Howell's *Michigan Stat.*, § 3355, providing that "all railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations."

The subject underwent a discussion in the recent *Massachusetts* case of *Old Colony R. Co. v. Tripp*, 147 Mass. 35; 33 Am. & Eng. R. Cas. 488; 9 Am. St. Rep. 661. Here the regulation was one which granted to a certain person the exclusive right of coming upon station grounds to solicit the patronage of incoming passengers with respect to carrying their baggage, etc. It was held that such a regulation was proper and did not contravene the provision of the statute, that "every railroad corporation shall give to all persons and companies reasonable terms, facilities, and accommodations for the transportation of themselves, their agents and servants, etc." The statute was considered to apply only to railroads as common carriers and their patrons. In this case, there was a dissent on the part of three of the judges. The majority opinion referred to *Markham v. Brown*, 8 N. H. 523, in which case it was held that an innkeeper had no right to exclude from his inn a stage driver who entered it to solicit guests to patronize his stage, in opposition to a driver of a rival line who had been admitted for a like purpose, but distinguished such a case from one involving the right to enter a railroad station for purposes substantially similar. As directly in point, the cases of *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301, and *Jenks v. Coleman*, 2 Sumn. (U. S.) 221, were cited. *Com. v. Power*, 7 Met. (Mass.) 506; 41 Am. Dec. 465; *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337, were also referred to. The opinion also reviewed the English cases of *Marriott v. London, etc., R. Co.*, 1 C. B. N. S. 499; 87 E. C. L. 498; *Beadell v. Eastern Counties R. Co.*, 2 C. B. N. S. 509; 89 E. C. L. 509; and referred to *Painter v. London, etc., R. Co.*, 2 C. B. N. S. 702; 89 E. C. L. 701; *Barker v. Midland R. Co.*, 18 C. B. 46; 86 E. C. L. 45; *In re Palmer R. Co.*, L. R., 6 C. P. 194; *In re Parkinson, L. R.*, 6 C. P. 554. The dissenting opinion referred to *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; 2 Am. Rep. 31. See, as illustrative of the subject, *Fluker v. Georgia, etc., R. Co.*, 81 Ga. 461; 38 Am. & Eng. R. Cas. 379; 12 Am.

**V. INJURIES AT AND AROUND STATIONS—1. In General.**—This subject involves only the application of the general law of negligent injury to a particular class of cases; the right of the injured party to recover depends upon his showing: *first*, that the company owed him a certain duty, e. g., to light the station premises; *second*, that it was guilty of a want of ordinary care in failing properly to perform that duty; and, *third*, that he himself stood in such a relation to the company that the duty was owing to him.<sup>1</sup>

**2. Duty of the Company.**—The company does not insure the lives or safety of its passengers, but the law imposes upon it a high measure of duty to provide for their safety and protection.<sup>2</sup> It is bound, therefore, to exercise care to have its station platforms and its depot buildings so constructed that injury shall not occur to persons properly occupying them.<sup>3</sup> It is also a part of

St. Rep. 328 (stating the right of a railroad company to license lunch vendors); *Jencks v. Coleman*, 2 Sumn. (U. S.) 221. In this last case, however, the question was submitted to the jury to find whether or not the contract for exclusive privilege was a reasonable one. See also *Griswold v. Webb*, 16 R. I. 649; 40 Am. & Eng. R. Cas. 683; *Cole v. Rowen*, 88 Mich. 219; *Smith v. New York, etc., R. Co.* (Pa. 1892), 24 Atl. Rep. 304.

**Elevator Companies.**—See *State v. Missouri Pac. R. Co.*, 29 Neb. 550; 42 Am. & Eng. R. Cas. 661, where the doctrine is stated that under the *Nebraska* statute the courts will compel railroad companies to grant equal facilities to elevator companies who desire in good faith to engage in handling and shipping grain along its line.

**Wharves Used as Stations.**—An injunction has been granted to compel a railroad company owning a wharf and using it as a station, to allow a steamboat company to land passengers on it who wished to take the trains on the railroad. *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387; 49 Am. & Eng. R. Cas. 212; *Oregon, etc., R. Co. v. Ilwaco R., etc., Co.*, 51 Fed. Rep. 611.

1. See the general subject discussed in *COMPARATIVE NEGLIGENCE*, vol. 3, p. 367; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 15 *et seq.*; *NEGLECT*, vol. 16, p. 386 *et seq.*; *Pennsylvania Co. v. Marion*, 104 Ind. 239; 27 Am. & Eng. R. Cas. 132.

2. See *NEGLECT*, vol. 16, p. 415; *CARRIERS OF PASSENGERS*, vol. 2, p. 738; *Gilson v. Jackson Co. Horse R.*

*Co.*, 76 Mo. 282; 12 Am. & Eng. R. Cas. 132; *Renneker v. South Carolina R. Co.*, 20 S. Car. 219; 18 Am. & Eng. R. Cas. 149.

3. In *Pennsylvania Co. v. Marion*, 104 Ind. 239; 27 Am. & Eng. R. Cas. 132; 7 L. R. A. 687, the rule is thus stated in the opinion of the court by *Mitchell, J.*: "While it is the duty of a railroad company to keep its platform and approaches safe and convenient for the ingress and egress of passengers to and from its cars, the rigor of the rule which requires it out of considerations of public policy to exercise the highest possible diligence for the benefit of the passenger while in the progress of his journey, and holds it responsible for the slightest defect in its machinery, track, and appliances, is measurably relaxed with respect to its platform and approaches. With respect to these it is to be held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded by individuals upon whose premises they come by invitation or inducement for the transaction of business." See *Gulf, etc., R. Co. v. Butcher*, 83 Tex. 309; *Jarvis v. Brooklyn El. R. Co.*, 133 N. Y. 623; *Evans v. Interstate Rapid Transit R. Co.*, 106 Mo. 504; *Bethmann v. Old Colony R. Co.* (Mass. 1892), 29 N. E. Rep. 587; *McDermott v. Chicago, etc., R. Co.* (Wis. 1892), 52 N. W. Rep. 85; *Ensley R. Co. v. Chewing*, 93 Ala. 24; *Bullard v. Boston, etc., R. Co.*, 64 N. H. 27; 27 Am. & Eng. R. Cas. 117; 10 Am. St. Rep. 367.

Wherever a railroad company is in



the habit of receiving passengers, there people have a right to assume that they may safely congregate to get aboard trains. *Lake Shore, etc., R. Co. v. Ward*, 35 Ill. App. 423, *aff'd* on other grounds in 135 Ill. 511.

Where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable. *Matthews v. Pennsylvania R. Co.* (Pa. 1892), 24 Atl. Rep. 67.

But because a train stops at a mere signal, or flag station, to take up or put off an occasional passenger, it does not follow that a building, or even a permanent platform, must be provided. *Cincinnati, etc., R. Co. v. Peters*, 80 Ind. 168; 6 Am. & Eng. R. Cas. 126; *Alabama, etc., R. Co. v. Stacey*, 68 Miss. 463. Nor is a railroad company running to a seaside summer resort, whose line is used chiefly for summer excursions, bound to keep its platform, cars and trains fenced in, or to keep a servant by them to warn people not to go on or about them at a time when no trains are running. *Hodges v. New Hanover Transit Co.*, 107 N. Car. 576.

Where a railroad company fails to provide a station with a platform upon which passengers may alight, but furnishes a box instead, it is their duty to at least render such assistance to passengers as to make the box as safe as a platform would have been. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25; 3 L. R. A. 368.

It is the company's duty to provide reasonable accommodations at its stations, and if the waiting room is full or is intolerably offensive because of tobacco smoke, a passenger has a good reason for not remaining there, and is justified in attempting to enter the cars at the earliest moment, and if in so doing he receives an injury from the unsafe condition of the platform at a point where passengers would naturally go, he may recover damages if he exercised proper care in other respects. *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124; 95 Am. Dec. 114. See also *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699; *East Tennessee, etc., R. Co. v. Connor*, 15 Lea (Tenn.) 254; *Keefe v. Boston, etc., R. Co.*, 142 Mass. 251; 27 Am. & Eng. R. Cas. 137; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145; *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363;

35 Am. & Eng. R. Cas. 476; 13 Am. St. Rep. 399.

In *Collins v. Toledo, etc., R. Co.*, 80 Mich. 390, it appeared that the platform at a station used by passengers in entering and leaving the cars, was so high as not to be conveniently reached, particularly by women, without a step, which the company failed to provide. A well beaten path led from the store of a station agent to this platform, which path was commonly used by the public. Some one had provided a plank reaching from the platform to the path, which was commonly used in reaching the platform, and had been since the depot was built, by the falling of which plank the plaintiff was injured. It was held that the case showed a violation of duty by the railroad company in not providing a reasonably safe and convenient means of reaching its trains, and that therefore the plaintiff might recover. See also *Cole v. Lake Shore, etc., R. Co.*, 81 Mich. 156; *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363; 35 Am. & Eng. R. Cas. 476; 13 Am. St. Rep. 399; *Reid v. New York, etc., R. Co.*, 63 Hun (N. Y.) 630.

A railroad company erecting and maintaining an approach to its boat landing is not relieved from liability for an injury to its patron caused by a defect in such approach by the fact that it was maintained in a public street. *Skotlowe v. Oregon, etc., R. Co.*, 22 Oregon 430; *Mullen v. Oregon, etc., R. Co.*, 22 Oregon 430.

A passenger was allowed to recover from a railroad company for personal injuries occasioned by his stepping into a hole in a bridge constructed on the company's right of way and connecting its depot platform with a hotel, although the bridge had been built by the hotel proprietor and turned over to the company for the use of passengers going to and from the hotel for meals, and was not connected with the ticket office except through another room, and the company had never exercised any control over it nor repaired it, nor used it for any purpose within three years prior to the accident, the court holding that passengers could not be presumed to know in regard to the ownership or control of such a structure. *East Tennessee, etc., R. Co. v. Watson*, 94 Ala. 634; *Watson v. Oxanna Land Co.*, 92 Ala. 320; *Watson v. East Tennessee, etc., R. Co.*, 92 Ala. 320.

its duty to keep the station premises well lighted during the time passengers or other persons have a right to be there.<sup>1</sup>

The company is bound to use a reasonable amount of care to protect waiting passengers from insults or assaults, but this duty cannot be extended to make it liable for assaults which it could not have anticipated, or reasonably be expected to prevent.<sup>2</sup>

Its duty in each of these cases is measured by that which every person owes to those who come upon his premises by invitation

**1. Duty to Have Station Premises Lighted.**—For cases in which this duty has been insisted upon and where a failure to perform it was considered a proximate or concurrent cause of injury, see *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159; 35 Am. & Eng. R. Cas. 466; 5 Am. St. Rep. 354; *Ensley R. Co. v. Chewing*, 93 Ala. 24; *St. Louis, etc., R. Co. v. White*, 48 Ark. 495; 30 Am. & Eng. R. Cas. 545; *Fordyce v. Merrill*, 49 Ark. 277; *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649; 30 Am. & Eng. R. Cas. 556; 4 Am. St. Rep. 231; *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777; 44 Am. Rep. 444; *Wentworth v. Eastern R. Co.*, 143 Mass. 248; *Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390; 18 Am. & Eng. R. Cas. 153; *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629; *Jarvis v. Brooklyn El. R. Co.*, 133 N. Y. 623; *Patten v. Chicago, etc., R. Co.*, 32 Wis. 524; *Martin v. Great Northern R. Co.*, 16 C. B. 179; 81 E. C. L. 177.

See also *Bishop v. Chicago, etc., R. Co.*, 67 Wis. 611, as to suing on the contract or in tort, where a lady passenger, having bought her ticket, asked the station agent to light the waiting room, which he refused to do, accompanying his refusal with grossly insulting language. *Stewart v. International, etc., R. Co.*, 53 Tex. 289; 2 Am. & Eng. R. Cas. 497; 37 Am. Rep. 753; *infra*, this title, *Negligence*.

Where it is the custom of a carrier to receive passengers on its boats in the evening and allow them to sleep there, for which an extra charge is made, there is no contributory negligence in a passenger's trying to board the boat in the evening instead of waiting until morning, and the carrier is liable for failing to keep its approaches lighted and in safe condition in the evening. *Skotlowe v. Oregon, etc., R. Co.*, 22 Oregon 430.

**2. Duty to Protect from Assault.**—An illustrative case is that of *Batton v.*

*South & North Ala. R. Co.*, 77 Ala. 591; 23 Am. & Eng. R. Cas. 514; 54 Am. Rep. 80. The plaintiff, a lady passenger, was in the passenger's waiting room, awaiting the arrival of her train. While there several intruders rushed in and grossly insulted her by obscene and profane language, indecent exposure, and other disorderly conduct. The company could not possibly have anticipated such an occurrence, nor could they have prevented it except by providing a force of police to be in constant attendance. It was held that the company was under no such obligation; that the insults were a part of the risk necessarily run by a lady traveling without a protector. The court, by Somerville, J., said: "We do not think there is any duty to police station houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. The liability of a common carrier, when receiving passengers at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests." 2 Kent's Com. (13th ed.), p. 593; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224. See *INNS AND INNKEEPERS*, vol. 11, p. 50.

See also *Smith v. Great Eastern R. Co.*, L. R., 2 C. P. 4, where the plaintiff while waiting at a station for a train was bitten by a stray dog. It was shown that the dog had a short time before attacked a passenger there and had been kicked off by the porter and had not been seen again prior to his attack on the plaintiff. The court held that there was no evidence which would warrant the jury in finding that the company had been guilty of negligence; this on the ground that no violated duty was shown.

The rule is somewhat different in the cases under consideration from those where the passenger is assaulted

or permission, and the same degree of care to prevent injury is not exacted as where the passengers are actually on the train.<sup>1</sup>

while actually on the cars. See *CARRIERS OF PASSENGERS*, vol. 2, pp. 752, 764; *Craker v. Chicago, etc.*, R. Co., 36 Wis. 657 (case of conductor kissing lady passenger); *Chicago, etc.*, R. Co. v. *Flexman*, 103 Ill. 546; 8 Am. & Eng. R. Cas. 354; 42 Am. Rep. 33; *Stewart v. Brooklyn, etc.*, R. Co., 90 N. Y. 588; 12 Am. & Eng. R. Cas. 127; 43 Am. Rep. 185; *Britton v. Atlanta, etc.*, Air Line R. Co., 88 N. Car. 536; 18 Am. & Eng. R. Cas. 391; 43 Am. Rep. 749; *Flint v. Norwich, etc.*, Transp. Co., 34 Conn. 554. In these cases the assault occurred while the passenger was actually on the cars and the company was held liable. But as was said in the opinion in *Batton v. South and North Ala. R. Co.*, 77 Ala. 591; 23 Am. & Eng. R. Cas. 514; 54 Am. Rep. 80, by *Somerville, J.*, "The measure of duty is admitted by all the authorities, however, not to be so great as it is after the passenger has boarded the train for reasons of a manifest nature. *Baltimore, etc.*, R. Co. v. *Schwinding*, 101 Pa. St. 258; 8 Am. & Eng. R. Cas. 544; 47 Am. Rep. 706."

1. *Pennsylvania Co. v. Marion*, 104 Ind. 239; 27 Am. & Eng. R. Cas. 132; *Batton v. South & North Ala. R. Co.*, 77 Ala. 591; 23 Am. & Eng. R. Cas. 514; 54 Am. Rep. 80; *Moreland v. Boston, etc.*, R. Corp., 141 Mass. 31.

A carrier is held to the highest degree of care as to the condition of its engines, cars, bridges, and other appliances, because negligence as to them involves extreme peril to passengers, but as the detention of a passenger at a depot, or his exit to the train, is not attended with the hazards pertaining to the journey on the cars, the degree of care is justly lessened to the extent that under such circumstances the carrier is bound to exercise only a reasonable degree of care for the protection of its passengers. But where a railroad company induces an unusual crowd to collect at its stations by means of advertisements and reduced rates, it is bound to use such means as are reasonably necessary to prevent injury to individuals from the conduct or pressure of the crowd in passing to and from the trains. *Taylor v. Pennsylvania Co.*, 50 Fed. Rep. 755.

**Waiting Passengers Injured by Postal**

**Agents.**—Several cases have arisen in which passengers waiting on the platform of a station have been injured by a mail-bag being thrown from the postal car. The company has constantly been held liable for such injuries on the ground that, though the postal agent may not have been its servant, or under its control, still the injury was one which he might reasonably anticipate, and by the exercise of ordinary care provide against by warning the passengers or by other means. *Carpenter v. Boston, etc.*, R. Co., 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331; 49 Am. Rep. 540; *Snow v. Fitchburg R. Co.*, 136 Mass. 552; 18 Am. & Eng. R. Cas. 161; 49 Am. Rep. 40. In the former case, the court, by *Danforth, J.*, said: "The practice which led to the accident was a familiar and usual one. It was proven by uncontradicted evidence that this method of discharging mail-bags from the postal car upon the platform provided for passengers, and while they were upon it and exposed to injury, had prevailed for a long time under circumstances from which notice to the defendant might be fairly implied, and with the actual knowledge of the defendant's agent, in whose presence the act was frequently, if not daily, performed. They were, therefore, chargeable with notice that the mail-bag was likely to be thrown off in the same manner and under the same circumstances at any arrival of a postal car. By this knowledge the defendant was brought fairly within the rule which enjoins care, not only on the part of itself and its servants, but also like care in preventing injury from the careless or wrongful act of any other person whom it permits to come upon its premises." See also *Hutchinson on Carriers*, § 499. In the second case cited, *Snow v. Fitchburg R. Co.*, 136 Mass. 552; 18 Am. & Eng. R. Cas. 161; 49 Am. Rep. 40, attention was called to the fact that the case presented was entirely unlike that of the act of a passenger which the railroad company had no reason to anticipate or power to prevent. For a similar case see *James v. Missouri Pac. R. Co.*, 107 Mo. 480, where it was alleged that the injury resulted from the mail-bags driving plaintiff's heel into a hole in

The duty exists on the part of a railroad company using a depot, although it is not the real owner but only a lessee.<sup>1</sup>

The statutes which exist in many States, requiring railroad companies to fence their tracks, do not, as a general thing, extend to the station and depot grounds, and injuries occurring there do not impose a liability on the company, unless actual negligence on its part in the management of the trains or otherwise can be shown.<sup>2</sup> But this exemption is considered to extend no further than to such part of the station grounds as public convenience or necessity requires to remain open, and does not excuse the company for a failure to fence its tracks at such parts of the station grounds as that the public convenience would not be disturbed.<sup>3</sup>

**3. Persons to Whom Duty Is Due.**—The liability of the company for injury to passengers at stations rests on the ground that it has extended an invitation to them to come there, and has, therefore, assumed the duty to use proper care to prevent injury to them.<sup>4</sup> Therefore, if a party injured is not properly at the station, as where he is a mere loiterer or trespasser, he cannot recover, since he cannot show the existence of a duty to him.<sup>5</sup> But the invita-

the station platform. It was held that the jury must determine the question.

But in *Muster v. Chicago, etc.*, R. Co., 61 Wis. 325; 18 Am. & Eng. R. Cas. 113; 50 Am. Rep. 141, where a similar injury occurred, the company was held not liable. It was on the ground, however, that as the bag was usually thrown out at a point 200 feet west of the depot the company could not be charged with notice that it would be thrown out on the station platform.

**1. Liability of Lessee.**—*Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448; 54 Am. Rep. 72. See NEGLIGENCE, vol. 16, pp. 473-475; RAILROADS, vol. 19, p. 899 *et seq.*

**2. Company Not Bound to Fence Station Grounds.**—See FENCES, vol. 7, pp. 911, 926; *Bechdolt v. Grand Rapids, etc., R. Co.*, 113 Ind. 343; 35 Am. & Eng. R. Cas. 168; *Indiana, etc., R. Co. v. Sawyer*, 109 Ind. 342; *Hooper v. Chicago, etc., R. Co.*, 37 Minn. 52; *Chicago, etc., R. Co. v. Campbell*, 47 Mich. 265; 7 Am. & Eng. R. Cas. 545; *McGrath v. Detroit, etc., R. Co.*, 57 Mich. 555; 22 Am. & Eng. R. Cas. 574; *International, etc., R. Co. v. Dunham*, 68 Tex. 231; 31 Am. & Eng. R. Cas. 530; 2 Am. St. Rep. 484; *Prickett v. Atchison, etc., R. Co.*, 33 Kan. 748; 23 Am. & Eng. R. Cas. 232.

**Meaning of Station or Depot in This Connection.**—Grounds on the main track of a road on which are water

tanks, a telegraph office, ticket office, etc., and on which there is a platform at which the trains stop, are to be considered a station within the meaning of the fencing statute. *Peters v. Stewart*, 72 Wis. 133; 35 Am. & Eng. R. Cas. 174. See also note 49 Am. & Eng. R. Cas. 555.

A mere side track, used only for loading and shipping tanbark, there being no depot buildings or platform, no station or station agent, no highway leading thereto, does not make a place "depot grounds" within the statute. *Jaeger v. Chicago, etc., R. Co.*, 75 Wis. 130; 40 Am. & Eng. R. Cas. 194. See also *Rhines v. Chicago, etc., R. Co.*, 75 Iowa 597; 35 Am. & Eng. R. Cas. 123; *Kobe v. Northern Pac. R. Co.*, 36 Minn. 518; 31 Am. & Eng. R. Cas. 528.

**3. Indiana, etc., R. Co. v. Quick, 109 Ind. 295; *Hooper v. Chicago, etc., R. Co.*, 37 Minn. 52; *Cox v. Minneapolis, etc., R. Co.*, 41 Minn. 101; 38 Am. & Eng. R. Cas. 287; *Atchison, etc., R. Co. v. Shaft*, 33 Kan. 521; 19 Am. & Eng. R. Cas. 529; *International, etc., R. Co. v. Dunham*, 68 Tex. 231; 31 Am. & Eng. R. Cas. 530; 2 Am. St. Rep. 484; *Kobe v. Northern Pac. R. Co.*, 36 Minn. 518; 31 Am. & Eng. R. Cas. 528; *Dinwoodie v. Chicago, etc., R. Co.*, 70 Wis. 160.**

**4.** See NEGLIGENCE, vol. 16, pp. 411, 414; *Shear & Red. on Neg.* (4th ed.), § 488; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 51.

**5.** *Baltimore, etc., R. Co. v. Schwind-*

tion of the railroad company is not confined to those taking passage on its trains; it extends to the friends or relatives who come to the station to meet or to part with passengers,<sup>1</sup> also to a passenger's servants;<sup>2</sup> and to other persons to whom it has extended permission to enter upon the station premises.<sup>3</sup>

4. **Negligence.**—A certain duty having been shown to exist, the injured party may recover only upon showing that the company has been guilty of a want of ordinary care in the performance of

ling, 101 Pa. St. 258; 8 Am. & Eng. R. Cas. 544; 47 Am. Rep. 706; Gillis v. Pennsylvania R. Co., 59 Pa. St. 141; Lary v. Cleveland, etc., R. Co., 78 Ind. 323; 3 Am. & Eng. R. Cas. 498; 41 Am. Rep. 572 (party taking refuge from a storm in an old freight building); Pittsburgh, etc., R. Co. v. Bingham, 29 Ohio St. 364; 23 Am. Rep. 751; Burbank v. Illinois Cent. R. Co., 42 La. Ann. 1156; 45 Am. & Eng. R. Cas. 593 (mere wayfarer); Williams v. Kansas City, etc., R. Co., 96 Mo. 275; 37 Am. & Eng. R. Cas. 329 (by playing in switch-yard). CONTRIBUTORY NEGLIGENCE, vol. 4, p. 51; RAILROADS, vol. 19, pp. 933-938; Shear. & Red. on Neg. (4th ed.), §§ 702 *et seq.*

A party entered the station to take a train, but finding it had gone, remained there while waiting for a horse car. It was held that he was not a person to whom the company owed the duty of keeping the station premises lighted. *Heinlein v. Boston, etc., R. Co.*, 147 Mass. 136; 33 Am. & Eng. R. Cas. 500.

In *Sweeny v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 372; 87 Am. Dec. 644, the court, by Bigelow, J., said: "The owner of land is not bound to protect or provide safeguards for wrong-doers; so a licensee who enters on premises by permission only, without any enticement, allurements, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He comes there at his own risk and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them for the purpose for which the premises are appropriated and occupied." *Hounsell v.*

*Smyth*, 7 C. B. N. S. 731; 97 E. C. L. 731; *Knight v. Abert*, 6 Pa. St. 472; 47 Am. Dec. 478; *Carleton v. Franco-nia Iron, etc., Co.*, 99 Mass. 216; *Corby v. Hill*, 4 C. B. N. S. 556; 93 E. C. L. 556.

1. **Passenger's Friends.**—In other words, the invitation of the company extends to all who come "to welcome the coming or speed the parting guest." *Hamilton v. Texas, etc., R. Co.*, 64 Tex. 251; 21 Am. & Eng. R. Cas. 336; 53 Am. Rep. 756; *Texas, etc., R. Co. v. Best*, 66 Tex. 116; *Langan v. St. Louis, etc., R. Co.*, 72 Mo. 392; 3 Am. and Eng. R. Cas. 355; *Pierce on Railroads*, p. 275; NEGLIGENCE, vol. 16, pp. 413-414. Thus, in *McKone v. Michigan Cent. R. Co.*, 51 Mich. 601; 13 Am. & Eng. R. Cas. 29; 47 Am. Rep. 596, the plaintiff had gone to the station to meet his wife, expected on the next train. While there he walked to an obscure part of the station premises to relieve a call of nature, the regular urinals having been destroyed by fire. He was injured by falling into a hole negligently left unguarded. It was held that he was one to whom the company owed a duty to use care, and he was therefore allowed to recover.

2. *Langan v. St. Louis, etc., R. Co.*, 72 Mo. 392; 3 Am. & Eng. R. Cas. 355.

3. In the case of *Tobin v. Portland, etc., R. Co.*, 59 Me. 183; 8 Am. Rep. 415, it was held that "a hackman carrying passengers to the railroad depot for transportation, and aiding them to alight upon the platform of the company, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other." *Barrett v. Black*, 56 Me. 498; 96 Am. Dec. 497.

So in *Toledo, etc., R. Co. v. Grush*, 67 Ill. 262; 16 Am. Rep. 618, a party who went upon the station platform to look for certain freight belonging to his employer, was held to be entitled to recover for injuries received because

such duty. His right to recover may be lost by his having been guilty of contributory negligence. The law in this connection has been treated elsewhere, and it will be enough here to state illustrative cases.<sup>1</sup>

of a hole in the platform, the company having been negligent in allowing the hole to remain there.

See also *St. Louis, etc., R. Co. v. Fairbairn*, 48 Ark. 491; 30 Am. & Eng. R. Cas. 166, where a party was injured who had entered the station in order to read for another a notice of stock that had been killed, which a statute required the company to publish; it was held that the company was liable. *Ingalls v. Adams Exp. Co.*, 44 Minn. 128, where a police officer who usually visited the station at the time of the arrival of trains was held to be lawfully there; *Sullivan v. Vicksburg, etc., R. Co.*, 39 La. Ann. 800; 30 Am. & Eng. R. Cas. 168; *Baltimore, etc., R. Co. v. Rose*, 65 Md. 485; 27 Am. & Eng. R. Cas. 125 (party injured while on pier connecting two carrier lines); *Tebbutt v. Bristol, etc., R. Co.*, L. R., 6 Q. B. 73 (similar facts).

Where the company maintains a telegraph office at its station for the use of the public, it is responsible to a passenger who is injured because of the company's neglect to keep a platform erected by them, over which the passenger, in alighting from the cars, must pass to reach the telegraph office, in proper condition and repair. *Clusman v. Long Island R. Co.*, 9 Hun (N. Y.) 618.

**Passengers, Licensees and Trespassers**  
—**Summary.**—A review of the foregoing cases in this section will show that by "passengers," are meant those who come by express or implied invitation; by "licensees," those who come there with the express or clearly implied permission of the company; while "trespassers" includes all those who are there without invitation or the undoubted permission of the company. One may be a trespasser although the company seeing him on the premises has not ordered him off, so that the term includes all that class of persons who loiter around the station at the time of incoming trains from motives of curiosity or idleness and whose presence has not been objected to by the company. A good instance of the class represented by the licensee is the hackman or the hotel drummer who is

at the station to solicit patronage. It will be seen, therefore, that the relationship existing between the company and each of these various classes of persons is very different in each case; and its measure of duty is therefore graded according to the relationship. See *NEGLIGENCE*, vol. 16, p. 402, note 1, 427; *RAILROADS*, vol. 19, pp. 933, 935. See also *Lucas v. Taunton, etc., R. Co.*, 6 Gray (Mass.) 70; *Cooley on Torts*, p. 605.

1. See the general law of negligent injury discussed in *COMPARATIVE NEGLIGENCE*, vol. 3, p. 367; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 15; *NEGLIGENCE*, vol. 16, p. 386; *MASTER AND SERVANT*, vol. 14, pp. 804-841.

**Instances Where Recovery Has Been Allowed.**—Thus, a person at the train to meet his wife being injured by falling into a hole on the station grounds was held entitled to recover. *McKone v. Michigan Cent. R. Co.*, 51 Mich. 601; 13 Am. & Eng. R. Cas. 29; 47 Am. Rep. 596. So where there was a hole in the depot grounds so near the recognized way that a person traveling at night fell into it, the company was held liable for the injury, the plaintiff having used proper care. *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363; 35 Am. & Eng. R. Cas. 476; 13 Am. St. Rep. 399.

In *Osborne v. London, etc., R. Co.*, 21 Q. B. Div. 220; 35 Am. & Eng. R. Cas. 483, a passenger was injured by falling on steps leading to the station, the steps being slippery. He was allowed to recover, although it was shown that he knew there were other steps which he might have used and that the ones he did use were dangerous.

A passenger injured by the company's servant sliding a trunk against him was allowed to recover in *Atchison, etc., R. Co. v. Johns*, 36 Kan. 769; 34 Am. & Eng. R. Cas. 480; 56 Am. Rep. 609.

Where a person walking along the platform was injured by the fall of a truck, it was held that there was no willful negligence and that the party was bound to show himself free from contributory negligence. *Louisville,*

etc., R. Co. v. Shanks, 94 Ind. 598; 19 Am. & Eng. R. Cas. 28.

In *Keefe v. Boston, etc.*, R. Co., 142 Mass. 251; 27 Am. & Eng. R. Cas. 137, a passenger started to leave the platform at a place not intended for that purpose. While still on the platform she received an injury caused by the negligence of the company's servants. She was allowed to recover.

In *Sullivan v. Vicksburg, etc.*, R. Co., 39 La. Ann. 800; 30 Am. & Eng. R. Cas. 168, a party standing on a platform was injured by a projecting brake from a passing train. It was held that the company's employés seeing the plaintiff there were bound to recognize the danger and guard against it, and were guilty of negligence for not doing so. See also *Dobiecki v. Sharp*, 88 N. Y. 203; 8 Am. & Eng. R. Cas. 485 (passenger injured by projecting platform of train); *Archer v. New York, etc.*, R. Co., 106 N. Y. 589; *Langan v. St. Louis, etc.*, R. Co., 72 Mo. 392; 3 Am. & Eng. R. Cas. 355 (injury caused by projecting bumper of engine); *Buchanan v. West Jersey R. Co.*, 52 N. J. L. 265; 41 Am. & Eng. R. Cas. 59 (woman injured in trying to avoid projection).

In *Moses v. Louisville, etc.*, R. Co., 39 La. Ann. 649; 30 Am. & Eng. R. Cas. 556; 4 Am. St. Rep. 231, a person walking to board a sleeping car was injured by falling from a walk leading thereto by reason of insufficient lights. He was allowed to recover.

In *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 41 Am. & Eng. R. Cas. 111, a passenger at an elevated station fell into an unguarded hole in the platform while getting on the train. It was held that the case was for the jury.

In *Patten v. Chicago, etc.*, R. Co., 32 Wis. 524; 36 Wis. 413, the plaintiff, a woman of seventy-two years, was put off with her trunk at a depot between nine and ten o'clock at night. The depot was not upon any public highway, was not open or lighted, nor was there anyone there to give her information. Being ignorant of the locality, and seeking in the dark the high way on which she knew the house in which she was to stay was situated, she failed to find the way of access to it, and, becoming bewildered, returned to the station, and afterwards, in trying to reach the other end of the platform to shelter herself from the cold

and wind, she fell down a flight of three steps from the platform and was injured. There was no defect in the platform or steps, and the injury occurred more than an hour after she had left the platform. It was held that the question of negligence and of proximate cause was properly left to the jury. The verdict for \$2,538 was set aside as excessive; but a subsequent one for \$1,500 was sustained.

In *Bennett v. New York, etc.*, R. Co., 57 Conn. 422; 41 Am. & Eng. R. Cas. 184, it was said that a passenger using an unlighted stairway when there were lighted stairways leading to the same place must be considered to have assumed the risk of accident.

In *Delaware, etc.*, R. Co. v. Trautwein, 52 N. J. L. 169; 41 Am. & Eng. R. Cas. 187; 19 Am. St. Rep. 442, a party was injured owing to a defective stairway. It was held that the company was not absolved from the duty of keeping the stairway in repair by the fact that it provided another passage way and that the passenger was justified in using it, since it was held out by the company as one of its passage ways. *Knight v. Portland, etc.*, R. Co., 56 Me. 234; 96 Am. Dec. 449; *McElroy v. Nashua, etc.*, R. Co., 4 Cush. (Mass.) 400; 50 Am. Dec. 794.

In numerous cases the whole matter has been left to the jury to determine from the facts whether or not the party should recover. *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621; 39 Am. & Eng. R. Cas. 471; 13 Am. St. Rep. 304; *Stafford v. Hannibal, etc.*, R. Co., 22 Mo. App. 333; *Gulf, etc.*, R. Co. v. Fox (Tex.), 33 Am. & Eng. R. Cas. 543.

See also for other cases *Nicholson v. Lancashire, etc.*, R. Co., 3 H. & C. 534; *Longmore v. Great Western R. Co.*, 19 C. B. N. S., 183; 115 E. C. L. 183; *Toomey v. London, etc.*, R. Co., 3 C. B. N. S. 146; 91 E. C. L. 146 (recovery denied); *Pickard v. Smith*, 10 C. B. N. S. 470; 100 E. C. L. 468; *Burbank v. Illinois Cent. R. Co.*, 42 La. Ann. 1156; 45 Am. & Eng. R. Cas. 593; *Wallace v. Wilmington, etc.*, R. Co. (Del. 1889), 18 Atl. Rep. 818 (proper instructions where passenger alighting at a strange place submitted himself to the guidance of a third person); *Stoaks v. Suffolk, etc.*, R. Co., 107 N. Car. 178; *Watson v. Wabash, etc.*, R. Co., 66 Iowa 164; 19 Am. & Eng. R. Cas. 114.

Instances Where Recovery Was De-

*mied.*—In *Reed v. Richmond, etc., R. Co.*, 84 Va. 231; 33 Am. & Eng. R. Cas. 503, it was said to be not only negligence, but recklessness, for a passenger, who is staying at a railway station, on a dark night, when the platform lamp has been temporarily removed, to go out on the platform and walk to the end of it, and, therefore, she can not recover if in so doing she falls off and is injured.

In *Ryan v. Manhattan R. Co.*, 121 N. Y. 126; 44 Am. & Eng. R. Cas. 426, the passenger alighting from the train was injured by falling through the open space between the station platform and the car. It was held error in the court to instruct the jury to find as a fact that an opening eight inches in width was negligence, in the face of the uncontradicted evidence that such an opening at that point was absolutely necessary for the safe operation of the train, owing to the platform being built on a curve. So in *Laffin v. Buffalo, etc., R. Co.*, 106 N. Y. 136; 30 Am. & Eng. R. Cas. 596; 60 Am. Rep. 433, a woman injured in attempting to alight from a car at night was not allowed to recover, knowing that the platform had been used for several years and no one had been seriously injured.

In *Potter v. Wilmington, etc., R. Co.*, 92 N. Car. 541; 21 Am. & Eng. R. Cas. 328, a girl about to take passage on a train caught her foot on a rail and fell down, breaking her arm. The rail was not defective, and had the girl looked she could have avoided injury. It was held that the company was not liable.

**Cases of Contributory Negligence.**—In *Kalembach v. Michigan Cent. R. Co.*, 87 Mich. 509, the plaintiff was at the railroad station unloading barrels from his wagon onto a car. His team became frightened by the moving car and ran away, throwing him from the wagon, thereby causing him injury. The team had run away with him and with others before. It was held proper for the jury to consider whether or not he had been guilty of contributory negligence in having the team where they might become frightened. And held, also, that a verdict of \$150 would not be set aside as inadequate, the court having properly charged as to the measure of damages, and there being nothing to show that the plaintiff was for more than two weeks unable to work, or that he was at any expense for medical aid. See also *Edwards v. Philadelphia, etc., R. Co.* (Pa. 1892), 23

Atl. Rep. 894, where it was held to be negligence *per se* to leave a horse standing unfastened and unattended at a railroad station. See also *Olson v. Chicago, etc., R. Co.*, 81 Wis. 41, where plaintiff, wishing to get to his team, which he had left unhitched, hurriedly jumped from the platform, and in so doing landed on a rapidly moving engine. Recovery was denied. *Forsyth v. Boston, etc., R. Co.*, 103 Mass. 511.

In *Toomey v. London, etc., R. Co.*, 3 C. B. N. S. 146; 91 E. C. L. 146, it appeared that on the platform of the station there were two doors in close proximity to each other; the one (a water-closet) had painted over it the words "For Gentlemen;" on the other were the words "Lamp Room." The plaintiff having occasion to go to the urinal inquired of a stranger where he should find it, and, having received direction, by mistake entered the lamp room, and was injured there by falling down some steps. It was held that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company.

Where a person, on leaving a railroad station, in order to reach the highway, is compelled to walk along the company's tracks or go through private property by a way over which travel is forbidden, and while walking along the tracks towards the highway, steps from one track to another to avoid a train and is struck by a train coming from the opposite direction and killed, it is proper for the court to refuse to adjudge him guilty of contributory negligence in using the tracks, as no safe way is provided by the company for reaching the highway. *Reid v. New York, etc., R. Co.*, 63 Hun (N. Y.) 630. And see *Baltimore, etc., R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387.

**Ferryboat Landing.**—Where the bridge of a ferry and the deck of a ferryboat are required to be, and usually are, kept as nearly even as possible, one scarcely ever projecting above the other more than an inch and a half, and a passenger who has used the ferry for years and always found the deck and bridge on a level, steps from the bridge, when dimly lighted, to the deck, without looking, and sustains a fall, the deck being eighteen inches below the bridge, he



**5. Assault by Station Servants.**—Most of the cases arising in this connection are those in which a person was ejected from the station premises by the agent in charge, because of a violation of a regulation of the company. Such cases turn upon the right of the company to make such a regulation; if the right to expel exists and is exercised properly, no cause of action arises for the expulsion.<sup>1</sup> If, however, the expulsion is made in a rude and unnecessarily violent manner, the person expelled may recover damages due to such excess of violence.<sup>2</sup>

is not guilty of contributory negligence in not looking before stepping, for under the circumstances he is justified in assuming the safety of the step. *Race v. Union Ferry Co.*, 19 N. Y. Supp. 675.

**Evidence.**—See generally NEGLIGENCE, vol. 16, p. 386. Evidence of other accidents at the same place was held admissible in *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621; 39 Am. & Eng. R. Cas. 471, 477, note; 13 Am. St. Rep. 304. *Contra*, *Early v. Lake Shore, etc.*, R. Co., 66 Mich. 349; 30 Am. & Eng. R. Cas. 163; *Central R., etc., Co. v. Smith*, 80 Ga. 526; 34 Am. & Eng. R. Cas. 456.

Where the injury occurred in December, evidence of the condition of the platform in March following is not competent, unless it can be shown that its condition was unchanged during that time. *Pennsylvania Co. v. Marion*, 104 Ind. 239; 27 Am. & Eng. R. Cas. 132.

In *Cross v. Lake Shore, etc.*, R. Co., 69 Mich. 363; 35 Am. & Eng. R. Cas. 476; 13 Am. St. Rep. 399, evidence of a civil engineer was admitted to show that the hole on the station premises was in a dangerous place and needed protection.

In *Railway v. Barger*, 52 Ark. 78, an action against a railroad company for injuries received from falling into a hole in the station platform, the statement of the station agent of the company, made at the time of the accident, that the hole "ought to have been fixed," was held incompetent to show unreasonable delay on the part of the company in repairing the platform, and its admission was, therefore, a reversible error.

*Lake Shore, etc.*, R. Co. *v. Herrick* (Ohio, 1892), 29 N. E. Rep. 1052, was an action against a railroad company to recover damages for injuries received at one of the stations by being struck by an incoming train. The

plaintiff claimed that he had been misled by information that the train which struck him was late, whereas, in fact, it was on time or nearly so, and that, acting upon such information, he was crossing its track when it suddenly ran upon him and struck him. It was held competent to rebut any inference of contributory negligence that might arise from the circumstances of the accident to introduce to the jury declarations of strangers to the record made in his presence that the train was late. It was held, also, that in such a case, if it becomes material to establish that the plaintiff was at the station to take passage on one of its trains, a declaration made by him as he left his house on the way to the station that he was going to another station of the same railway is competent evidence to establish his character as a passenger. In such case, the condition of the place of crossing at the time of the accident, whether thronged with people or otherwise, is evidence tending to prove its condition in this respect and is, therefore, competent.

1. See this question discussed in the various sections, *supra*, this title, *Rules and Regulations Regarding Stations*. *Com. v. Power*, 7 Met. (Mass.) 596; 41 Am. Dec. 465.

2. See RAILROADS, vol. 19, pp. 907-910; *Johnson v. Chicago, etc.*, R. Co., 58 Iowa 348; 8 Am. & Eng. R. Cas. 206 (master liable only for acts of servant within the scope of his employment); *People v. McKay*, 46 Mich. 439; 8 Am. & Eng. R. Cas. 205; 41 Am. Rep. 169 (passenger ejected for spitting on floor; undue violence having been used, a conviction for assault was sustained); *Beeson v. Chicago, etc.*, R. Co., 62 Iowa 173; 13 Am. & Eng. R. Cas. 45 (prostitute ejected from depot).

The mere fact that a woman is a prostitute does not authorize her expulsion if she conducts herself in an

As to other assaults upon passengers waiting at the station the general rule applies, that the railroad company is not liable in damages unless the assault was committed by a servant in the scope of his employment, or unless the company was guilty of negligence in failing to provide against such injuries.<sup>1</sup>

**VI. CONDEMNATION OF LAND.**—The railroad station is an essential part of the railroad, so that land may be condemned for station sites, this being a public use.<sup>2</sup>

orderly and proper manner. *Brown v. Memphis, etc.*, R. Co., 7 Fed. Rep. 51; 1 Am. & Eng. R. Cas. 247, *aff'd* 5 Fed. Rep. 499.

1. In *Christian v. Columbus, etc.*, R. Co., 79 Ga. 460; 38 Am. & Eng. R. Cas. 261, a party lawfully at the station on business with the railroad company, while transacting his business with the company's agent was assaulted by the latter and killed. It appeared that the agent was subject to temporary fits of insanity and the company knew of this when they employed him. It was held that the company must respond in damages. In *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360; 39 Am. & Eng. R. Cas. 360, the depot company leased to a tenant a room in the depot where he carried on the business of storing for hire the light baggage of travelers. The plaintiff arriving in one of the trains went to the said room to get his valise checked and while there was assaulted and beaten by an employé of the company's tenant. It appeared that this employé was of savage and vicious propensities and had more than once in times past attacked and beaten persons on the premises, all of which was known to the defendant company. It was held that the plaintiff had a good cause of action. See also *Batton v. South, etc.*, Ala. R. Co., 77 Ala. 591; 23 Am. & Eng. R. Cas. 514; 54 Am. Rep. 80 (company not liable for assault by third parties).

In *Mulligan v. New York, etc., R. Co.*, 14 L. R. A. 791, a railroad ticket-agent to whom a bill had been handed in payment for a ticket, believing it to be counterfeit, procured the arrest of the person who tendered him the bill. After the arrest and imprisonment of the party it was discovered that the bill was a good one and the arrest was therefore without cause. It was held that the ticket-agent was not acting within the scope of his business in procuring the arrest so as to make the

company liable to an action for false imprisonment, admitting that the arrest was wrongful. Nor could the plaintiff recover on the ground that the railroad company owed him the duty to protect him from injury while occupying its accommodations in the relation of passenger. Compare *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331; 49 Am. Rep. 540.

Where a complaint alleges that plaintiff was lawfully entering defendant's coach as a passenger when one of defendant's employes violently jerked him off the car so as to cause him to fall between the moving cars and the station platform, in consequence of which he received serious injuries, it states a cause of action consisting of an unlawful assault directly causing the injuries complained of. *Harrold v. Winona, etc., R. Co.*, 47 Minn. 17.

## 2. Condemnation of Land for Stations.

—See *EMINENT DOMAIN*, vol. 6, p. 524; *Lawrence v. Morgan's La., etc., R., etc., Co.*, 39 La. Ann. 427; 30 Am. & Eng. R. Cas. 309; 4 Am. St. Rep. 265. Compare *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337; 80 Am. Dec. 526.

See, also, as to the quantity of land to be taken, the province of the jury, court, and company respectively, as to determining the proper amount. *Smith v. Chicago, etc., R. Co.*, 105 Ill. 511; 14 Am. & Eng. R. Cas. 384.

In *Connecticut* the statute authorizes railroads to take a street for depot purposes in altering its line of road, subject, however, to the right of the railroad commissioners to approve or disapprove it. *State v. Railroad Com'rs*, 56 Conn. 308; 36 Am. & Eng. R. Cas. 510.

So in *Iowa*, the railroad commissioners have jurisdiction of application for lands for additional station grounds. *Jager v. Dey*, 80 Iowa 23; 42 Am. & Eng. R. Cas. 683.

The *Wisconsin* statute is construed

**Definition. STATUTE MILE—STATUTE OF WILLS. Definition.**

Station grounds have been taken for highway purposes under the exercise of the power of eminent domain.<sup>1</sup>

**STATUTE MILE.**—See MILE, vol. 15, p. 389.

**STATUTE OF DESCENT AND DISTRIBUTION.**—See SUCCESSION.

**STATUTE OF FRAUDS.**—See FRAUDS (STATUTE OF), vol. 8, p. 657.

**STATUTE OF JEOPAILS.**—See AMENDMENT, vol. 1, p. 546; JEOPAILS, vol. 11, p. 926; PLEADING, vol. 18, p. 467.

**STATUTE OF LIMITATIONS.**—See LIMITATION OF ACTIONS, vol. 13, p. 667.

**STATUTE OF USES.**—See REAL PROPERTY, vol. 19, p. 1028; TRUSTS; USES.

**STATUTE OF WILLS.**—See WILLS.

to allow railroad companies to occupy highways with their roads in certain cases, but never with their depots. *Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 325; 10 Am. & Eng. R. Cas. 716.

Laws of *Mississippi* (1888, ch. 26, § 2) provide that the railroad commissioners are authorized to designate the site of any new depot, and to prescribe the number and dimensions of the rooms therein, and provide for a penalty of \$50 a day against a railroad for neglecting to comply with such order. The penalty cannot be enforced where a new depot was ordered to be built, but the number of rooms was not prescribed. *State v. Alabama, etc., R. Co.*, 67 Miss. 647; 42 Am. & Eng. R. Cas. 681. The court, by Woods, C. J., said: "The obvious and reasonable construction of the statute shuts us up to the conclusion that before the railroad company can be required to erect a new depot or station house (not to see that a suitable reception room is provided, nor to have additions or alterations in existing depots made), the railroad commissioners shall prescribe the number and dimensions of the rooms therein for passengers, designating and providing, if deemed proper, separate rooms for the sexes and for the races."

1. **Station Grounds Taken for Highway.**—*State v. Drummond*, 46 N. J. L. 644; 20 Am. & Eng. R. Cas. 13; *Philadelphia, etc., R. Co. v. Philadelphia,*

9 Phila. (Pa.) 563 (company entitled to damages in such case); *Sackett v. Greenwich*, 38 Conn. 526; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *RAILROADS*, vol. 19, pp. 865-7; *EMINENT DOMAIN*, vol. 6, pp. 535-7. Station premises may not be condemned for highway purposes under the General Railroad act of *New York*. *Prospect Park, etc., R. Co. v. Williamson*, 91 N. Y. 552; 14 Am. & Eng. R. Cas. 34. The court, by Rapallo, J., said: "Reference has also been made to the statutes relating to laying out highways, and among others to the provisions of 1 R. S. 514, §§ 58, 64, which prohibit laying out highways through improved lands without compensation. The lands in question are certainly improved lands, and the title of the plaintiff thereto is unquestionable. But we do not rest our decision upon that point, but upon the fact that these lands having already been lawfully appropriated, under the right of eminent domain, to a public purpose, express and direct legislative authority is necessary to justify their appropriation by proceedings *in invitum* to a different public purpose, and that general laws authorizing the laying out of highways are not sufficient. In respect to the crossing of railroad tracks by highways, such express authority is contained in the General Railroad Act, but this authority does not extend to lands taken for depot purposes." *Compare Albany, etc., R. Co. v. Brownell*, 24 N. Y. 345.

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**I. DEFINITION.**—A statute is the written will of the legislature solemnly expressed according to the forms necessary to constitute it the law of the state.<sup>1</sup> In the *United States* it is an act of Congress, or of a state or territorial legislature passed and promulgated according to the constitutional requirements; in *England* it is an act of Parliament made by the sovereign by and with the advice and consent of the Lords and Commons.<sup>2</sup> In the civil law the term statute is applicable to any particular municipal law or usage, though resting for its authority on judicial decisions or the practice of nations.<sup>3</sup> The term statute generally is used to designate the written law in contradistinction to the common or unwritten law.<sup>4</sup>

**II. CLASSIFICATION**—1. **In Respect to Nature and Object**—*a.* **DECLARATORY.**—A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.<sup>5</sup> A statute in affirmance of the common law is to be construed as was the rule by that law.<sup>6</sup> Declaratory statutes are in form either affirmative or negative.

(1) *Affirmative.*—An affirmative statute is one enacted in affirmative terms.<sup>7</sup> Such a statute does not take away the common law in relation to the same matter.<sup>8</sup> Thus, a statute without negative terms declaring that deeds shall have in evidence a certain effect provided certain requisites are complied with, does not prevent their being used in evidence, though the requisites are not complied with, in the same manner as they might have been prior to the statute.<sup>9</sup> Nor does an affirmative statute repeal a precedent statute if effect can be given to both.<sup>10</sup> A party may waive his benefit by an affirmative statute and take his remedy by the common law, which, however, does not mean that the statute is not binding, but that the party has his election to proceed upon the statute or at the common law.<sup>11</sup> But if an affirmative statute, introductive of a new law, direct a thing to be done in a certain manner, that thing may not, even though there are no negative words, be done in any other manner.<sup>12</sup>

1. Bouv. L. Dict.

2. Century Dict.

3. 2 Kent's Com. 456.

4. Bouv. L. Dict.

5. Bouv. L. Dict.

Statutes are declaratory where the old custom of the kingdom has almost fallen into disuse or become disputable; in which case Parliament has thought proper *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties to declare what the common law is and ever has been. Thus, the Statute of Treasons, 25 Edw. III., ch. 2, does not make any new species of treason, but only for the benefit of the sub-

ject, declares and enumerates those several kinds of offenses which, before, were treason at the common law. 1 Bl. Com. 86.

6. Baker v. Baker, 13 Cal. 87; Miles v. Williams, 1 P. Wms. 252; Arthur v. Bokenham, 11 Mod. 150.

7. 1 Bouv. Inst. 105.

8. 2 Co. Inst. 200; Fairchild v. Gwynne, 14 Abb. Pr. (N. Y.) 126.

9. Jackson v. Bradt, 2 Cal. (N. Y.) 169.

10. Potter's Dwaris 69.

11. 2 Co. Inst. 200; Cro. Eliz. 104.

12. Cook v. Kelley, 12 Abb. Pr. (N. Y.) 35; District Township v. Dubuque,

(2) *Negative*.—A negative statute is one expressed in negative terms, and so controls the common law that it has no force in opposition to the statute.<sup>1</sup> A statute which is an entire revision of the subject is negative, and repeals the common law with which it is inconsistent.<sup>2</sup>

*b. REMEDIAL*.—A remedial statute is one made to supply defects or abridge superfluities in the common law arising from the general imperfections of human laws, the change of time and circumstances, or from any other cause whatever. This being done either by enlarging the common law where too narrow or circumscribed, or by restraining it where too lax and luxuriant, has occasioned a subdivision of remedial statutes into enlarging and restraining statutes.<sup>3</sup> In this sense remedial statutes are contrasted with declaratory statutes. But according to modern classification remedial statutes are contradistinguished from penal; a recent definition being as follows: A remedial statute is one, the main object of which appears directly beneficent by supplying some defect in the law, or removing inconveniences, as distinguished from those, the immediate aspect of which is to impose a punishment or penalty, which are called penal statutes.<sup>4</sup> It has been held that where an act gives a penalty to the party aggrieved it is to be regarded as remedial,<sup>5</sup> but if the penalty is given to the public it is penal.<sup>6</sup>

*c. PENAL*.—A penal statute is one which imposes a penalty or forfeiture for transgressing its provisions, or for doing a thing prohibited.<sup>7</sup> But every law which imposes a penalty or forfeiture is not, legally speaking, a penal law—that is, a law to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, as, for instance, the revenue laws, are not in this sense penal laws.<sup>8</sup>

2. In Respect to Subject-Matter—*a. PUBLIC*.—A public act,

7 Iowa 262. See *infra*, this title, *Mandatory and Directory Statutes*.

1. Bacon's Abr. Statute (G); Bouv. L. Dict.; State v. Norton, 23 N. J. L. 33.

The difference in operation of affirmative and negative statutes is illustrated as follows: "If a statute were to provide that it should be lawful for a tenant in fee simple to make a lease for twenty-one years and that such lease should be good, an affirmative statute could not restrain him from making a lease for sixty years; but a lease for more than twenty-one years would be good, because it was good by the common law; and to restrain him it ought to have words negative, as that it shall not be lawful for him to make a lease for above twenty-one years, or that a lease

for more shall not be good." Potter's Dwarries 70.

2. State v. Wilson, 43 N. H. 415.

3. 1 Bl. Com. 86.

4. Cent. Dict.

5. Ordway v. Central Nat. Bank, 47 Md. 217; 28 Am. Rep. 455. A statute creating a right of action and recovery in individuals, or a particular class of individuals is remedial. Neal v. Moultrie, 12 Ga. 104.

6. Ordway v. Central Nat. Bank, 47 Md. 217; 28 Am. Rep. 455. A statute authorizing a third person to recover treble the value of money lost by gaming is penal. Cole v. Groves, 134 Mass. 471.

7. Potter's Dwarries 74.

8. Taylor v. U. S., 3 How. (U. S.) 197.



according to Blackstone, is a universal rule that regards the whole community.<sup>1</sup> If by this it is meant that the act must apply to the whole territory, or the entire people subject to the legislative jurisdiction, the definition has undergone considerable modification in this country, as it is now held that an act which in any wise affects the public at large, though operating within the limits of a particular locality, is as much a public act as one operating throughout the entire state.<sup>2</sup>

Acts creating public corporations,<sup>3</sup> regulating the disposal of public funds,<sup>4</sup> authorizing the sale of state lands,<sup>5</sup> taxing bank stock,<sup>6</sup> imposing penalties or providing for forfeitures to the state,<sup>7</sup> authorizing a foreign private corporation to carry on business in the state, and providing that it shall have an office and place of business therein, and that it may sue and be sued, like a

1. 1 Bl. Com. 86.

2. *Winooski v. Gokey*, 49 Vt. 282. In *State v. Chambers*, 93 N. Car. 600, it is said that public statutes are such as affect the public at large, whether they apply to the whole state or only to a locality in it.

In other cases the same principle is thus stated: "It is not necessary in order to give a statute the attributes of a public law that it shall be equally applicable to all parts of the state: all that is necessary to make it a public law is that it shall apply to all persons within the territorial limits described in the act." *State v. Baltimore County*, 29 Md. 516; *Pierce v. Kimball*, 9 Me. 54; 23 Am. Dec. 537; *Levy v. State*, 6 Ind. 281.

In *West v. Blake*, 4 Blackf. (Ind.) 234, the court says: "The objects and purposes of these laws (referring to *Indiana* statutes authorizing the agent of the state for the town of Indianapolis, to lay off lands belonging to the state into lots, and offer the same for sale) are public; that the subject of them is local does not change their character. Statutes incorporating counties, fixing their boundaries, establishing courthouses, canals, turnpikes, railroads, etc., for public uses all operate upon local subjects: they are not for that reason special or private acts."

See also *infra*, this title, *Local Acts*.

3. *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Louisiana State Bank v. Flood*, 3 Martin N. S. (La.) 341; *Young v. Bank of Alexandria*, 4 Cranch (U. S.) 384; *White Water Valley, etc., Co. v. Boden*, 8 Blackf. (Ind.) 130; *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *Crawford*

*v. Planters', etc., Bank*, 6 Ala. 289; *Douglas v. Bank of Missouri*, 1 Mo. 24; *Bank of Utica v. Smedes*, 3 Cow. (N. Y.) 662; *Prell v. McDonald*, 7 Kan. 426; 12 Am. Rep. 423; *Stier v. Oskaloosa*, 41 Iowa 353.

4. *State v. Hoeflinger*, 31 Wis. 257.

5. *West v. Blake*, 4 Blackf. (Ind.) 234.

6. *Den v. Helmes*, 3 N. J. L. 600; *People v. Stephens*, 2 Abb. Pr. N. S. (N. Y.) 350.

7. *Rex v. Baggs, Skin.* 429; *Rex v. Morgan*, 2 Stra. 1066; *Rogers' Case*, 2 Me. 303; *Jenkins v. Union Turnpike Road*, 1 Cai. Cas. (N. Y.) 86; *Com. v. M'Curdy*, 5 Mass. 324; *State v. Cobb*, 1 Dev. & B. (N. Car.) 115; *Burnham v. Acton*, 4 Abb. Pr., N. S. (N. Y.) 1.

In *Herida v. Ayres*, 12 Pick. (Mass.) 334, Chief Justice Shaw, for the court, said: "The last objection is, that the statute (Mass. St. 1829, ch. 2, regulating pilotage for Boston harbor) is a private act and ought to have been recited in the declaration. Without going minutely into this subject, which sometimes involves distinctions of much nicety and difficulty, there is one consideration which renders it decisive that this is a public act, which is, that the first section in terms imposes a penalty upon every person who violates its provisions. It is therefore binding upon every citizen of the commonwealth, and upon every stranger who, coming within its jurisdiction, owes a temporary allegiance, and is bound by its laws."

Where a statute provided that it should be a felony to steal the notes of a particular incorporated bank, it was held that this constituted the statute by which such bank was incorporated as a public statute. *U. S. v. Porte*, 1 Cranch (C. C.) 369.

domestic corporation,<sup>1</sup> giving to an individual the privilege of improving a water highway, and of charging and taking tolls for its use,<sup>2</sup> regulating rates of railroad speed within a city,<sup>3</sup> are public acts. An act supplementing, or amending,<sup>4</sup> or repealing<sup>5</sup> a public act, is itself public. The terms "public" and "general" in this connection are synonymous,<sup>6</sup> and are opposed to "private."<sup>7</sup>

**b. PRIVATE.**—A private statute relates to, concerns, and affects particular persons, or something in which individuals or classes of persons are interested in a way and degree peculiar to themselves, and not common to the whole community.<sup>8</sup> Such statutes

1. *Fall Brook Coal Co. v. Lynch*, 47 How. Pr. (N. Y.) 520.

2. *Calking v. Baldwin*, 4 Wend. (N. Y.) 667; 21 Am. Dec. 168.

3. *Horn v. Chicago, etc.*, R. Co., 38 Wis. 463.

4. *State v. Bergen*, 34 N. J. L. 438; *Hawthorne v. Hoboken*, 32 N. J. L. 172; *Bank of Utica v. Magher*, 18 Johns. (N. Y.) 341; *Unity v. Burrage*, 103 U. S. 447.

5. *State v. Hoeflinger*, 31 Wis. 257.

6. From the earliest times the words "public" and "general," as applied to statutes, have been used as convertible terms. In *Holland's case*, Coke, pt. 4, 75, the question was whether the act involved was a public act, such as the court should take notice of. It is called a general law throughout the case. In the notes referring to other cases on the same question, statutes are spoken of as "public" and "private." In *Samuel v. Evans*, 2 T. R. 569, the act in question is said in the head-note to be a "public act." In the arguments of counsel the decisions upon it are presented. Several of the judges had held it to be a "general law," others a "private law." And throughout the case the words "general" and "public" are used as synonymous. Chancellor Kent, in his *Commentaries* (vol. 1, p. 506), classifies all statutes as "public or private;" and says, "the most comprehensive, if not the most precise, definition in the English books is, that public acts relate to the kingdom at large." And on the next page he says, "public statutes are a part of the general law of the land," etc. Again, in *Stephen's Commentaries* (vol. 1, p. 67), the author classifies statutes as "either public or private;" and says, "a public act is a universal rule that regards the whole community." Both of these commentators evidently use the word public as synonymous with general.

So in *Dwarris on Statutes* 629, it is said, "public acts relate to the kingdom at large;" and again, on page 630, "a general or public act then regards the whole community;" using the words as synonymous; and also "a private act, if recognized by a public act, must afterwards be noticed by the courts as a general law." In *Sedgwick on Statutory Laws, etc.*, p. 30, it is said the leading division of statutes is into "public or general, and private or special." And the author then proceeds: "Public or general statutes are, in *England*, those which relate to the kingdom at large. In this country they are those that relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraints."

In *Bouvier's Law Dictionary* we find "public" or "general" statutes defined. And this use of the word is in accordance with common understanding, and the definitions of standard lexicographers; thus Webster defines "general" as meaning, among other things, "public," "common," "extensive, though not universal," etc. So one definition of "public" is "general."

See also *Brooks v. Hyde*, 37 Cal. 366; *Allen v. Hirsch*, 8 Oregon 412; *Mills v. Gleason*, 11 Wis. 493; 78 Am. Dec. 721; *Rains v. Oshkosh*, 14 Wis. 372; *Clark v. Janesville*, 10 Wis. 136; *State v. Lean*, 9 Wis. 279.

In *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214, the act under consideration was adjudged to be local, but the court expressly declines to say whether it is "private or general"—evidently using the latter term in the sense of public.

7. See *infra*, this title, *Private Acts*.

8. *State v. Chambers*, 93 N. Car. 600.

A private act is one which does not affect the public at large, but bears.

are, however rare, constituting the exception rather than the rule in legislation.<sup>1</sup>

A private statute may embrace provisions of a public nature, and *vice versa*,<sup>2</sup> but such intermixture does not change nor modify their respective natures; whether the statute or some enactment in it, is private or public, is a question of law, to be determined by the court, in the absence of a statute declaring and settling its nature.<sup>3</sup>

The fact of the publication of a private act among the public acts will not, in legal contemplation, affect its nature.<sup>4</sup> The charter of a private corporation is a private act;<sup>5</sup> so also are acts relating to a particular trade, or to a particular person of that trade;<sup>6</sup> authorizing one private corporation to guarantee the paper of another;<sup>7</sup> declaring that loans and contracts previously made by any person with a particular corporation shall not be deemed usurious by reason of the corporation's agreeing to pay more than the legal rate of interest;<sup>8</sup> empowering the local authorities of a particular city or county to raise money by tax for the payment of certain claims against it;<sup>9</sup> authorizing the sale of property of infants and others under disability;<sup>10</sup> relieving a particular *feme covert* of the disabilities of coverture.<sup>11</sup> And it has been held that an act of Congress for the relief of insolvent

upon individuals only, such as an act changing a person's name; settling the title to, or authorizing the sale of, a particular parcel of land; allowing one's claim against government and directing payment thereof. Abbott's L. Dict., *Private Acts*.

The line between private and public acts is not always clear. Blackstone shows the distinction thus: "The statute 13 Eliz., ch. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act: it being a rule prescribed to the whole body of spiritual persons in the nation; but an act to enable the Bishop of Chester to make a lease to A B for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act." 1 Bl. Com. 86.

1. 1 Bl. Com. 86.

2. *People v. Chautauqua County*, 43 N. Y. 10; *Bretz v. New York*, 4 Abb. Pr. N. S. (N. Y.) 258; *McLain v. New York*, 3 Daly (N. Y.) 32; Bacon's Abr., *Statutes* (F).

3. *Humphries v. Baxter*, 6 Ired. (N. Car.) 437; *State v. Wallace*, 94 N. Car. 827; *Durham v. Richmond, etc.*, R. Co., 108 N. Car. 399; *Potter's Dwarries* 53. See also *infra*, this title, *Interpretation*.

4. *Durham v. Richmond, etc.*, R. Co., 108 N. Car. 399.

5. *Drake v. Flewellen*, 33 Ala. 106; *First Nat. Bank v. Gruber*, 87 Pa. St. 468; 30 Am. Rep. 378; *Mandere v. Bosignore, etc.*, Sav. Inst., 28 La. Ann. 415; *Durham v. Richmond, etc.*, R. Co., 108 N. Car. 399; *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367. And the fact that the state is a stockholder in the corporation does not have the effect of making the act of incorporation a public act. *Durham v. Richmond, etc.*, R. Co., 108 N. Car. 399; *Marshall v. Western North Carolina R. Co.*, 92 N. Car. 322; *State Bank v. Clark*, 1 Hawk. (N. Car.) 36.

6. Bacon's Abr., *Statutes* (F).

7. *Timlow v. Philadelphia, etc.*, R. Co., 99 Pa. St. 284.

8. *Handy v. Philadelphia, etc.*, R. Co., 1 Phila. (Pa.) 31.

9. *Bretz v. New York*, 3 Abb. Pr., N. S. (N. Y.) 478.

10. *Carroll v. Olmsted*, 16 Ohio 251; *Boon v. Bowers*, 30 Miss. 246; 64 Am. Dec. 159; *Croxall v. Shererd*, 5 Wall. (U. S.) 295; *Labrano v. Nelligan*, 9 Wall. (U. S.) 295; *Rice v. Parkman*, 16 Mass. 326; *Moore v. Maxwell*, 18 Ark. 469; *Stewart v. Griffith*, 33 Mo. 13; 82 Am. Dec. 148.

11. *Ashford v. Watkins*, 70 Ala. 156.

debtors in the District of Columbia, is, as regards the Union at large, a private act.<sup>1</sup>

c. GENERAL.—As stated elsewhere in this article the term "general" is synonymous with "public" and opposed to "private," when reference is had to the subject-matter of the statute.<sup>2</sup> When, however, regard is had to the extent of territory over which the statute operates, the term is opposed to "local," and describes a statute operative throughout the legislative jurisdiction and not confined to a particular locality.<sup>3</sup> It is also used as contradistinguished from "special," and then it means relating to all of a class instead of to one or a part of that class.<sup>4</sup> In many of the states there are constitutional inhibitions against the enactment of special or local laws in enumerated cases, and in all others where a general law may be made applicable. In the latter case the legislature is to decide whether a given subject which is not expressly named in the constitution will admit of general legislation;<sup>5</sup> and the passage of a special act is evidence that it was thought that a general law could not be made applicable, and clear evidence of mistake is required to invalidate the enactment.<sup>6</sup>

In order to determine whether or not a given law is general, the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably

1. *Wright v. Patin*, 10 Johns. (N. Y.) 299.

2. See *supra*, this title, *Public Laws*.

3. *Clark v. Janesville*, 10 Wis. 180.

General laws are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraint. *People v. Cooper*, 83 Ill. 585. A statute that cannot be reduced to a general rule, to operate in all parts of the state alike, is not a general law. *King v. State*, 87 Tenn. 304.

In *Healey v. Dudley*, 5 Lans. (N. Y.) 115, it was said that the true criterion whereby to determine whether an act is local or general, is to inquire whether under it the people of the state may be affected; if they may be, it is general; if not, it is local.

4. *Wheeler v. Philadelphia*, 77 Pa. St. 348; *Clark v. Janesville*, 10 Wis. 180; *Porter v. Thomson*, 22 Iowa 391; *Hymes v. Aydelott*, 26 Ind. 431.

The term "general" does not import that the law designated operates upon all persons or all things: it is derived from *genus*, and relates to a whole *genus* or kind; or, in other words, to a whole class or order; accordingly a

law that affects a class of persons or things less than all may be a general law. *Brooks v. Hyde*, 37 Cal. 366. See also *People v. Cooper*, 83 Ill. 585; *People v. Wright*, 70 Ill. 398.

5. *Longworth v. Common Council*, 32 Ind. 322; *State v. Tucker*, 46 Ind. 355; *Gentile v. State*, 29 Ind. 409; *overruling Thomas v. Clay County*, 5 Ind. 4; *Vickery v. Chase*, 50 Ind. 461; *Kelly v. State*, 92 Ind. 236; *Johnson v. Wells County*, 107 Ind. 15; *People v. McFadden*, 81 Cal. 489; 15 Am. St. Rep. 66; *Edmonds v. Herbrandson*, 2 N. Dak. 270.

6. *Richman v. Muscatine County*, 77 Iowa 513; 14 Am. St. Rep. 308.

While the Iowa legislature cannot, in view of art. 3, § 30, of the constitution of the state, which prohibits that body from passing special laws in certain cases, and in all others where a general law may be made applicable, pass a special law incorporating an independent school district, it nevertheless has the power to pass a curative act legalizing the defective organization of a school district already in existence under the general law authorizing the creation of independent school districts. Though such curative act is special,

appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class, to be general.<sup>1</sup> But if the characteristics used to distinguish the objects to which the legislation applies from others be not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded

yet it is a case where a general law cannot be applicable. *State v. Squires*, 26 Iowa 340.

1. *State v. Sloane*, 49 N. J. L. 356; *Hudson County v. Buck*, 51 N. J. L. 156.

*Tennessee* Act of 1887, releasing all druggists from liquor dealers' privilege taxes, incurred by them under acts of 1881 to 1886, inclusive, is not obnoxious to the constitutional inhibition against special legislation. The class provided for by the act is a natural, and not an arbitrary one. *Demoville v. Davidson County*, 87 Tenn. 214.

In *State v. Donaldson*, 41 Minn. 74, a distinction or classification of dealers in medicines, based on the location of their places of business in respect to distance from drug stores, was held a reasonable one.

Insurance companies, for the purpose of taxation, may be classified according to the amount of premiums received. *State v. Liverpool, etc., Ins. Co.*, 40 La. Ann. 463. And railroads, for the purpose of prescribing the rates of charges, according to length. *Dow v. Beidelman*, 49 Ark. 325; *Little Rock, etc., R. Co. v. Hanniford*, 49 Ark. 291.

An act for the incorporation of towns not exceeding four miles' square and having a population not exceeding 5,000, is based upon a proper principle of classification. *State v. Clayton*, 53 N. J. L. 277.

So also is an act authorizing towns in which are located toll roads, to purchase the same. *Gilson v. Rush County*, 128 Ind. 65. A law giving the right of eminent domain to corporations engaged in mining petroleum, etc., and in supplying patrons within the state, is general. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446.

A law applying only to railroads "organized under the general railroad law," is general, as they are a class unto themselves. *State v. Bergen Neck R. Co.*, 53 N. J. L. 108.

A law defining rights and liabilities for libel, and limited to the publishers of newspapers, is not special. *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707; nor is a law reducing the fees of all executors and administrators throughout the state. *Dewar's Estate*, 10 Mont. 426; nor one relating to every receivership. *Dillingham v. Putnam* (Tex. 1890), 14 S. W. Rep. 303.

A law providing for a bridge to be built by adjoining counties where waters divide and join again within not more than 500 yards, is general. *State v. Hunterdon County*, 52 N. J. L. 512.

An act relating to ordinary public roads, is not special because it excepts turnpikes and county roads. *Harrington Tp. Road Commission v. Collector*, 54 N. J. L. 274. Nor an act providing for the enforcement of individual liability of stockholders of corporations and exempting suits for labor. *Ripley v. Evans*, 87 Mich. 217.

An act providing for the taxation of corporations is general, notwithstanding the exception of certain corporations to be taxed as individuals. *Coal Run Coal Co. v. Finlen*, 124 Ill. 666. See also *State v. Yard*, 42 N. J. L. 357.

There is such a relation between the population of counties and the amount of services rendered by the judges thereof, that the judges may, for the purpose of regulating their compensation, be classified on the basis of the number of inhabitants within their jurisdictions. *State v. Bogert*, 42 N. J. L. 407; *State v. Reitz*, 62 Ind. 159.

In *State v. Hammer*, 42 N. J. L. 435, the court, by Beasley, C. J., said: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction having a refer-

from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, but local and special.<sup>1</sup>

ence to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such in the nature of things as will in some reasonable degree at least account for or justify the restriction of the legislature." And in *State v. Spaude*, 37 Minn. 322, Gilfillan C. J., for the court, said: "A law to be general need not operate alike upon all the inhabitants of the state, or all the cities, or all the villages in the state; to require that, would be utterly impracticable. A law is general which operates alike upon all the inhabitants, or all the cities, or all the villages, or other subjects of a class of such subjects of legislation. That for the purpose of legislation it may be necessary to make and that the legislature may make such classification is undoubted. The only practical limitation to this power is that the classification shall be based upon some natural reason—some reason suggested by necessity, by some difference in the situation and circumstances of the objects classified suggesting the necessity of different legislation with respect to them, and shall not be merely arbitrary with no apparent reason except a desire to evade under the forms of a general law the constitutional inhibition of special legislation."

For further illustrations see the following cases: *State v. Dalrymple*, 49 N. J. L. 530; *State v. Donovan*, 29 Neb. 75; *Costello v. Wyoming* (Ohio 1892), 30 N. E. Rep. 613; *Wyoming Street*, 137 Pa. St. 494; *Weinman v. Wilkinsburg*, etc., R. Co., 118 Pa. St. 192; *Ayar's Appeal*, 122 Pa. St. 266; *Ruan St.*, 132 Pa. St. 257; *Straub v. Pittsburgh*, 138 Pa. St. 356; *People v. Wallace*, 70 Ill. 680; *Elder v. State*, 96 Ind. 162; *Heanley v. State*, 74 Ind. 99; *Hanlon v. Floyd county*, 53 Ind. 123; *Groesch v. State*, 42 Ind. 547; *U. S. v. De Amador* (N. Mex. 1891), 27 Pac. Rep. 488; *U. S. v. De Lujan* (N. Mex. 1891), 27 Pac. Rep. 489; *U. S. v. Chaves* (N. Mex. 1891), 27 Pac. Rep. 489; *Jensen v. Fricke*, 133 Ill. 171; *Farris v. Vannier*, 6 Dakota 186; *State v. Hughes*, 104 Mo. 459; *State v. Orrick*, 106 Mo. 111;

*State v. Pond*, 93 Mo. 606; *Ex Parte Swann*, 96 Mo. 44; *Wheeler v. Philadelphia*, 77 Pa. St. 348; *Land, etc., Co. v. Brown*, 73 Wis. 294; *Kilgore v. Magee*, 85 Pa. St. 401; *State v. New Brunswick*, 42 N. J. L. 51; *State v. Moore*, 54 N. J. L. 121; *State v. Hoagland*, 51 N. J. L. 62; *In re Cleveland*, 52 N. J. L. 188; *Youngs v. Hall*, 9 Nev. 226; *State v. Hunter*, 38 Kan. 578; *Holmes v. Smythe*, 100 Ill. 413; *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170; *Lancaster county v. Trimble*, 33 Neb. 121; *State v. Berka*, 20 Neb. 375; *People v. Judge*, 17 Cal. 548; *People v. Henshaw*, 76 Cal. 436.

1. *Edmonds v. Herbrandson*, 2 N. Dak. 270; *Lorentz v. Alexander*, 87 Ga. 444; *Lodi Tp. v. State*, 51 N. J. L. 402; *State v. Somers' Point*, 52 N. J. L. 323; *State v. Bergen County*, 52 N. J. L. 303; *Bray v. Hudson*, 50 N. J. L. 82; *State v. Camden*, 50 N. J. L. 87; *State v. Wood*, 49 N. J. L. 88; *State v. Mullica Tp.*, 51 N. J. L. 412; *State v. Ramsey County* (Minn. 1892), 51 N. W. Rep. 112; *State v. Boyd*, 19 Nev. 43; *Scowden's Appeal*, 96 Pa. St. 422; *Davis v. Clark*, 106 Pa. St. 377; *Pasadena v. Stimson*, 91 Cal. 238; *Topeka v. Gillett*, 32 Kan. 431; *Utsy v. Hiott* (S. Car. 1889), 9 S. E. Rep. 338.

Interdicted special laws are those that rest upon a false or deficient classification. Their vice is that they do not embrace all the class to which they are naturally related; they create preferences and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which are not dissimilar in these respects. *State v. Parsons*, 40 N. J. L. 1.

There is no reason why an officer known as "city physician" in cities of the second class should have a different appointment, with a term fixed by the mayor, and an annual salary to be allowed by the legislative body confirming the appointment, from a physician to be appointed and compensated in a city of the first or third classes; population cannot have any just reference to such a distinction. *State v. Simon*, 53 N. J. L. 550; *State v. Bogert*, 42 N. J. L. 407.

Nor is there any natural connection

between the number of inhabitants in a city and its right to fund its floating debt; therefore a statute conferring power to issue bonds for that purpose, limited in its operation to cities of not less than 25,000 population, is special. *State v. Trenton*, 42 N. J. L. 486.

And a law declaring that all cities containing a certain population shall have a certain system of laying out streets, and all having a smaller population, a different one, is special, inasmuch as the law bears no affinity to the qualities or attributes forming the principle of classification. *State v. Parsons*, 40 N. J. L. 11. See also *State v. Plainfield* (N. J. 1892), 24 Atl. Rep. 494.

No characteristics mark boroughs with a population under 3,000 as a class peculiarly requiring legislation conferring upon the courts of common pleas therein the power to license taverns, etc., which do not apply to boroughs with a population in excess of that number, and therefore the standard of classification is illusory. *State v. Glenn*, 47 N. J. L. 105. See also *State v. Trenton*, 48 N. J. L. 438; *State v. Gaddis*, 44 N. J. L. 363.

A statute providing that all county warrants which are not paid when presented shall bear interest, but excepts the warrants of a single county, is special. *Hotchkiss v. Marion* (Mont. 1892), 29 Pac. Rep. 821. So also an act making a different rule for *certiorari* in a single county. *Maxwell v. Tumlin*, 79 Ga. 570.

And an act providing a different method of levying taxes in boroughs which are seaside resorts from that of other boroughs having all but this feature, is special. *State v. Philbrick*, 50 N. J. L. 581.

*New Jersey Act of March 9, 1891*, Pamp. L. 101, providing that "no person now holding an appointive position in any city or county of this state and receiving a salary from such city or county, who is an honorably discharged soldier or sailor, having served in the war of the rebellion, shall be removed from such position except for cause," is special, in that it fails to include within its provision all the members which constitute the selected class. *State v. O'Connor*, 54 N. J. L. 36.

In *Earle v. Board of Education*, 55 Cal. 489, the law relating to salaries of public school teachers was held special, because it selected from the general class of public school teachers of the

state those within certain cities and counties, and regulated their salaries in a manner different from that of others without such locality.

*New Jersey Act of 1882*, Rev. Supp., p. 983, which provides that mortgages made to the chancellor in his official capacity shall be assessed to the person having the beneficial interest therein, or who is entitled to the interest or income thereof, is unconstitutional, because of its special character in not including in its operation all mortgages made to officers of the court, the interest or income of which is payable to the beneficiary. *State v. Dalrymple*, 49 N. J. L. 530.

In *State v. Trenton* (N. J. 1892), 24 Atl. Rep. 478, the act directed that in all cities where a German newspaper has been published once a week for three years, such paper shall be selected as the official paper, and it was held that the characteristic thus made the basis of classification was not one of sufficient importance to warrant the classification, and the statute was therefore special. And where the statute by its terms applied to cities of less than 10,000 inhabitants divided into not less than two nor more than three wards, and which at the time of the act had twelve councilmen, it was held that the three incidents on which the classification was attempted were too unimportant and restrictive to form the basis of a general law. *State v. Wood*, 49 N. J. L. 88.

The effect and not the form of the law determines its character. *State v. Newark*, 53 N. J. L. 4; *Com. v. Patton*, 88 Pa. St. 258; *State v. Tolle*, 71 Mo. 645; *Humes v. Missouri Pac. R. Co.*, 82 Mo. 231; 52 Am. Rep. 369; *Marmet v. State*, 45 Ohio St. 63; *State v. Smith*, 48 Ohio St. 211; *Fellows v. Walker*, 39 Fed. Rep. 651; *McAnnich v. Mississippi, etc., R. Co.*, 20 Iowa 338; *Haskel v. Burlington*, 30 Iowa 232.

Thus, an act requiring county commissioners in any county having a population at the census of 1880 of a certain number and containing a city of the second class, third grade, to provide a depository for county funds is general in form but special in its operation, as there is only one county of the description, and no other can ever come within the operation of the act. *State v. Ellett*, 47 Ohio St. 90; 21 Am. St. Rep. 772. To the same effect are *State v. Anderson*, 44 Ohio St. 247; *Devine v. Cook County*, 84 Ill. 590. Such a law could

*d. LOCAL.*—The term “local” as applied to statutes is of modern origin,<sup>1</sup> and is used to designate an act which operates only within a single city, county, or other particular division or place, and not throughout the entire legislative jurisdiction.<sup>2</sup> In this sense the term “local” is the antithesis of “general.”<sup>3</sup>

By some authorities the term is considered as synonymous with “private,”<sup>4</sup> but in one instance it was held that the word “private” referred to persons, and “local,” to territory, but both

not be more special had the county been designated by name instead of by the circumlocution employed. *State v. Mitchell*, 31 Ohio St. 592.

1. *McGregor v. Baylies*, 19 Iowa 43.

2. *State v. Chambers*, 93 N. Car. 600.

A local statute touches but a portion of the territory of a state, a part of its people, or a fraction of the property of its citizens. *Anderson's L. Dict.*; *People v. Chautauqua County*, 43 N. Y. 15; *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214; *Kerrigan v. Force*, 68 N. Y. 381. An act regulating the fees of local officers is local. *State v. Judges*, 21 Ohio St. 1; *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259; *Gaskin v. Meek*, 42 N. Y. 186.

An amendment of the charter of the city of New York relating to the term of office of councilmen, and the time, etc., of their election, was held to be local and the court said: “It is clear that it relates only to the officers of the municipal corporation of New York, and has no force outside of the territory embraced in the corporation, nor any possible effect upon property not within the corporate limits, nor upon persons not for the time being within such limits. It would seem to follow necessarily that the act in question is local as contradistinguished from general.” *People v. O'Brien*, 38 N. Y. 193.

To the same effect is *People v. Hills*, 35 N. Y. 449.

An act to enable the supervisors of the city and county of New York to raise money by tax is local. *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *Sharp v. New York*, 31 Barb. (N. Y.) 572; *Pullman v. New York*, 54 Barb. (N. Y.) 169.

In *People v. Allen*, 42 N. Y. 378, the meaning of the word “local” as used in art. 1, § 9, *New York* constitution, making a two-thirds' vote of the members elected to each branch of the legislature requisite to a bill appropriating public moneys “for local or private

purposes,” being under consideration, the court said: “An appropriation of money by the legislature must generally be regarded as for a local purpose when the money is to be expended in a particular locality, and the people of that locality are to be directly and mainly benefited, notwithstanding the public are incidentally and remotely benefited also.”

In discussions on the relative authority of state and United States laws, “local statute” frequently refers to the statute law of one state, in contradistinction to a law on the same subject of another state, or of Congress, or the general commercial law. *Anderson's L. Dict., Statute.*

3. See *supra*, this title, *General Acts*. In *People v. O'Brien*, 38 N. Y. 193, it is said that local acts are confined to the persons or property of a specified locality, while general acts embrace either the persons or property of the people of the state generally, or of some class of persons or species of property, not limiting the operation to any particular locality less than the whole.

4. *Bouviér* defines “local” as fixedness in a place (*Bouv. L. Dict. Local*); and at the word “statute” he does not mention in his division of statutes those which are local, but defines private acts as those relating to any particular place, or to several particular places, or to one or several particular counties. So in his view, local and private, in this connection, would seem to be convertible terms.

And in *Dwarris' Statutes*, page 463, it is said that acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, are private acts. And, again, at page 354, the author says that every bill for the particular benefit of a person or company, or a locality, in which the whole community is not interested, is, in a parliamentary sense, a private bill.



as signifying a narrowing or restricting of purpose.<sup>1</sup> Again, "local" has been contrasted with "public"<sup>2</sup> but unhappily so, as a statute may be both local and public, local in its application and public in its object—indeed, statutes which operate alike and in the same degree, although within a prescribed locality, upon all individuals and classes of persons and their interests, subject to the law, where they are in the same condition and circumstances, possess this dual character.<sup>3</sup> Thus, acts establishing counties and towns,<sup>4</sup> prescribing their boundaries,<sup>5</sup> for the location or removal of a county seat,<sup>6</sup> relating to a road in a particular county,<sup>7</sup> to the preservation of fish in a particular river,<sup>8</sup> prohibiting the sale of liquor in a particular county,<sup>9</sup> or in several townships of a county,<sup>10</sup> authorizing the issue of municipal bonds,<sup>11</sup> limiting suits against a certain city to a specified period of time,<sup>12</sup> are of this kind. A *proviso* repealing a general law, in so far as it may affect a particular locality, is itself local.<sup>13</sup>

The duration of a statute has no bearing upon its character as being local or general—a local statute may be perpetual, and a general one temporary, and *vice versa*.<sup>14</sup>

**3. In Respect to Compliance Required—*a*. MANDATORY.**—A statute is mandatory when non-compliance therewith will render the act done under it absolutely void.<sup>15</sup> Statutory directions which are of the essence of the thing required to be done are mandatory.<sup>16</sup>

***b*. DIRECTORY.**—If a statute is such that disregard of its provisions will constitute an irregularity, but one not necessarily

1. *People v. Chautauqua County*, 43 N. Y. 15.

2. Abbott's L. Dict., *Statute*.

3. *State v. Chambers*, 93 N. Car. 600; *Orr v. Rhine*, 45 Tex. 345; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *Manning v. Klippel*, 9 Oregon 367.

4. *Winooski v. Gokey*, 49 Vt. 282; *Clark v. Janesville*, 10 Wis. 136; *Gorham v. Springfield*, 21 Me. 58. *Compare Johnson v. State*, 3 Lea (Tenn.) 469; 31 Am. Rep. 648; *Loper v. St. Louis*, 1 Mo. 681.

5. *State v. Jackson*, 39 Me. 291; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 489; *Com. v. Springfield*, 7 Mass. 9.

6. *State v. Lean*, 9 Wis. 279.

The requirement of the constitution of *Tennessee* that "the ayes and noes shall be taken in each house upon the final passage of every bill of a general character" does not apply to an act changing two counties from their respective judicial circuits to others, and fixing the time of holding courts therein and in one other county. Such an

act is of a public local nature. *State v. Algood*, 87 Tenn. 164.

7. *State v. Baltimore County*, 29 Md. 516. But see *Allen v. Hirsch*, 8 Oregon 412.

8. *Burnham v. Webster*, 5 Mass. 266.

9. *Van Swartow v. Com.*, 24 Pa. St. 131; *State v. Chambers*, 93 N. Car. 600.

10. *Levy v. State*, 6 Ind. 281.

11. *State v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 136; *Rochester v. Alfred Bank*, 13 Wis. 432; 80 Am. Dec. 746; *Burhop v. Milwaukee*, 21 Wis. 260; *Knox County v. Aspinwall*, 21 How. (U. S.) 539.

12. *Covington v. Voskotter*, 80 Ky. 219.

13. *Fire Department v. Bacon*, 2 Abb. App. Dec. (N. Y.) 127.

14. *People v. Wright*, 70 Ill. 398. See also *infra*, this title, *Temporary Statutes; Perpetual Statutes*.

15. Abbott's Law. Dict.; Black's Law Dict.

16. *Rex v. Locksdale*, 1 Burr. 447. See *infra*, this title, *Interpretation of Statutes*, where the subject is discussed at length.

fatal to acts done or proceedings had thereunder, it is said to be directory.<sup>1</sup>

Statutory regulations designed for the information of public officials, and intended to promote method, system, uniformity and dispatch in the modes of proceeding, are generally deemed directory.<sup>2</sup> Officers may be liable to legal animadversion, perhaps to punishment for non-compliance, yet compliance is not a condition precedent to the validity of their acts.<sup>3</sup>

*c. PROHIBITORY.*—A prohibitory statute is one which forbids an act, whether it be a crime or a misdemeanor, or something which disturbs the public repose, or injures private rights, or relates to the transmission of estates, or the capacity of persons, or other objects.<sup>4</sup>

*d. PERMISSIVE.*—A permissive statute is one which allows certain acts or things to be done without commanding them, as, for example, allowing certain persons to make wills, to pre-empt lands, to vote, or to form corporations.<sup>5</sup> But the act when done is as valid as if done in obedience to a legislative command, and rights acquired thereby are entitled to the same protection.<sup>6</sup>

**4. In Respect to Time of Passage**—*a. ANCIENT AND MODERN.*—The statutes from Magna Charta to the end of the reign of Edward II are known as *vetera statuta*, or ancient statutes. Those passed in the reign of Edward III, and subsequently, are termed *nova statuta*.<sup>7</sup> English statutes passed before the emigration of the American colonists, and which were applicable to their condition, and not inconsistent with the government instituted by them, constitute a part of the common law adopted by them.<sup>8</sup>

**5. In Respect to Time of Taking Effect**—*a. PROSPECTIVE.*—A

1. Black's Law. Dict.

2. Torrey v. Milbury, 21 Pick. (Mass.) 64; Cooley's Const. Lim. 92.

3. Torrey v. Milbury, 21 Pick. (Mass.)

64. See *infra*, this title, *Interpretation of Statutes*, where the subject is fully treated.

4. 1 Bouv. Inst. 109; Philpott v. St. George's Hospital, 6 H. L. Cas. 338. In this case it was said: "Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do, and whenever you can find that anything done is substantially that which is prohibited, I think it is perfectly open to the court to say that it is void, not because it comes within the spirit of the statute or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute, it is a thing or one of the things actually prohibited."

5. Potter's Dwaris 74.

Permissive statutes confer privileges

or licenses which the donee may exercise or not at pleasure, having only his own interest or convenience to consult. Sutherland on Stat. Const., § 205. See also Nicholl v. Allen, 1 B. & S. 935.

6. Slack v. Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

7. Bouv. L. Dict.

8. Com. v. Leach, 1 Mass. 60; Com. v. Knowlton, 2 Mass. 534; Bogardus v. Trinity Church, 4 Paige (N. Y.) 198; State v. Rollins, 8 N. H. 561; Doe v. Winn, 5 Pet. (U. S.) 233; O'Ferrall v. Simplot, 4 Iowa 400; Vidal v. Girard, 2 How. (U. S.) 128; Webster v. Morris, 66 Wis. 366; 57 Am. Rep. 278; Dodge v. Williams, 46 Wis. 92; Carter v. Balfour, 19 Ala. 814; Nelson v. McCrary, 60 Ala. 301; 1 Kent's Com. 473. But see 1 Min. Insts., p. 47, where it is said: "A pernicious and, as is believed, an unwarrantable doctrine has been propounded, that English statutes passed before the emigration of our ancestors and applicable to our constitution,

law is said to be prospective when it is applicable only to cases which arise after its enactment.<sup>1</sup>

*b.* RETROSPECTIVE.—It is retrospective when it applies to cases existing, as those which destroy or impair vested rights, create new obligations, impose new duties, or attach new disabilities in regard to transactions already passed.<sup>2</sup>

**6. In Respect to Duration**—*a.* PERPETUAL.—A perpetual statute is one for the continuance of which there is no time limited, although this be not expressly declared.<sup>3</sup> If, however, a statute which does not itself contain any limitation is to be governed by another which is temporary merely, the former will also be temporary and dependent upon the existence of the latter.<sup>4</sup>

*b.* TEMPORARY.—A temporary statute is one limited in duration at the time of its enactment, either expressly, or by force of its character.<sup>5</sup> An ordinary appropriation bill is an instance of the latter kind.<sup>6</sup> A temporary statute is not necessarily a special statute; the limitation is merely in regard to time, and its character may be such that it is also a general statute.<sup>7</sup> An act may be temporary in some of its parts, and permanent in others.<sup>8</sup> If a statute, temporary when enacted, is made permanent by a subsequent act, it is to be deemed permanent *ab initio*.<sup>9</sup> Rights acquired under a temporary statute may continue after its expiration.<sup>10</sup>

**III. ENACTMENT**—1. The Legislature—*a.* STATUS.—It is essential to the enactment of a valid statute that the legislature should have been constituted legally, and that it should act in conformity to constitutional provisions. Its members must have been elected and their election certified in accordance with the requirements of the constitution, and this instrument must be followed also in convening and organizing the legislature.<sup>11</sup>

and in amendment of the common law, constitute a part of the common law of this country."

1. Black's L. Dict.

2. Society, etc. *v.* Wheeler, 2 Gall. (U. S.) 105.

See *infra*, this title, *Retrospective Laws*.

**Retrospective and Ex Post Facto Distinguished.**—Retrospective and *ex post facto* are not synonymous terms, the former being the more comprehensive, and including the latter. All *ex post facto* laws are of necessity retrospective, but the converse is not true; thus a curative statute is retrospective, but not *ex post facto*, that phrase referring only to criminal laws such as make acts, innocent when done, criminal; or if criminal when done, aggravate the crime, increase the punishment or reduce the measure of proof. Constitutions of nearly all the states contain

inhibitions against *ex post facto*, but only a few prohibit retrospective laws in specific terms. Black, Const. Prohib., §§ 170, 172, 222; Locke *v.* New Orleans, 4 Wall. (U. S.) 172; State *v.* Squires, 26 Iowa 340.

3. Bouv. L. Dict.

In *Ex parte Wellington et al.*, 16 Pick. (Mass.) 87; 26 Am. Dec. 631, it was said that, in legal contemplation, all statutes are perpetual unless limited by their terms, which means that they are of force until duly repealed or amended.

4. Bacon's Abr., *Statutes* (D).

5. 1 Bouv. Inst. 112.

6. Bouv. Law. Dict.

7. People *v.* Wright, 70 Ill. 388.

8. Warren *v.* Windle, 3 East 205.

9. Rex *v.* Swiney, 1 Alc. & Nap. 139.

10. Steavenson *v.* Oliver, 8 M. & M. 234.

11. The proclamation for convening

Where the legislature is regularly organized, fully recognized by the political department of the government, has no rival organization, and has existed and performed duties as a legislature, it is presumed, as far as the judiciary is concerned, that such a legislature is legally constituted.<sup>1</sup>

Of the election and qualification of its members, the legislature, after its organization, is the sole judge.<sup>2</sup> And when it has determined that its members are regularly elected, the question cannot, as a rule, be raised afterwards in testing the validity of a law.<sup>3</sup> But it has been held that where it appears from the journal of the legislature itself that the number of members exceeds the constitutional limit, and that an act was passed only by the assistance of the votes of those not entitled to seats in the legis-

the legislature must be issued by the proper officer. *People v. Parker*, 3 Neb. 409; 19 Am. Rep. 634.

A proclamation issued by the governor calling an extraordinary session of the legislature, may be revoked by a subsequent proclamation issued before the convening of the legislature under the first proclamation; and any act done by the legislature under the first proclamation is void. *People v. Parker*, 3 Neb. 409; 19 Am. Rep. 634.

**Reconvening of the Legislature.**—Where the legislature is dispersed by any sudden irruption or insurrection, or by any external force, the power might, perhaps, remain and the duty also, to reassemble without previous votes for such purpose. But when such dispersion is the result of its own action, as any acquiescence in an unauthorized proclamation of the executive assuming to adjourn the house, without any formal resolution on its part, the legislature cannot be brought together again as a legislative body in the absence of a previous vote to reassemble, without a call from the executive. The spontaneous reassembling of the members will not have that effect. *People v. Hatch*, 33 Ill. 1.

See generally *State v. Judge*, 29 La. Ann. 223; *Gormley v. Taylor*, 44 Ga. 76; *Rohrbacher v. Jackson*, 51 Miss. 748.

1. *Luther v. Borden*, 7 How. (U. S.) 1; *Ex parte Dorr*, 3 How. (U. S.) 104; *State v. Judge*, 29 La. Ann. 225; *Gormley v. Taylor*, 44 Ga. 85; *Hughes v. Felton*, 11 Colo. 489.

2. *Cooley Const. Lim.*, pp. 173, 624; *State v. Gilmore*, 20 Kan. 551; 27 Am. Rep. 189; *Hughes v. Felton*, 11 Colo. 489; *People v. Mahaney*, 13 Mich. 481; *People v. Fitzgerald*, 41 Mich. 2; *People v. Goodwin*, 22 Mich. 496;

*Alter v. Simpson*, 46 Mich. 138; *Doran v. De Long*, 48 Mich. 552; *People v. Harshaw*, 60 Mich. 200; *Weston v. Probate Judge*, 69 Mich. 600; *Nau-mann v. Board of City Canvassers*, 73 Mich. 252; *Dalton v. State*, 43 Ohio St. 652; *Kerr v. Trego*, 47 Pa. St. 292; *O'Ferrall v. Colby*, 2 Minn. 180; *State v. Kenney*, 9 Mont. 223.

3. *People v. Mahaney*, 13 Mich. 481. Where the right to a seat in the legislature was contested, and the person legally entitled to the claim ousted and his opponent seated by a vote of the members of the legislature, but against the protest of certain of them, when, as a matter of fact, less than a quorum was present, though the presence of a quorum was recited in the journal, and the person so illegally seated as a member was allowed to continue for some months, acting and voting as such, a bill passed by his vote, where otherwise a quorum would not have been present, being contested on the ground that a quorum had not voted for it, it was held that the court was bound by the journal entry and that by the acquiescence of the members of the legislature who alone could judge of the election and qualification of its members, the illegally seated person was a *de facto* member of the legislature, and that the bill in question was validly passed. *Auditor Gen'l v. Menominee County*, 89 Mich. 552.

Where the legislature has failed to determine whether or not one of its members is legally entitled to his seat, the courts, when the question comes before them, will regard the person who has a certificate of election from the legally constituted canvassing board as being a member. *State v. Kenney*, 9 Mont. 223.

lature, the court must recognize the fact and declare the act so passed invalid.<sup>1</sup>

Where the legal status of the legislature—or either of its branches—as a whole is questioned, the judiciary, when the matter is properly before it, has jurisdiction to inquire into and determine whether the body referred to is legally constituted;<sup>2</sup> or, if there are two rival organizations, to determine which of them is so constituted.<sup>3</sup> While it is true that a fraudulent legislature which succeeds in driving out its *de jure* rival and forcing it to retire would, by continuing in the field and performing the duties

1. *State v. Francis*, 26 Kan. 724. This decision rests on the theory that the court may inquire into the legal existence of the legislature, though it may not pass on the fact of an election of a member to such legislature. *Poultry v. Stover*, 11 Kan. 238; *State v. Francis*, 26 Kan. 737.

2. When *Kansas* was admitted into the Union, the governor-elect was required by the constitution, upon receiving final information of the admission of *Kansas* into the Union, to proclaim the same and convene the legislature elected under it. This proclamation was issued several weeks after the admission of *Kansas* into the Union. It was also provided by the constitution that the "governor, secretary, and judges and all other officers, both civil and military," under the territorial government should continue in the exercise of the duties of their respective departments until the said officers were superseded under the authority of the constitution. The legislature which was elected under the territorial organization, and which was in session when *Kansas* was admitted, passed a law two days thereafter but before the proclamation of the governor was issued. On the question as to whether or not the legislature was legally constituted for the purpose of passing the aforesaid law, it was held that the members of the legislature were "officers" within the meaning of the constitutional provision above referred to, and that the law was therefore valid. *State v. Meadows*, 1 Kan. 91.

In *Georgia*, an act known as the "Relief Act," passed October 13, 1870, was attacked on the ground that it was invalid because the session of the legislature at which it was passed was a "session of the general assembly after the second under the constitution," and that at the time of the passage of the act, that legislature had been in session more than forty days without having

prolonged the session by a vote of two-thirds of each house, as required by the constitution. This constitution was adopted by a provisional legislature, called by the government of the United States under the Reconstruction Acts, which legislature continued in power after the adoption of the constitution; and it was urged that thereby its sessions constituted sessions of the general assembly under the constitution. If this were so, the act referred to was undoubtedly unconstitutional. But the court decided that the aforesaid sessions of the provisional legislature, the members of which were elected or appointed before the adoption of the constitution, were not those of a general assembly under the constitution, but those of the legal provisional legislature, and that, therefore, the provisions of the constitution had not been violated and the act was valid as an act of the provisional legislature. *Macon, etc., R. Co. v. Little*, 45 Ga. 370.

3. *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471. See also *Hughes v. Felton*, 11 Colo. 489; *Macon, etc., R. Co. v. Little*, 45 Ga. 371.

"The cases in which the official acts or votes of members of a legislative body, who are such *de facto* only and not *de jure*, have been held valid, are all cases in which there has been no question as to the legality of the body in which they sat. They are cases in which the body admitting such persons was, in doing so, acting within its admitted jurisdiction, and in such cases the courts will not inquire into the title of such members as to their seats. The courts in such cases will go no further than to inquire as to the legal status, and the authority of the body as a whole; but where there are two bodies, each claiming to be the legislature, then the court whose duty it is to respect and execute the acts of such legislature, must of necessity decide which is the

and exercising the powers of the legislature, become, when recognized, a *de facto* legislature,<sup>1</sup> still if the *de jure* organization continues to exist and to assert its rights without cessation, it is impossible for a legislature *de facto*, though recognized by the political power in the state, to usurp and destroy its title.<sup>2</sup> In the case of dual state governments the courts recognize that legislature as legal which belongs to that government of which the court is a part.<sup>3</sup>

*b. ORGANIZATION.*—It is contemplated that each house of the legislature shall be organized by the persons who are *prima facie* members thereof, as shown by the duly authenticated certificates issued by the proper canvassing officers.<sup>4</sup>

legislature." McCrary on Elections, § 517, quoted in *In re Gunn* (Kan. 1893), 32 Pac. Rep. 478.

"When different bodies of men, each claiming to be and to exercise the functions of the legislative department of the state appear, each asserting their title to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably at no distant day be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of these bodies lawfully represent the people from whom they derive their power. There can be but one lawful legislature. The court must know for itself whose enactments it will recognize as the laws of binding force when brought judicially before it. In a thousand ways it becomes essential that the court should forthwith ascertain and take judicial cognizance of the question which is the true legislature." Opinion of the Judges, 70 Me. 609.

1. "The body of men which the counsel for the defendant terms by courtesy a *de facto* legislature, though its house was composed of men who were and who were not elected, both classes not constituting a quorum, and of a senate a part of whom, less than a quorum, were duly elected, and a part were not elected, could not legally act as legislative bodies. While this condition of affairs remained there was no legal legislature. The greater portion of the members of the bodies thus illegally constituted subsequently took their seats, respectively, in the rightful house and senate—a house and senate composed of members unquestionably elect-

ed. They participated in its legislative action until its final adjournment. They received and acknowledged the receipt of the compensation to which by law they were entitled as members of the legislature. There was no other body claiming to exercise legislative functions. What the counsel calls the *de facto* legislature became merged into the rightful legislature, by which a governor was chosen in the accustomed manner, who entered upon and is now discharging, without interference or obstruction, the duties of that office. All this is well known as matter of current history, as well as by the legislative journals." *Prince v. Skillin*, 71 Me. 369; 36 Am. Rep. 325.

2. *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471.

"A legally organized legislature being now in existence, and exercising its constitutional functions, it follows that no convention of members-elect of either house can exist which can be treated as a nucleus for another organization. Two governments are claiming to be in existence as valid and entitled to the obedience of the people. Both cannot rightfully exist at the same time; but one government can be recognized and obeyed." Opinion of the Justices, 70 Me. 612.

3. *State v. Judge of Superior Court*, 29 La. Ann. 223; *Luther v. Borden*, 7 How. (U. S.) 40.

4. *State v. Van Camp* (Neb. 1893), 54 N. W. Rep. 114; *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471. See ELECTIONS, vol. 6, p. 373.

"It may seem plausible, without full consideration, to say that only those members of the legislature who are actually elected whether having certificates or not, are the persons that should organize or hold seats in either

In determining the existence of a constitutional quorum for organization only those members can be counted who have recognized the temporary organization.<sup>1</sup>

To form a quorum for the organization of the house, the presence only of the number of members required by the constitution is necessary; and the presence of such a number of persons alone, participating in the organization, gives the necessary power without regard to the manner in which the fact is ascertained.<sup>2</sup> Less than the required number of persons has no power to act in the organization; and, on the withdrawal of a major portion of the whole number of members in the body so as to leave no quorum, the power of a minority to act ceases.<sup>3</sup>

c. EXTRA SESSIONS.—Where an extra session is convened by special proclamation, a constitutional prohibition against legislation concerning matters not mentioned in the proclamation is mandatory, and legislation attempted in disregard of it is void.<sup>4</sup>

house; but some method of organization is necessary; some written title must be created or exhibited before any person can be regarded as having a *prima facie* right to a seat in the legislature. Those persons having certificates and only those must be permitted to organize, and no authority can change or overthrow that right or *prima facie* written title of a member except the house itself; and the members of the house cannot be regarded as a legal constitutional house until there is some temporary or permanent organization by a majority thereof. . . . The certificates of election give a title to the members holding the same which must govern their associates until there can be an adjudication by the house itself to the contrary; that is, by a constitutional house having a quorum." Wharton, C. J., in *Re Gunn* (Kan. 1893), 32 Pac. Rep. 474.

1. *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471. When this question came before the court in the above case, it was asserted that the prevailing practice in Washington in the House of Representatives under what is known as the Reed rule, that in any assembly or in any legislature or in any convention, if members are present and do not vote or answer to their names, the speaker or the clerk may count them in order to make a quorum, should be followed in organizing the House of Representatives; but it was decided that the Reed rule was not applicable for either of two reasons; first, that the action of the speaker of the House of Representatives in Washington was

not a matter of his own volition, but was especially authorized by a rule adopted by the House, thus allowing him so to count as present those members who did not answer to their names, though in the chamber, and second, that, in order to constitute a quorum, the speaker of the House could not call the name of any person in the House who refused to consider and recognize him as speaker, or to recognize the House as the constitutional body—the legal House.

2. *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471; *U. S. v. Ballin*, 144 U. S. 1.

3. *Brown v. Dist. of Columbia*, 127 U. S. 579; *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471.

Where, in the organization of a house of the legislature, the constitution requires that the secretary of state shall lay before the body a roll of the names of those persons whose certificates of membership have been filed in his office, the withdrawal of the secretary of state with the roll, after having brought it to the proper place, and the subsequent use by the legislative body of a duplicate of the same roll, was held to be a sufficient compliance with the constitutional provision so that the valid organization of the house was not affected by the failure to use the original roll. *In re Gunn* (Kan. 1893), 32 Pac. Rep. 471.

4. *Wells v. Missouri Pac. R. Co.* (Mo. 1892), 19 S. W. Rep. 530; *St. Louis v. Withaus*, 90 Mo. 646; *Davidson v. Moorman*, 2 Heisk. (Tenn.) 575; *Jones v. Theall*, 3 Nev. 233.

The restriction, however, is on legis.

In the absence of such a constitutional provision the field of legislation at an extra session is as broad as at the regular session.<sup>1</sup>

A provision that after a bill has been rejected no bill having the same substance shall be passed at the same session of the

lation alone; and in the case of the election of a United States senator under the duty imposed on a state legislature by the federal constitution, a special legislature called by proclamation of the governor may proceed with such an election. Election of Senator Faulkner of West Virginia, Senate Report, Lth Congress. So appointments of the governor may be confirmed, though not mentioned in the proclamation. *People v. Blanding*, 63 Cal. 333.

Where the proclamation of the governor convened the legislature to "provide the legislative enactments necessary or expedient to enforce those laws and practices with reference to railroads and railroad companies, which the people themselves have enacted and declared in their constitution," it was held that this proclamation did not authorize the passage of "an act to provide for the prevention of accidents to railroad employes and others, by requiring that switches, frogs and the guard rails be properly blocked." *Wells v. Missouri Pac. R. Co.* (Mo. 1892), 19 S. W. Rep. 530.

Where a city charter provided that ordinances could be passed by the city council at extra sessions only on the subjects stated to them by the mayor when assembled, it was held that the city council could not consider matters stated to them by the mayor after they had assembled. *St. Louis v. Withaus*, 90 Mo. 646; and that they could not consider such matters, though in his opening message the mayor stated that he would afterwards propose further legislation. *St. Louis v. Withaus*, 16 Mo. App. 247.

**Extended Sessions.**—Constitutions in some states prescribe that the sessions of the legislature shall not exceed a certain number of days, unless extended by a vote of two-thirds of all the members elected to each house. Where this is the case, after a session has been once properly extended, it seems that the constitutional restriction is satisfied, and a majority vote is thereafter sufficient to protract the session from time to time. In that case laws passed after the limited time are valid. *Speed v. Crawford*,

3 Metc. (Ky.) 214; *Mitchell v. Franklin, etc., Co.*, 3 Humph. (Tenn.) 456.

A proclamation of the governor, convening a legislature in special session "to reduce the taxes," was held sufficient to authorize the legislature to pass a bill levying a tax on those who engage in the sale of certain specified newspapers, on the ground that the subject of taxation, generally, was before the legislature. *Baldwin v. State*, 21 Tex. App. 591.

Where the governor convened the legislature "to protect public treasuries against unnecessary expenditure, by regulating the cost, charges and proceedings in criminal cases before justices of the peace and circuit court," it was held that an act which in effect gave the prosecuting officer two peremptory challenges of jurors in criminal trials where before he had had none, came within the meaning of the proclamation, on the ground that the right of challenge given the prosecution would reduce the number of "hung juries," consequently the cost of subsequent trials. *State v. Shores*, 31 W. Va. 491; 13 Am. St. Rep. 875.

The governor, by proclamation, convened the general assembly in special session, and recommended to their consideration an act of Congress, entitled, "an act to regulate the deposits of public money" (a portion of the money belonging to the United States being deposited by said act with the state of *Tennessee*) and recommended the reception and judicious investment of such sums as might be deposited with the state in works of internal improvement: *Held*, that the state, being interested to the extent of one-third in all turnpike companies, a resurvey or change in the location of the routes of such public improvements might be a material step to the judicious investment of the funds alluded to; and, therefore, an act providing for such resurvey and change in the location of the road of the Franklin and Columbia Turnpike Company was valid." *Mitchell v. Franklin, etc., Turnpike Co.*, 3 Humph. (Tenn.) 456.

1. *Cooley's Const. Lim.* (6th ed.) 187; *Morford v. Unger*, 8 Iowa 52.



legislature, does not prevent the passage, at an extra session, of a bill rejected at the regular session.<sup>1</sup>

d. POWERS AND LIMITATIONS.—As to form and mode of legislation the provisions of the constitution must be followed,<sup>2</sup> otherwise acts passed in disregard of them are, as a rule, invalid.<sup>3</sup> This is the rule in those states where it is held that courts can go behind the enrolled statute and inquire whether the constitutional provisions have been complied with. In other states it is held that, while the constitutional provisions regarding the legislative

1. *Williams v. Nashville*, 89 Tenn. 487. Under a constitutional provision that an enumeration shall be made under the direction of the legislature at the end of every tenth year, and that the legislative districts shall be reapportioned by the legislature at the first session after the enumeration, it has been held that an extra session of the legislature, called by the governor, was not a part of the regular session which had been adjourned without date, and so terminated, and was such a session as permitted the apportionment referred to. *People v. Rice*, 135 N. Y. 473.

2. See generally, CONSTITUTIONAL LAW, vol. 3, p. 670. See also *Field v. Clark*, 143 U. S. 670; *Legg v. Annapolis*, 42 Md. 203; *Moog v. Randolph*, 77 Ala. 597; *Jones v. Hutchinson*, 43 Ala. 721; *Perry County v. Selma, etc.*, R. Co., 58 Ala. 542; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Jones v. Hutchinson*, 43 Ala. 721; *State v. Buckley*, 54 Ala. 599; *People v. Mahaney*, 13 Mich. 481; *Jones v. Lancaster County*, 6 Neb. 479; *In re Bernstein*, 3 Redf. (N. Y.) 20; *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 121; 85 Am. Dec. 348; *Ryan v. Lynch*, 68 Ill. 160; *State v. Gaines*, 1 Lea (Tenn.) 734; *Martin v. Borgman*, 21 Kan. 672; *State v. Francis*, 26 Kan. 724; *In re Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545; *State v. Patterson*, 98 N. Car. 660; *Boyers v. Crane*, 1 W. Va. 176; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *South Ottawa v. Perkins*, 94 U. S. 260; *Walnut v. Wade*, 103 U. S. 683; *Brown v. Nash*, 1 Wyoming Ter. 85; *Allen v. Hall*, 14 Bush (Ky.) 85.

“Generally under affirmative and mandatory constitutional provisions, the legislature may do more than is required, but it cannot do less if it does its duty. Under negative and prohibitory constitutional provisions, however, the legislature may often refrain from

doing things which are not prohibited, but it can never do what is prohibited.” *Valentine, J.*, in *State v. Francis*, 26 Kan. 737.

A concurrent resolution adopted by the senate and the house of representatives, but not passed by bill nor approved by the governor, nor passed, notwithstanding his disapproval, by a two-thirds vote in accordance with the provisions of the constitution, was held insufficient to authorize a contract for the printing of copies of the state engineer's report for distribution among the people of the state. *Collier, etc.*, *Lith. Co. v. Henderson* (Colo. 1893), 32 Pac. Rep. 417.

3. See, for illustrations of this general doctrine, *Mosely v. Tuthill*, 45 Ala. 648; *Dane v. McArthur*, 57 Ala. 454; *Sayre v. Pollard*, 77 Ala. 608; *Stein v. Leeper*, 78 Ala. 517; *Smithee v. Campbell*, 41 Ark. 471; *Webster v. Little Rock*, 44 Ark. 536; *Worthen v. Badgett*, 32 Ark. 496; *State v. Little Rock, etc.*, R. Co., 31 Ark. 701; *State v. Crawford*, 35 Ark. 237; *Vinsant v. Knox*, 27 Ark. 266; *Smithee v. Garth*, 33 Ark. 17; *Burr v. Ross*, 19 Ark. 250; *Weill v. Kenfield*, 54 Cal. 111; *San Mateo County v. Southern Pac. R. Co.*, 8 Sawyer (U. S.) 238; *Miller v. Goodwin*, 70 Ill. 659; *People v. De Wolf*, 62 Ill. 253; *People v. Loewenthal*, 93 Ill. 191; *State v. Francis*, 26 Kan. 724; *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446; 20 Am. Rep. 69; *Green v. Graves*, 1 Dougl. (Mich.) 351; *Attorney Gen'l v. Joy*, 55 Mich. 94; *Ramsey County v. Heenan*, 2 Minn. 330; *State v. Hastings*, 24 Minn. 78; *Burt v. Winona, etc.*, R. Co., 31 Minn. 472; *State v. McLelland*, 18 Neb. 236; *State v. Liedtke*, 9 Neb. 462; *People v. Com'rs of Highways*, 54 N. Y. 276; *Opinion of Justices*, 35 N. H. 579; 52 N. H. 622; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *State v. Smalls*, 11 S. Car. 262; *State v. Hagood*, 13 S. Car. 46; *Walker v. State*, 12 S. Car. 200; *Williams v.*

proceedings are mandatory on the legislators themselves, yet they are, as far as their effect on the validity of a duly authenticated law is concerned, directory only.<sup>1</sup>

Rules and usages regarding forms for the passage of laws, when settled and known at the time of the adoption of the constitution, may be deemed adopted into it by implication.<sup>2</sup>

c. RULES.—Each legislative house has power to make its own rules not in disregard of constitutional provisions, and to change and suspend them at will; and, generally, courts will not inquire whether such rules have been complied with in the enactment of a statute.<sup>3</sup>

State, 6 Lea (Tenn.) 549; Gaines v. Horrigan, 4 Lea (Tenn.) 608; Memphis Freight Co. v. Memphis, 4 Coldw. (Tenn.) 419; State v. Fatterson, 98 N. Car. 660; Houston, etc., R. Co. v. Odum, 53 Tex. 343; Blening v. Galveston, 42 Tex. 641; Hunt v. State, 22 Tex. App. 396; *overruling* Blessing v. Galveston, 42 Tex. 641, and Usener v. State, 8 Tex. App. 177; Field v. Clark, 143 U. S. 649; South Ottawa v. Perkins, 94 U. S. 260; Post v. Kendall County, 105 U. S. 667; Gardner v. Barney, 6 Wall. (U. S.) 499; Luther v. Borden, 7 How. (U. S.) 38; Lyman v. Martin, 2 Utah 136; Meracle v. Down, 64 Wis. 323; Bound v. Wisconsin Cent. R. Co., 45 Wis. 543; Brown v. Nash, 1 Wyoming Ter. 85.

1. See *infra*, this title, *The Enrolled Bill*.

In *Kilgore v. Magee*, 85 Pa. St. 412, the court said: "In regard to the passage of the law and the alleged disregard of the forms of legislation required by the constitution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the consciences of the members of the legislature are involved the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. The presumption applies to the act of passing the law, that applies generally to the proceedings of any body whose sole duty is to deal with the subject. The presumption in favor of regularity is essential to the peace and order of the state."

2. Cooley Const. Lim. (6th ed.) 156. In *Field v. Clark*, 143 U. S. 649, Har-

lan, J., said: "Although the constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." See also *State v. Young*, 32 N. J. L. 33.

3. *McDonald v. State*, 80 Wis. 407; *In re Ryan*, 80 Wis. 414. In these cases Lyon, J., said: "The courts will take judicial notice of the statute laws of the state, and to this end they will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements. Further than this the courts will not go. When it appears that an act was so passed, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure upon the bill, intermediate its introduction and final passage. The presumption is conclusive that they have done so. We think no court has ever declared an act of the legislature void for non-compliance with the rules of the procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will." See also *St. Louis R. Co. v. Gill*, 54 Ark. 101.

Where the joint rules of the two houses of the legislature provided for an adjournment *sine die* by joint resolution, and, in fact, they dispersed and separated without any such resolution, the question arising whether or not the legislature had legally adjourned, it was decided that the rule regarding the joint resolution of adjournment was

**2. Introduction.**—The first step in the enactment of a statute is the introduction of the bill.<sup>1</sup> Sometimes constitutions require before introduction that notice be given a certain time in advance; this requirement is limited usually to special or local bills. As a rule, courts will not inquire whether this requirement has been observed.<sup>2</sup> A bill when introduced requires a title.<sup>3</sup>

A statute, as a rule, must contain an enacting clause, without which it is generally held to be void.<sup>4</sup> The style of the clause is usually prescribed by the constitution, but the provision in this

not a constitutional provision and not mandatory, and was, therefore, not necessary to a valid adjournment of the legislature. *People v. Hatch*, 33 Ill. 1.

The legislature may suspend its own rule that a bill shall not have its third reading on the last day of the session, and a bill so read and passed on that day will be valid. *State v. Brown*, 33 S. Car. 151.

1. The bill is the form or draft of a law presented to a legislature but not yet enacted, or before it is enacted a proposed or projected law. *May v. Rice*, 91 Ind. 549.

2. *Brodnax v. Groom*, 64 N. Car. 247; *Walker v. Griffith*, 60 Ala. 361; *Harrison v. Gordy*, 57 Ala. 49; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *Day v. Stetson*, 8 Me. 365; *McClinch v. Sturgis*, 72 Me. 288; *Davis v. Gaines*, 48 Ark. 370.

In *Georgia*, it was said: "It appears from the paragraph of the constitution and the act of the legislature just cited (Code, § 193a) that the legislature itself is made the judge of the evidence as to whether the proper notice has been given or not before the introduction of the bill. It is proposed in this case to show by extrinsic evidence that the proper notice had not been given for a sufficient length of time before the bill was introduced into the legislature. We do not think that courts are authorized to receive such evidence and upon it to decide whether or not the legislature, a co-ordinate branch of the government, has made an erroneous decision, and allowed a bill to be introduced without the notice required by the constitution and the law." *Speer v. Athens* (Ga. 1890), 85 Ga. 49.

The question of the giving of notice of the introduction of a special or local bill is not disputable, unless the lack of notice is affirmatively shown by the journals of the general assembly. *McKemie v. Gorman*, 68 Ala. 442.

Where the constitution provided

that no local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected shall be situated, it was held that a bill allowing a certain debt owing by the state to a third party to be set off against the debt owing by the third person to the state was not such a bill as required notice of intention to be published. *State v. Crawford*, 35 Ark. 237.

3. *Binz v. Weber*, 81 Ill. 290, overruling doctrine in *Larrison v. Peoria*, etc., R. Co., 77 Ill. 11, and *Plummer v. People*, 74 Ill. 361.

4. *Seat of Government Case*, 1 Wash. Ter. 115; *State v. Patterson*, 98 N. Car. 660. See constitutions in the various states. *Contra*, *Cape Girardeau v. Riley*, 52 Mo. 424; *followed in Watson v. Corey*, 6 Utah 150, the court in the last case expressing doubt.

*Wood, C. J.*, said in *Barton v. McWhinney*, 85 Ind. 487: "Doubtless this clause (Be it enacted) should precede everything which is made and declared to be law; but this, by no means, forbids the use of a preamble."

In *State v. Wright* (Oregon), 12 Pac. Rep. 708, there appeared in the original enrolled bill on file in the office of the secretary of state a single heavy pen stroke through the words "Be it enacted." It was claimed that the bill lacked an enacting clause on this account; but the court said that "while the absence of an enacting clause would render the act void, that the said erasure was doubtless done surreptitiously by some irresponsible party and not by the authority of the legislative assembly, and no legal effect could be given to such unauthorized act."

In *Dew v. Cunningham*, 28 Ala. 466, it was contended that the laws in the revised statute adopted by reference were invalid because each of them was not preceded by the words "Be it enacted," etc., as prescribed by the consti-

particular has been held directory only and a substantial compliance therewith sufficient.<sup>1</sup> If, however, the words used, besides being a variation from the constitutional style, also indicate that the will of the legislature is expressed as a joint resolution rather than as a law, the change in the phraseology is fatal to the validity of the enactment, unless it can be effective as a resolution merely.<sup>2</sup>

By the constitutions of many states no law can be passed except by bill.<sup>3</sup> Generally, bills may originate in either house, and may be amended, altered, or rejected in the other house. There

tution; but it was held that as the bill adopting the revised statutes was preceded by the words designating the style of the laws, that was sufficient. See also *Mathis v. State* (Fla. 1893), 12 So. Rep. 681.

Where publication of a law was necessary to put it in force, a publication omitting the enacting clause was held insufficient. *In re Swartz* (Kan.), 27 Pac. Rep. 839.

1. *McPherson v. Leonard*, 29 Md. 377, distinguishing *Hordesty v. Taft*, 23 Md. 512; *Swann v. Buck*, 40 Miss. 268. *Contra*, *State v. Rogers*, 10 Nev. 250, in which case, the enactment clause prescribed in the constitution being "The people of the State of Nevada represented in senate and assembly do enact as follows," the words "senate and" were omitted, and the constitutional style was held mandatory and the omission of the said words fatal.

In *Swann v. Buck*, 40 Miss. 292, the words "Resolved by," etc., instead of the form "Be it enacted," etc., were used in the enacting clause and held sufficient, the court by Ellett, J., in respect to the necessity of literal adherence to the formula prescribed by the constitution, saying: "The question is one that does not seem to have received judicial decision, so far as we have been able to discover; but in a work cited on the law and practice of legislative assemblies, by Mr. Cushing, the opinion is expressed that this form of enactment must be strictly pursued and that no equivalent language will be sufficient. In the absence of any authoritative adjudication, we are not prepared to adopt this conclusion. The argument against requiring a literal compliance with any form of words in the enacting clause, as a condition of giving effect to a statute, would be very strong on the score of convenience; for the plainest expressions of the legislative will, and the most urgent in

their character, would be constantly liable to be defeated by the slightest omission or departure from the established phraseology. No possible good could be achieved by such strictness, and the greatest evil might result from it. There are no exclusive words in the constitution negating the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only. It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed."

Where it was provided that an act "be and the same is hereby enacted," these words were held a sufficient compliance. *Mathis v. State* (Fla. 1893), 12 So. Rep. 681. The omission of the words "by the general assembly" in the enactment clause was held immaterial in *McPherson v. Leonard*, 29 Md. 377.

2. *Burritt v. Com'rs*, 120 Ill. 322; *Boyers v. Crane*, 1 W. Va. 176; *May v. Rice*, 91 Ind. 546. In the cases aforesaid it appeared that the legislature endeavored by resolution beginning, "Be it resolved" to accomplish what could be constitutionally done only by bill, and the resolutions were held invalid for the purpose, because they violated the constitutional provision that all laws should receive their force from the words "Be it enacted," etc., contained in them.

In *State v. Delesdenier*, 7 Tex. 76, it was held that the provision as to style of laws, applied to "bills" and not to "resolutions," and that an expression of the legislative will beginning "Be it resolved," was valid as a resolution. See also *State v. Bailey*, 16 Ind. 49.

3. See various state constitutions.

is a general exception, however, to the effect that bills for raising revenue must originate in the lower house.<sup>1</sup>

Some constitutions provide that a bill which has been once introduced cannot be so altered or amended on its passage through either house as to change its original purpose.<sup>2</sup>

In some states it is provided, in order to prevent lack of deliberation in the enactment of laws and to allow time for publicity and protest, that no bill shall be introduced after a certain specified time in the session.<sup>3</sup> Attempts have been made to evade this provision by calling a new measure an amendment. When the so-called amended bill has in view the same general object as the first bill, it may be valid,<sup>4</sup> but where the substitute has no

1. Where a bill originated in the senate and, having been passed, was sent to the house where it was passed with amendments and then placed in the hands of the committee of conference for adjustment, and was reported by them with a change of title, its sections having been reduced from twenty-six to twenty-two, and some of them transposed, it was held that these changes did not make it a new bill originating in the conference committee, and that it did not violate the article of the constitution which only provided that bills may originate in either house. *Nelson v. Haywood County* (Tenn. 1892), 20 S. W. Rep. 1.

In *Texas*, an act authorizing towns and villages incorporated for free-school purposes to levy taxes originated in the senate, and it was held not to be in conflict with the constitutional provision that all bills for raising revenue should originate in the house of representatives. *Gieb v. State* (Tex. 1893), 21 S. W. Rep. 190.

In *Massachusetts*, the exclusive privilege of the house of representatives under the constitution to originate money bills is limited to bills that transfer money or property from the people to the state, and does not include bills that appropriate money from the treasury of the commonwealth to particular uses of the government or bestow it upon individuals or corporations. *Opinion of Justices*, 126 Mass. 557.

2. *Hall v. Steele*, 82 Ala. 562; *In re Senate Resolution*, 9 Colo. 624.

A bill introduced to prohibit the sale of intoxicating liquors in the county of Montgomery alone and afterwards amended by extending the prohibition to other designated places, was held not to violate the constitutional provision that no bill shall be altered or

amended so as to change its original purpose. *Hall v. Steele*, 82 Ala. 562.

The original purpose of a bill to create Logan county out of Wild county is changed by an amendment to create Montezuma county out of La Plante county. *In re House Bill No. 231* (Colo. 1886), 21 Pac. Rep. 472.

The constitution of *Alabama* provides that no bill shall be so altered or amended on its passage through either house as to change its original purpose; and this is said to be so provided to prevent "hodge-podge and injurious combinations by confining each law to one subject." *State v. Buckley*, 54 Ala. 612.

3. *Michigan* Const., art. 4, § 28, provides that no new bill shall be introduced in the legislature after the first fifty days of the session.

In *Maryland* it is provided that no new bill shall be introduced in the last ten days of the session. Const., art. 3, § 26. And in *Arkansas*, not within the last three days of the session. Const., art. 5, § 24.

4. *Powell v. Jackson Common Council*, 51 Mich. 131; *Attorney Gen'l v. Amos*, 60 Mich. 372; *People v. McElroy*, 72 Mich. 446.

So in *Michigan*, where the period for the introduction of new bills is limited to the first fifty days of the session, a bill properly introduced to organize certain territory into a township was amended after the expiration of the fifty days into one to organize the same territory into a county, and such amendment was held valid. *Pack v. Barton*, 47 Mich. 520.

In the same state a bill was introduced to organize a specified township and amended after fifty days to organize a different township, and this was also upheld. *Attorney Gen'l v. Rice*, 64 Mich. 385.

connection with the original, but is a palpable attempt to evade this provision, it is invalid.<sup>1</sup>

**3. Readings.**—Constitutions generally require that a bill shall be read in each house by sections three times on different or successive days.<sup>2</sup>

1. A bill entitled "To discontinue that portion of the Midland and St. Claire state road in the township of Midland, Midland county," introduced in the *Michigan* legislature before the expiration of the constitutional fifty-day limit was thereafter amended to provide for the construction and maintenance of stone, gravel, macadamized and dirt roads in the county of Saginaw. This the court held unconstitutional and void. *Sackrider v. Saginaw County*, 79 Mich. 59. In this case, which seems to mark the limit of the bald attempts to violate the constitutional provision, the court said: "If a constitutional provision can ever be evaded or violated by the reporting and passing of a substitute for an original bill, it certainly has been evaded and violated in this case; and if this legislation can be upheld, it would seem that the constitutional provision above quoted is worthless to prevent the evil against which it is manifestly directed. If a new bill can be reported as a substitute for a bill, the subject-matter of which has no connection with or relation in the remotest degree to the subject-matter of such bill under the guise of a substitute, then it is difficult to perceive the use or value of this constitutional provision. No one will admit for a moment that the framers of the constitution ever intended that this provision should be rendered nugatory in this way. Courts have gone a great ways to uphold legislation that apparently trenched on this, or similar provisions in constitutions, and have sometimes, it seems to me, strained the constitution almost to breaking to sustain laws that in their passage came close to, if not within, the line of the prohibition of the fundamental law. I, for one, have gone as far in this direction as my conscience and duty will permit me. Let the consequences as to laws already on our statute books be what they may, it is time to call a halt in this direction. If the constitutional provision is in the way of legislation, and the people desire that new bills may be introduced at any time during the session, there is a constitutional

way to get rid of this provision; but it is the duty of the courts, while it remains in the constitution, to see that it is obeyed."

2. *Jones v. Hutchinson*, 43 Ala. 721; *Ramsey County v. Heenan*, 2 Minn. 330.

There is no constitutional objection to the first reading of a bill in the senate being on the same day of its final passage in the house. *Burks v. Jefferson County*, 40 Ark. 200.

Where a bill was regularly read three times in the house and then reported to the senate, where it was read twice, and the house recalled the bill from the senate for reconsideration, and after again passing the bill on the reconsideration, returned it to the senate, where it had its third reading in that body, this was held a sufficient compliance with the statutory provision. *State v. Crawford*, 35 Ark. 237.

When a bill has been read at length in the committee of the whole, the report of that fact and the recording of it upon the journal will be deemed sufficient as one of the required three readings. *In re Senate Resolution*, 9 Colo. 641.

The rule that a bill shall not be read on the last day of the session, not being a constitutional provision, in *South Carolina*, may be suspended. *State v. Brown*, 33 S. Car. 151.

Where an act was introduced, read a first and second time, referred to a committee, reported back with amendments, was engrossed for a third reading and finally passed upon the call of the ayes and noes, it was held the bill was properly read and passed. *Larrison v. Peoria, etc., R. Co.*, 77 Ill. 11.

Where an original bill was read a first and second time and referred, a substitute reported and adopted in lieu of the original bill, read a third time and passed, the journal not showing the first and second reading of the substitute, the contrary not appearing however, it was presumed that the substitute was read three times as the constitution required. *Worthen v. Badgett*, 32 Ark. 496.

**Reference to Committees.**—It is provided in the constitution of *Alabama* that no bill shall become a law until it

This provision is sometimes directory,<sup>1</sup> but generally mandatory, so that an act not so read is void.<sup>2</sup> In the states where the latter rule obtains, constitutions allow this rule to be dispensed with in cases of urgency, on a specified vote of the legislature.<sup>3</sup> The question whether the circumstances present a case of urgency is for the house of the legislature in which the bill is depending and not for the courts.<sup>4</sup> The aforesaid requirement of three readings does not apply to amendments,<sup>5</sup> even though something not embodied in the original bill is thereby made a law.<sup>6</sup>

The constitutional provision, so far as it concerns the specific manner of reading bills, is generally considered to be directory

shall have been referred to a committee of each house and returned therefrom, and a bill not so referred is invalid. *State v. Buckley*, 54 Ala. 599.

1. *Miller v. State*, 3 Ohio St. 475; *Pim v. Nicholson*, 6 Ohio St. 176.

In *Illinois* the constitution requires the three readings, but does not in terms command their entry in the journal. In a case where no entry in the journal appeared, it was presumed that the bill was read as provided for. *Schuyler County v. People*, 25 Ill. 181.

2. *Ramsey County v. Heenan*, 2 Minn. 330; *People v. Campbell*, 8 Ill. 466; *Weill v. Kenfield*, 54 Cal. 111; *Ryan v. Lynch*, 68 Ill. 160; *Burritt v. Com'rs of State Contracts*, 120 Ill. 322; *South Ottawa v. Perkins*, 94 U. S. 260; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667.

3. *Weill v. Kenfield*, 54 Cal. 111; *McCulloch v. State*, 11 Ind. 429; *Ramsey County v. Heenan*, 2 Minn. 330.

4. *Weyand v. Stover*, 35 Kan. 545; *Hull v. Miller*, 4 Neb. 503.

Where a bill was introduced in the senate and read the first and second time on the same day, and the senate journal does not show whether a case of urgency existed or not, it was held that each house was the exclusive judge whether the case of urgency did exist or not, and it was not necessary that the emergency should be stated upon the journal. *Weyand v. Stover*, 35 Kan. 545.

5. *People v. Wallace*, 70 Ill. 680; *State v. Brown*, 33 S. Car. 151; *McCulloch v. State*, 11 Ind. 433; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *Miller v. State*, 3 Ohio St. 476.

6. *Dew v. Cunningham*, 28 Ala. 467; 65 Am. Dec. 362. See *infra*, this title, *Amendments*.

Where a bill after having been read

twice was amended by striking out "all after the enacting clause" and inserting "a new bill," and was then read the third and last time, it was held that the constitutional provision had been complied with; the court saying that the journal, not showing the contrary, it would be presumed that the amendment was on the same subject as the original bill even though the amendment was called in the journal "a new bill." *Miller v. State*, 3 Ohio St. 476.

Where a bill passed the three readings required in the senate and was sent to the house, where it also passed the three readings but under a somewhat different title, and it was afterwards placed in the hands of the committee of conference of both houses and was reported by them under a slightly different title with the sections somewhat transposed and reduced in part, the report of the committee asking leave to propose "in lieu" of the original bill, a bill "embracing substantially all the provisions of both houses," and giving as a reason that the original bill had been "much disfigured by amendments, interlineations, and erasures," and the bill was then passed without further readings, it was held that the bill reported from the committee was not a new bill such as would require three further readings in both houses, but was such an amendment to the old bill as to do away with the requirement. *Nelson v. Haywood County* (Tenn. 1892), 20 S. W. Rep. 1.

An act was introduced in the legislature to amend "section 63" of a specified previous act, was read twice and then amended by striking out "63" and inserting "25" and ordered to a third reading after being engrossed. But on the third reading, the journal showed that an act to amend "section

only.<sup>1</sup> It is not necessary, in absence of distinct constitutional requirement, that the three readings be in full.<sup>2</sup> It is customary in many legislatures to read a bill by its title;<sup>3</sup> in some it is considered unnecessary to read at length documents referred to in a bill, provided that the references thereto are sufficiently certain.<sup>4</sup>

4. **Passage—*a*. ACTUAL PASSAGE.**—It is essential to the validity of an enactment that the bill shall have been actually passed by the concurrence of the number of the members of each house

63" was read and passed, although the enrolled act amending "section 25" was presented to the governor, approved by him and promulgated. It was contended that while the act to amend "section 63" had been read three times and passed, that the act to amend "section 25" had not been. It appeared that the "section 25" of the original act was designated in the revised statutes, where it appeared as part of a chapter, as "section 63." The court presumed and held, therefore, that one and the same section was intended to be designated by the legislature by both "section 63" and "section 25," and that the act was properly read three times and passed. *Illinois Cent. R. Co. v. People* (Ill. 1892), 33 N. E. Rep. 173.

1. *Pim v. Nicholson*, 6 Ohio St. 176, where the constitution requires the reading to be "distinct." That provision is directory only, for the degree of distinctness cannot be judicially determined.

2. In *California*, it is required that the bill be read three times at length or otherwise it is void. *Weill v. Kenfield*, 54 Cal. 111.

In *Minnesota*, a bill must be read twice at length prior to its passage. *Supervisors v. Heenan*, 2 Minn. 330.

Under the constitution of *Arkansas* 1874, it is probable that bills must be read at length. *Burks v. Jefferson County*, 40 Ark. 207.

In the constitution of *Alabama* it is provided that no bill shall become a law unless on its final passage it be read at length. *State v. Buckley*, 54 Ala. 599.

3. *Chicot County v. Davies*, 40 Ark. 200.

As to the reading of the bill and substitute twice by titles and only once at length, it cannot be considered at this late day a violation of the constitution which provides, "Every bill and joint resolution shall be read three times in each house before the final passage thereof." The legislative practice of reading the same twice by title and

only once at length has been maintained too long in this state to be now overthrown by the courts. It would deprive us of all statutory law. The constitution in terms does not direct that the reading shall be at length, and while such reading might be the better practice, we cannot hold that it is imperatively required that it should be so read more than once. *People v. McElroy*, 72 Mich. 446.

In *Indiana*, the provision of the constitution governing the reading of bills in the legislature was: "Every bill shall be read by sections on three several days in each house, unless in cases of emergency two-thirds of the house where such bill may be depending shall by a vote of yeas and nays deem it expedient to dispense with this rule; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and a vote on the passage of every bill shall be taken by yeas and nays." Under this provision it was held sufficient to read the bill twice by its title only, provided it was fully read on the third reading. *McCulloch v. State*, 11 Ind. 424.

**Suspension of Rules.**—The constitution of *Arkansas* of 1868 provided that under a suspension of rules a bill could be read by its title only, and that as the constitution did not require the suspension to be entered in the journal, in the absence of such entry the rules will be considered to have been suspended in a proper case. *Burks v. Jefferson County*, 40 Ark. 200; *overruling Smithee v. Garth*, 33 Ark. 17, where an act read by title was held to be excluded because the rules were not suspended. See *English v. Oliver*, 28 Ark. 317; *Worthen v. Badgett*, 32 Ark. 496.

4. In *Georgia*, the legislature incorporated the building and loan association already organized, by a mere reference to its constitution and by-laws, without setting out or reading the constitution and by-laws. And this was held sufficient, the court saying: "While



required by the constitution.<sup>1</sup> If it appears that this has not been done, the act is invalid.<sup>2</sup> Sometimes the constitution requires for the passage of ordinary bills a majority vote of all elected members, while, again, a majority vote of a quorum only

I may question the wisdom and prudence of this species of legislation, I do not for a moment doubt its validity." *Bibb County Loan Assoc. v. Richards*, 21 Ga. 592.

1. *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 U. S. 260; *Miller v. State*, 3 Ohio St. 475; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *Prescott v. Illinois, etc., Canal*, 19 Ill. 324.

2. *People v. Starne*, 35 Ill. 142; 85 Am. Dec. 348; *Berry v. Baltimore, etc., R. Co.*, 41 Md. 446; 20 Am. Rep. 69; *Opinion of Justices*, 52 N. H. 622; *Legg v. Annapolis*, 42 Md. 203. See also *infra*, this title, *Impeachment of the Validity of Enactment*.

So where a bill was passed by one house in which it originated, sent to the other house where it was materially amended and passed, which amendments were concurred in by the house where the bill originated, but when prepared for the signatures of the presiding officers of the two houses said amendments were omitted, and it was so signed by the presiding officers and approved by the governor without said amendments, such act of the legislature is invalid and void. *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Jones v. Hutchinson*, 43 Ala. 721.

A resolution passed only by one house, authorizing the governor to employ counsel, is void. *Field v. Auditor*, 83 Va. 882.

Mere change in the title after a bill has passed one house, does not make the enactment void, if the change is immaterial. *Plummer v. People*, 74 Ill. 361.

A statute containing sections which have not passed both houses is void as to such sections and good as to the rest of the bill, if the subject-matters of the different sections are distinct so as to permit of division. *State v. Van Duyn*, 24 Neb. 586; *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204.

Where the constitutional number of the house of representatives was one hundred and twenty-five members, and it appeared from the journal that one hundred and twenty-nine members actually occupied seats in the house, a bill passed by the legislature, but only

by the votes of four irregularly elected members, was held void. *State v. Francis*, 26 Kan. 724. Where a bill was regularly passed by one branch of the legislature, and then sent to the other where it was amended and returned, the concurrence by the house first mentioned in the amendments of the other branch of the legislature was held sufficient. *McCulloch v. State*, 11 Ind. 424.

In *Michigan*, on the ground that the legislature is the sole judge of the qualification and election of its members, the court held that an act of the legislature could not be declared void because a portion of the members voting for it, and whose votes were necessary to its passage, were not legally elected and were retained in their seats by a decision of the legislature opposed to the constitution. *People v. Mahaney*, 13 Mich. 489; *Auditor Gen'l v. Menominee County*, 89 Mich. 552. See also *State v. Smith*, 44 Ohio St. 348.

The constitution of the State of *West Virginia* provided that no bill should be passed by either branch of the legislature without an affirmative vote of a majority of the members elected thereto, and this was construed to mean a majority of those elected to the legislature who continued to be members at the time the vote was taken, and a bill passed by the vote of eleven senators, the full number elected being twenty-two, but one having resigned prior to the vote, was held valid. *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640.

**Effect of Protest on Passage.**—In *Michigan*, it is the constitutional right of any member of either house of the legislature to dissent from and protest against any act, proceeding, or resolution which he may deem injurious to any person or the public and the reason of his dissent entered on the journal; but this right is a mere personal privilege, and has no force as legislative action, and does not affect the validity of the law passed in spite of the protest. *Auditor Gen'l v. Menominee County*, 89 Mich. 552.

Under the constitution of *Missouri* it is provided that in case an objection is raised to the signature of a bill by the presiding officer by any member of

is necessary.<sup>1</sup> It is customary for constitutions to require, on the passage of bills for a private, local or special purpose, a two-thirds vote of the legislators, or a vote greater than a majority, and such a provision is mandatory.<sup>2</sup>

In the absence of a constitutional provision regulating the method of ascertaining the presence of a constitutional quorum of a house of the legislature, it is proper for the house to regulate the matter by a rule of its own; and a rule providing that "on demand of any member, or at the suggestion of the speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the speaker with the names of the

the legislature, and this objection shall not be sustained, then any five members may embody the same over their signatures in a written protest under oath against the signing of the bill; said protest when offered in the house shall be noted upon the journal and the original shall be annexed to the bill to be considered by the governor in connection therewith. *State v. Mead*, 71 Mo. 269.

1. Cooley's Const. Lim. (6th ed.) 168. See various state constitutions.

Under the charter of San Francisco in 1853, no ordinance could have any validity, unless it received the votes of a majority of all the members elected to the board of aldermen. The board consisted of eight members. One of the members elected that year was an alien, and ineligible, yet he was sworn in, and entered upon the discharge of his duties; *held*, that there were eight members elected, and that it required five votes to pass an ordinance. *Satterlee v. San Francisco*, 23 Cal. 315; *Southworth v. Palmyra*, etc., R. Co., 2 Mich. 287. A constitutional amendment which is ratified by two-thirds of a quorum of one house of the legislature, which quorum is composed of two-thirds of all the members elected, is ratified by two-thirds of that house, within the meaning of the constitution. *State v. McBride*, 4 Mo. 303; 29 Am. Dec. 636.

Where a constitution provides that a majority of each house shall constitute a quorum to do business, the word "house" means the members present doing business, there being a quorum, and not a majority of all the members elected; and an act of incorporation passed by two-thirds of the members present, there being a quorum, is constitutional. *Southworth v. Palmyra*, etc., R. Co., 2 Mich. 287.

2. *People v. Com'rs of Highways*, 54 N. Y. 276; *Corning v. Greene*, 23 Barb. (N. Y.) 33.

Where certain swamp lands which had been granted to a state by act of Congress were appropriated for the construction of a state road by act of the legislature of the state, the act was held not to be one appropriating public property for local or private purposes within the section of the constitution requiring the assent of two-thirds of the members elected to each house of the legislature for the passage of such bills. *McRae v. Shaffer*, 89 Mich. 463.

An act to establish and maintain a water department in the city of Syracuse, which authorizes the said city to take water from a lake appropriated by the state for a reservoir and feeder to the Erie Canal, is not a local or private bill, or one taking public property for private use without compensation, and therefore requiring the assent of two-thirds of the members elected to each branch of the legislature to make it valid. *Sweet v. Syracuse*, 129 N. Y. 316; *Comstock v. Syracuse*, 129 N. Y. 643.

In *New York*, where it is provided that the assent of two-thirds of the members elected to each branch of the legislature is requisite to every bill appropriating the public moneys or property for local or private purposes, it was held that a bill which empowers the commissioners of the land office to grant to the proprietors of adjacent lands so much of the lands under waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner, is one requiring the assent of two-thirds of the members of both houses of the legisla-

members voting, and be counted and announced in determining the presence of a quorum to do business," is a constitutional mode of ascertaining the presence of a quorum empowered to act as the house.<sup>1</sup>

*b. YEAS AND NAYS ON FINAL PASSAGE.*—Constitutions usually provide that the vote on final passage of a bill shall be by yea and nay, which shall be entered in the journal.<sup>2</sup> The failure

ture. *Rumsey v. New York, etc., R. Co.*, 130 N. Y. 88.

An act permitting persons to commute for military services by the payment of a sum of money is not an act imposing a tax within the meaning of the constitution so as to require the presence at its passage of three-fifths of all the members elected to either house. *People v. Chenango County*, 8 N. Y. 317.

The act of May 14, 1840, excluding aldermen of the city of New York from the right of sitting as judges of the court of general sessions, is one for altering the charter of that city, and not having received the assent of two-thirds of the members elected to each branch of the legislature, it is void. *Purdy v. People*, 4 Hill (N. Y.) 384.

Associations formed pursuant to the act entitled "An act to authorize the business of banking," passed April 13, 1838, are corporations. And the act is therefore within the provision of the constitution of the State of *New York* declaring the assent of two-thirds of all the members elected to each branch of the legislature to be requisite to every bill creating any body politic or corporate; the assent of two-thirds of the legislature not having been obtained to the bill, it was held void. *De Bow v. People*, 1 Den. (N. Y.) 9.

An act creating a new judicial circuit, and providing for the election of a judge therefor, etc., is not a law which "creates a debt or charge, or makes, continues, or renews an appropriation of public money," within the meaning of the section of the constitution which requires that on the passage of laws of that nature the question shall be taken by yeas and nays which shall be duly entered on the journal; and that three-fifths of all the members elected to each house shall in all such cases be required to constitute a quorum therein. *McDonald v. State*, 80 Wis. 407.

1. In *U. S. v. Ballin*, 144 U. S. 1, the court said: "The constitution provides that 'a majority of each (house)

shall constitute a quorum to do business.' In other words, when a majority are present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and when that majority are present the power of the house arises. But how shall the presence of a majority be determined? The constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the house is in a condition to transact business."

2. The purpose of the requirement that the yeas and nays on the final passage of a bill be entered at large in the journal, is to make the members of the legislative body feel the responsibility of their action when important measures are upon their passage, and to compel each member to bear his share in the responsibility by a record of his action,

to comply with such a provision, as a rule, renders the law void.<sup>1</sup> When no provision is made either by the constitution or by a

which should not afterwards be open to dispute. *Steckert v. East Saginaw*, 22 Mich. 103.

The "final passage" of a bill is a vote on its passage in either house of the legislature after it has received three readings on three different days in that house. *State v. Buckley*, 54 Ala. 599.

An act permitting a private person to sue the State of *Kentucky*, and directing the proper officers of that state, in case a judgment was recovered against it, to pay the amount of the said judgment, being over one hundred dollars, to the person recovering it, was held not to be in contravention of a section of the state constitution declaring that "the general assembly shall have no power to pass any act or resolution for the appropriation of any money or the creation of any debt exceeding the sum of one hundred dollars at any one time, unless the same on its passage shall be voted for by a majority of all the members then elected to each branch of the general assembly, and the yeas and nays thereon entered on the journal." *Com. v. Jackson*, 5 Bush (Ky.) 680.

1. *Ryan v. Lynch*, 68 Ill. 160; *Spangler v. Jacoby*, 14 Ill. 296; 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 142; 85 Am. Dec. 348; *Schuyler County v. People*, 25 Ill. 163; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *Burritt v. Com'rs of State Contracts*, 120 Ill. 322; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667; *State v. McBride*, 4 Mo. 303; 29 Am. Dec. 636; *Steckert v. East Saginaw*, 22 Mich. 103; *Lincoln v. Haugan*, 45 Minn. 451; *State v. Buckley*, 54 Ala. 605; *South Ottawa v. Perkins*, 94 U. S. 260.

Apart from a constitutional provision requiring the aye and nay vote, the ordinary method of taking the vote upon a question is by the voices, show of hands, or by a rising vote, affirmative and negative. It may also be done by roll call. But where the object is to ascertain the names as well as the number voting on each side, with a view to having them entered on the journals, this method, when resorted to to obtain such list of names, is denominated "the taking the yeas and nays on a question." *Vanderberg, J.*, in *Lincoln v. Haugan*, 45 Minn. 451.

A bill was properly passed by the

house, and then also was passed by the senate with sundry amendments in which the house refused to concur. The senate then by a vote of yeas and nays properly entered on the journal, receded from its amendments, and no further action on the bill was taken. It was held that, as this manner of passing bills has always been considered sufficient in the State of *Kansas*, and has always been acted upon, it will be considered that the constitutional provision requiring that the yeas and nays shall be taken and entered immediately on the journal upon the final passage of every bill or joint resolution, was sufficiently complied with. *Division of Howard County*, 15 Kan. 194.

The constitution of *Minnesota* providing that "no law shall be passed unless voted for by a majority of all the members elected to each branch of the legislature, and the vote entered upon the journal of each house," does not require the yeas and nays to be entered. *Lincoln v. Haugan*, 45 Minn. 451.

The constitutional requirement that "the yeas and nays shall be taken in each house upon the final passage of every bill of a general character" has no application to an act changing two counties from their respective judicial circuits to others, and fixing the time of holding courts therein, and in one other county, such act being of a *local*, not of a *general* character." *State v. Algood*, 87 Tenn. 163.

Unless the yeas and nays are entered in the journal as required by the *Illinois* constitution, the act is void. *Schuyler County v. People*, 25 Ill. 163; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667; *State v. Francis*, 26 Kan. 724.

Where the journal recited the names of those members present, and that they all voted unanimously for a bill without reciting the names voting, it was held that the requirement above referred to had not been fulfilled. *Steckert v. East Saginaw*, 22 Mich. 103.

**Amendments.**—In *New York*, it has been held that the requirement of the constitution that the question on the final passage of an act shall be taken by yeas and nays entered on the journals, is directory merely, and does not apply to a vote taken on receding from amend-

statutory rule to govern the case, it must be regulated by the rules of each house.<sup>1</sup>

**5. Signing by Presiding Officers.**—It is provided frequently that the presiding officers of the legislative houses shall sign bills when passed.<sup>2</sup> This provision, in those states where the enrolled bill duly authenticated is considered conclusive evidence of the valid enactment of a law, is of necessity mandatory, for in such case the signatures of the presiding officers are a part of the constitutional method of authentication.<sup>3</sup> In some of the states in which the journal may be looked to for the purpose of investigating the compliance of the legislature with constitutional provisions, it is

ments once adopted by the requisite vote and in the prescribed form, to which the other house has disagreed. *People v. Chenango County*, 8 N. Y. 317.

Where an amendment was offered in the house to a bill properly passed in the senate, it was held that the senate must concur in the amendment by a yeas or nay vote entered in the journal. *Norman v. Kentucky Board of Managers* (Ky. 1892), 20 S. W. Rep. 901.

In *Alabama*, it is provided that no amendment to bills by one house shall be concurred in by the other except by a vote of a majority thereof taken by yeas and nays, and the names of those voting for and against recorded on the journals, and reports of committees of conference shall in like manner be adopted in each house. *State v. Buckley*, 54 Ala. 612.

1. When in a state where there is no constitutional requirement that a bill shall be passed by a yeas and nays vote, a rule was adopted by the senate that it should be competent for any member to call for the yeas and noes, which should be entered in the journal, and if it did not appear that the yeas and noes were called for, the omission to enter in the journal the name of members voting was not fatal to the law passed. *Lincoln v. Haugan*, 45 Minn. 451.

2. The constitution of *Nevada* requires that all bills or joint resolutions passed shall be signed by the presiding officers of the representative houses and by the secretary of the senate and clerk of the assembly, and it was held that signatures by presiding officers and by an assistant secretary were sufficient. *State v. Glenn*, 18 Nev. 34.

**Enrollment of Bills.**—In *Minnesota* the constitution provides that "every bill passed by both houses shall be carefully enrolled, as well as be signed by the presiding officers of each house,

in order to put it in condition to be sent to the governor for his action." *Burns v. Sewell* (Minn. 1892), 51 N. W. Rep. 224.

3. *Scarborough v. Robinson*, 81 N. Car. 418; *State v. Glenn*, 18 Nev. 38; *State v. Swift*, 10 Nev. 176; 21 Am. Rep. 721; *Pacific R. Co. v. Governor*, 23 Mo. 364; 66 Am. Dec. 673; *State v. Mead*, 71 Mo. 269; *Evans v. Browne*, 30 Ind. 523; 95 Am. Dec. 710; *Hunt v. State*, 22 Tex. App. 396. (This case allows consultation of the journal, but has since been overruled in that particular.) See *Ex parte Tipton*, 28 Tex. App. 438.

"In our opinion the signatures of the presiding officers of the two houses under and by force of the words used in our constitution, are an essential prerequisite to the existence of the statute—the finishing and perfecting act of legislation—and must be affixed during the session of the general assembly. An enrolled bill is not that considered and adopted by the concurring action of the two houses, but is a substituted copy transcribed to take the place of the original, and becomes the final expression of the legislative will. Its accuracy is secured by the examination, comparison and report of a committee in each house, and then each house ratifies that it accepts and adopts the enrolled bill as the embodiment of its own action and the correct expression of its will. Ratification is the act of the house, and its presiding officer in attesting the same acts on behalf of and by its authority. This is a necessary safeguard against fraud in the insertion of new matter, or the omission or change of existing provisions in the bill, not to be lost sight of or surrendered. Each body gives its direct and positive sanction to the enrolled bill, as its act, when its presiding officer signs; and he is but its agent acting in its stead when he does

also essential that the signatures of the presiding officers of the legislature be affixed to bills in order to make them valid.<sup>1</sup> In other states of the latter class the requirement of the constitution regarding the signature of presiding officers is considered to be directory only.<sup>2</sup>

The signatures of the presiding officers have been held unnec-

so. In other words this is the consummation of legislative action, which is incomplete and inoperative without it." Smith, C. J., in *Scarborough v. Robinson*, 81 N. Car. 418.

"The provision of the constitution that every bill having passed both houses shall be signed by the speaker of the house of representatives and by the president of the senate, is the constitutional mode adopted for the authentication of every bill, and furnishes the evidence of its passage by the two houses in the first instance. The governor's signature to a bill is not required as a means or part of its authentication, but as evidence of his approval. The governor being no member of either house, and in contemplation of the constitution not being present during the deliberations, could not know whether a bill had passed the two houses or not. The constitution itself contemplated that there might be laws without the signature of the governor, and therefore the mode of authentication adopted was the evidence of the passage of all bills in the first instance by the two houses as well those passed with his approbation as those passed against his consent." Scott J., in *Pacific R. Co. v. Governor*, 23 Mo. 364; 66 Am. Dec. 673. This case was overruled by *State v. Mead*, 71 Mo. 270 in another point.

In *Scarborough v. Robinson*, 81 N. Car. 409, it was decided that the presiding officers of the legislature could not be compelled after the adjournment of the legislature to affix their signatures to a bill properly passed by that body, for the duty placed on the speakers is not ministerial but legislative, and must be exercised, if at all, during the session.

1. *State v. Kiesewetter*, 45 Ohio St. 263; *Burritt v. Com'rs of State Contracts*, 120 Ill. 322; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *State v. Bank of S. Car.*, 12 Rich. (S. Car.) 609. See *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Legg v. Annapolis*, 42 Md. 221.

It is urged that to declare the signature of presiding officers essential to the bill would be to clothe the presiding officers of the general assembly with a veto power, and that such result cannot have been intended by the convention which framed the constitution. It is certain that that body did not so intend, and the obvious answer to the objection is that confidence must be reposed somewhere. It is not to be presumed that men selected to fill places of such high trust will intentionally violate the constitution and prove false to their oaths. *State v. Kiesewetter*, 45 Ohio St. 254.

"This signing in open session may incidentally serve to fix the attention of members to the bill being signed, but it has a much more important purpose. It authenticates a bill and affords a sure means of identification. No official copy is required of a bill introduced, nor is it required to be copied on the journal, and a legal standard of comparison is wanting. The signatures of the presiding officers, therefore, furnish the evidence that that which the journals show by title and number passed the general assembly is this identical measure. The act thus authenticated is to be given the force of law, is to be treated as such, and to prove itself upon inspection; and this verification by the officers designated by the constitution is conclusive evidence to the secretary of state that the act so signed is a law and entitled to be filed as such in the office of that officer and under his direction to be published, duly certified by him for the information and guidance of all the people of the state. The signing is, therefore, for the benefit of the people in their examination to ascertain what is and what is not law." Spear, J., in *State v. Kiesewetter*, 45 Ohio St. 258. In this state, constitutional provisions requiring the reading of a bill, etc., were held to be merely directory, and the provisions requiring the signatures of the presiding officers were held to be mandatory.

2. *Leavenworth County v. Higgenbotham*, 17 Kan. 62; *State v. Robert-*

essary when the act has been passed over the governor's veto. The passage through both houses with the necessary vote completes the enactment in such a case.<sup>1</sup>

son, 41 Kan. 200; *Cottrell v. State*, 9 Neb. 128.

"The signature of a presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings and been adopted by the constitutional majority of the house over which he presides. . . . And when it appears from the journals that a bill has passed by the requisite majority and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act, as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same." Maxwell, C. J., in *Cottrell v. State*, 9 Neb. 125.

"Does the failure of the presiding officer of the senate to sign said bill invalidate everything connected therewith? If it does, then the presiding officer of the senate has more power to veto bills than the governor or than any other person or officer of the state. The legislature may pass a bill over the veto of the governor; but if the plaintiff in error is correct, they cannot pass a bill over the veto, so to speak, of the lieutenant-governor so as to make the bill become a valid law. The lieutenant-governor is the president of the senate; he holds his office independent of the legislature; they have no power to remove him from office, except by the slow and tedious proceeding of impeachment; they have no power to compel him to sign a bill except by the equally slow and tedious proceeding of *mandamus*, and this can only be done in the courts; and if the plaintiff in error is correct, they have no power to make a valid law except with the aid of his signature so long as he is the acting presiding officer of the senate. . . . The signatures of the presiding officers do not constitute any portion of the law. It is not necessary that the consent of the presiding officers should be had in order to enact the law. The only office that the signatures of the presiding officers is intended to perform, is to furnish evidence of the due passage and validity of the bill; such signatures are only portions of the many evidences of the due passage and validity of the bill, and a bill may in

some instances, as we think, be valid although the signatures of one of the presiding officers be omitted. With one of such signatures gone the evidence of the passage and the validity of the bill would, of course, be somewhat weakened; if the signatures of both of the presiding officers were gone, the evidence, of course, would be weaker still. If in addition to this the journals did not show the passage of the bill, then the evidence of its passage would be almost wholly gone, and taking the whole of the evidence together, if it should not clearly appear to the courts that the bill had been passed by the legislature and approved by the governor, it would be the duty of the courts to declare that the bill had never become a law. The courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable in such cases. If the enrolled bill were perfect and formal in every particular, then the courts might say that the bill had passed and become a law, although there might be omissions from the journals, or, if the journals were perfect in every particular and showed that the bill had been regularly and duly passed, then the courts might say that the bill had passed and become a law, although there might be some omissions from the enrolled bill." Valentine, J., in *Leavenworth County v. Higginbotham*, 17 Kan. 74, 76.

The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act. *Taylor v. Wilson*, 17 Neb. 88.

1. *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449.

Where the constitution provides that the passage of an act by a certain vote over the veto of the governor, shall be officially certified by the chief clerk of the house of representatives and the secretary of the senate, and these officers are prevented from so certifying by the fact of their retirement from office, the validity of the bill would not be affected by their failure to certify its passage in the proper time, if the fact of its passage appears from the published

In states where the courts are permitted to look behind the enrolled statute, the bills signed by the presiding officers, to be valid, must be the bills actually passed by the legislature,<sup>1</sup> though immaterial variances will be disregarded.<sup>2</sup> If the constitution does not require the signature of bills, it is not vital.<sup>3</sup> Though it seems that usage in all cases would require it.<sup>4</sup>

**6. Presentation to Executive.**—After the passage of a bill and its authentication by the signatures of the presiding officers, or by the great seal, where such authentication is required,<sup>5</sup> the bill must be presented to the executive, unless the constitution dispenses with such presentation.<sup>6</sup> As to whether this presentation must be made to the governor personally, or whether it is enough to leave the bill at his office, the authorities are not in accord.<sup>7</sup> In *Massachusetts* it has been decided that the bill must be personally presented to the governor, or, in his absence from the state, to

journals of the legislature. *Houston*, etc., R. Co. v. Odum, 53 Tex. 343.

1. *Jones v. Hutchinson*, 43 Ala. 721; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647. See *infra*, this title, *Approval of Bill*.

So where an act signed by the presiding officers of the legislature and approved by the governor, omitted material amendments made and passed by both houses, it was held void. *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28.

2. *People v. Onondaga*, 16 Mich. 254.

3. *Speer v. Plank Road Co.*, 22 Pa. St. 376. In *Pennsylvania* there is no constitutional requirement concerning the signature of bills by presiding officers of the legislature.

4. See *Field v. Clark*, 143 U. S. 671; *State v. Young*, 32 N. J. L. 33.

5. In *Maryland* the constitution requires that every bill passed by the general assembly shall be sealed with the great seal of the state before it is presented to the governor; he may refuse to consider it if not so authenticated. *Hamilton v. State*, 61 Md. 14.

6. It has been held in *Indiana* that the court may not look beyond the enrolled act of the legislature to ascertain whether there has been a compliance with the constitutional requirement that "no bill shall be presented to the governor within two days next previous to the final adjournment of the general assembly." *Bender v. State*, 53 Ind. 254. Compare *Evansville v. State*, 118 Ind. 434.

In *Arkansas* a bill may be presented to the governor after the adjournment of the legislature; and the return of

such a bill is held to be "prevented by the adjournment" of that body. *Dow v. Beidelman*, 49 Ark. 333.

It was held in *State v. Crounse* (Neb. 1893), 55 N. W. Rep. 246, that such presentation was necessary, even though the bill was passed by a majority, which would be sufficient to pass it over the governor's veto. The ground of the above decision was that the governor is a part of the law-making power of the state, and it is therefore necessary that every bill shall be presented to him as a part of its legal enactment.

Where, however, a city charter required that all ordinances passed by the city council should be presented to the mayor, and if vetoed by him then passed by a two-thirds vote of the council over his veto, in order to give them the force of law, it was held that where, to pass a specified law, a three-quarters vote was required in the original passage, presentation to the mayor was, under the circumstances, unnecessary. *Hall v. Racine*, 81 Wis. 72.

7. In *Hamilton v. State*, 61 Md. 27, Stone, J., said: "The first of these objections raises the distinct question of a personal presentation of a bill to the governor before he can be required to consider it, or whether a proper delivery in the executive chamber, although the governor may be absent therefrom at the time, is sufficient. This is a very important question, but one which we do not now mean to decide, because the determination of that question is not necessary to the decision of this case, and because there



the person officially filling his position;<sup>1</sup> while in *New Hampshire* the courts have held that the bill may be left at the usual office of the governor for receiving bills with the person there in charge.<sup>2</sup> Whatever the specific mode of presentation may be, it seems at least reasonable that the bill must be left with the gov-

is a wide and irreconcilable difference of opinion among the different members of the court on that point.

1. In *Opinion of Judges*, 99 Mass. 636, the court said: "As the duty of revision by the governor is a personal duty, with which he alone is intrusted, when his chair is not vacant, it is necessary that the bill should be laid before him personally. A bill is not laid before him or presented to him, within the meaning and intent of these provisions, by being sent from the senate to the secretary of the commonwealth. The constitution makes the secretary an independent officer, and prescribes his duties, and his possession of a bill sent by the senate to be presented to the governor is not the possession of the governor. A bill must be laid before the governor, or the person who for the time being is clothed with the powers of governor, under the constitution, for his revision. The individual whose duty it is to sign the bill is entitled to have it before him that he may have the opportunity to sign it or return it, with his objections thereto, to the branch of the legislature in which it originated."

2. In *Opinion of Justices*, 45 N. H. 61, the court said: "But it would be absurd to hold that the officers of the senate and house of representatives are obliged, in order to perform their duty, to follow the governor wherever he may chance to go, whether in the state or out of it, upon his private business as well as public, and present bills to him *in person* wherever he may happen to be. . . . Now it is perfectly apparent that, in order that the business of legislation may be conducted with sufficient order and the necessary despatch, there should be some place where it can be understood that communications can be made to the governor, and where it shall be his duty to attend, either in person or by some private secretary or agent, authorized to receive bills, papers and communications for him in his absence, at least during the sessions of the legislature; and we know of no more appropriate place, during the sessions, for the presentation

of bills and making other communications to the governor than in the executive chamber, where it may be understood that such presentations may be made at reasonable hours, and where they will be received and attended to, and where it may be expected that the governor will attend in person or otherwise, at such proper times as to see that the public interests do not suffer, and that all the duties imposed upon him by his high office may be seasonably performed. Still this is not *necessarily* the place where the governor receives communications from the two houses; that must depend upon the usage. If it had been customary, both for the two houses to make these communications there, and for the governor to receive them there; if they both understood that this was the proper place where such communications were to be made and received, then the assent of both would be implied; and if such was the usage, and it was continued down to the time of the presentation of the bill in question, then it would be the duty of the governor to attend at such chamber and receive such communications, or to have some one there for that purpose, and the depositing of a bill there in the usual place by an officer of one of the houses, and calling the attention of the governor, secretary, or other person in charge of the room to the fact would, we think, be a good presentation, although, in consequence of the temporary absence of the governor for a few hours, or his attention being directed to other things, he may not have seen or known of its presentation on the day it was made. This usage, though of long continuance, might probably be changed by the governor, and he might make, by special appointment, and a notice thereof to both houses, a private apartment in his own house, or at a hotel, or some other room in the state house, or in any other building, if within proper distance, and in other respects reasonably convenient, the place for receiving such communications, and then such apartment would be the proper place for making such presen-

error, for his approval and consideration, out of the possession or control of the legislature or its messengers.<sup>1</sup>

The fact of the presentation of the bill to the executive ought to be somewhere preserved or recorded;<sup>2</sup> an entry in the journal of the legislature, is in some states where it can be appealed to, provided for;<sup>3</sup> in other states, where no mode of record is prescribed, the entry of the governor on the bill itself is the practice followed.<sup>4</sup> It has also been held that no record at all is nec-

tations, and would so continue until otherwise ordered. But when he has thus changed the place and established a new one for this purpose, and such communications are habitually made there, his temporary absence for an hour, or for an afternoon, ought not to affect the presentation, and we think that in law it could not."

1. See *Harpending v. Haight*, 39 Cal. 199; 2 Am. Rep. 432; *McKenzie v. Moore* (Ky. 1891), 17 S. W. Rep. 483. In the first of these cases, Wallace, J., said: "The bill must, before it becomes a law, be 'presented to the governor;' it might be merely exhibited to that officer, and even if it should be immediately thereafter taken away or withdrawn, it might be contended that it had, nevertheless, been 'presented' within the very letter of the constitution. But when we come to reflect that the only purpose for which the bill is to be 'presented to the governor' is to afford him an opportunity to deliberately consider its provisions and prepare his objections, if any he have to its passage, we would instinctively reject such a presentation as being fictitious—merely spurious—and certainly not that one contemplated by the constitution, because it would defeat rather than promote the very object intended."

2. See *Danielly v. Cabaniss*, 52 Ga. 223.

3. *People v. Hatch*, 33 Ill. 149; *White v. Hinton*, 3 Wyoming 753. In the first of these cases, the court said: "The tenth joint rule of the two houses requires that before a bill shall have been signed by the speakers of both houses it shall be presented by the committee on enrolled bills to the governor for his approbation. The said committee shall report the day of presentation to the governor, which time shall be carefully entered on the journal of each house. That this rule has the force of a law will not be questioned; it was made to give full operation to the constitution, and, taken in connection with it, requires

that the legislature shall be in session when a bill is presented to the governor, and the reason is obvious; when it is presented the responsibility of the governor commences, and from the entry on the journal of the time when, the ten days are to be computed."

By the *Maryland Code* it is provided that "every bill when passed by the general assembly shall be returned to the house in which the same originated, and shall as soon thereafter as practicable be sealed with the great seal by the secretary of the senate, or chief clerk of the house of delegates, as the case may be, and presented to the governor for his approval, and in his presence such clerical officer, having custody of the same, shall make on the back of every such bill a memorandum in writing of the day and hour when the same was presented to the governor for his approval; and such officer so presenting the same shall sign his name to such memorandum, and shall make a corresponding entry upon the journal of the house in which the same originated." *Lankford v. Somerset County*, 73 Md. 105.

4. In *Danielly v. Cabaniss*, 52 Ga. 223, the court said: "There seems to be no law or rule of either houses of the general assembly providing any mode in which it is authoritatively to be ascertained when a bill is presented to the governor for his signature, and the practice on the subject is not uniform. The fact ought in some way to appear of record and on the act itself. Some of the governors seem to have made an entry on the enrolled bill, others have left it to the legislature to preserve the evidence."

The record of the official acts and proceedings of the executive department kept by the secretary of state, as required by the constitution, is competent evidence to show that a bill indorsed by the secretary of the senate as having been presented on a particular day was in fact presented on a different

Essary to be kept of the presentation of a bill to the governor for approval.<sup>1</sup>

**7. Legislative Power of Recall.**—After presentation of a bill to the executive, it would seem that the legislature is without power to demand a recall for further consideration, though in practice bills have been recalled and the legality of the practice conceded.<sup>2</sup> It has been held that a bill cannot be recalled by a single branch

day. *Lankford v. Somerset County*, 73 Md. 105.

1. *State v. Hitchcock*, 1 Kan. 178.

2. *Wolfe v. McCaull*, 76 Va. 876.

In *People v. Devlin*, 33 N. Y. 277; 88 Am. Dec. 377, Potter, J., said: "If they do possess the power, it is not found in the constitution, it is not found in the statute, it is not shown to be the custom or usage. Although each house shall determine the rules of 'its own proceedings,' no rule for such a proceeding as that of sending for a bill in the possession of the governor has been shown to exist; besides, the bill at that time had become the act of both houses, and neither had then any further control over it. The act of courtesy of the governor in returning to the assembly the bill at their request conferred no power upon the house of assembly to act further upon it. Even if the governor had intended to allow them so to act (as by his subsequently signing the bill in the form he first received it, it seems he did not), it is still a question of power. No authority is shown to be possessed by the governor to perform such an act as a part of the law-making power."

In *Re Senate Resolution*, 9 Colo. 630, the court said: "We discover nothing in the constitution or statutes that forbid the legislatures requesting, by joint or concurrent resolution of both houses, the return of a bill in the hands of the governor for his approval, or which directs or controls the action of his excellency in response to such request. Neither do we find any provision in the constitution or statutes which inhibits a reconsideration and amendment, if in accordance with the parliamentary practice adopted by the respective houses, of a bill thus returned."

Again, in *People v. Devlin*, 33 N. Y. 277; 88 Am. Dec. 377, Potter, J., said: "After the passage of a bill in the legal and constitutional form by both houses of the legislature, and the same has been transmitted by them to the gov-

ernor in the manner provided by the constitution, have the two houses exhausted their power over it, or can they, or can either of the said houses without the consent of the other, recall the bill by resolution and revest themselves with power further to act upon it? . . . When both houses have finally passed upon a bill and sent it to the governor, they have exhausted their powers upon it, except the power of sending it to the governor by the house in which it originated, according to parliamentary law."

In *Wolfe v. McCaull*, 76 Va. 890, Christian, J., said: "As was so well said by one of the able counsel for the petitioner in a brief filed by him: 'The constitution, moreover, provides that all bills shall be presented to the governor—that is, presented to the governor in such a way that he will be able to consider the merits and demerits of a bill, deliberate upon it, and finally determine whether he will approve or disapprove. The constitution contemplates that he shall exercise this power without let or hindrance from any source whatever. He could not properly perform this duty and fully enjoy this privilege, if at any moment the bill under consideration could be recalled from his hands by a resolution passed by a minority of both houses, who avail themselves of a temporary ascendancy caused by the absence of the friends of the bill, or even by a majority of both houses. To allow such a power to the legislature would tend to produce a constant conflict between it and the executive, and in the unequal contest that would ensue, the executive would have to succumb to its more powerful opponent. In the exercise of this power, although a legislative function, the independence of the executive should be guarded with the same zealous care as his independence in the exercise of his ordinary executive duties; and to allow the legislature the power claimed by them in this instance would be entirely subversive of that independence.'"

of the legislature,<sup>1</sup> and that, in the absence of a rule permitting it, both branches, after voting down a motion to reconsider, immediately before the presentation of the bill to the governor, cannot recall it by joint resolution.<sup>2</sup>

**8. Executive Functions—*a*.** IN GENERAL.—The executive, upon presentation of the bill to him, may approve it or disapprove it and return it with his objections to the legislative branch in which it originated, or he may allow it to become a law by inaction and a failure to approve or disapprove within the time prescribed by the organic law.<sup>3</sup>

"There must be a time when this right to reconsider terminates, and that is when the bill or law has passed from the custody or control of the department of the body seeking to reconsider." *People v. Hatch*, 19 Ill. 288.

**Practice of Permitting Recall.**—In *People v. Hatch*, 19 Ill. 288, Cator, C. J., said: "Instances are not wanting in the history of our legislation where bills which have been laid before the governor for his approval, have been returned to one of the houses of the general assembly and then finally defeated, and no one has ever thought of questioning the legality of such a proceeding."

So in *Kentucky*, where the governor, after the presentation of a bill to him, said that he should veto it, and the member who introduced it obtained leave of the house of which he was a member to veto the bill, and it was delivered to him by the governor, it was held that the bill did not become a law by reason of the failure of the governor to act upon the bill within the time limited by law. *McKenzie v. Moore* (Ky. 1891), 17 S. W. Rep. 483.

1. In *People v. Devlin*, 33 N. Y. 277; 88 Am. Dec. 377, Potter, J., said: "By no rule or custom shown, nor by the exercise of common reason, could one house by their action undo, annul, or change what both had solemnly done under their solemn legislative sanction, according to all constitutional forms, and according to their published rules and forms of law."

2. In *Wolfe v. McCaull*, 76 Va. 889, Christian, J., said: "There must be a time in all parliamentary proceedings when the controlling power of the legislative body must come to an end. If the general assembly had the power to recall the bill it must have been for the purpose of a reconsideration. The object of requiring possession of the paper must have been for a reconsideration, because no motion to reconsider it is in

order unless the paper is before the body in which the motion to reconsider is made. But in *Virginia* the rules of both houses of the general assembly fix the time and mode by which the bill passed may be reconsidered. By the constitution each house is allowed to adopt its own rules. House rule 70 provides that 'when a question has been decided it may be reconsidered on the motion of any member who voted with the prevailing side, provided the motion be made on the same day, or the next two days of actual session.' Rule 61 of the senate is to the same effect. According to these rules and general practices a motion to reconsider the same vote cannot be made twice, and if made at all must be made upon the day of the vote or upon one of the two ensuing days. In the case before us a motion to reconsider was made in each house within the proper time, and was lost. After this was done, and after it was sent to the governor the legislature had no further control over the bill; it was then before the governor for his action or non-action, and was beyond the control of the legislature."

3. *Birdsall v. Carrick*, 3 Nev. 156; *State v. Crounse* (Neb. 1893), 55 N. W. Rep. 256; *Seven Hickory v. Ellery*, 103 U. S. 423. In this last case Waite, C. J., said: "Under the constitution of *Illinois*, if a bill is passed by both houses of the legislature it becomes a law: first, when approved and signed by the governor within ten days after its presentation to him; second, when the legislature being in session, the governor fails to sign the bill or return it with his objections to the house in which it originated within the ten days; third, when, after being returned within the ten days, it is passed by the requisite majorities over his objections; fourth, when, if the session of the legislature terminates by an adjournment before the expiration of the ten days, he fails to return the

In some states the power of the governor is merely a qualified veto power exercised in requiring a further consideration by the legislature of bills disapproved by the governor; in these states his approval is not a component part of the law.<sup>1</sup> In other states the executive function is broader.<sup>2</sup> From this distinction follow corollaries concerning the necessity of presentation to the governor, his right of approval after a legislative adjournment, and the time when a statute takes effect.<sup>3</sup>

bill with his objections the first day of the next session; and, fifth, when, having returned it with objections on the first day of the next session, it is again passed by the requisite majorities in both houses. And it becomes a law at the time when the event happens which is to give it validity."

1. In *State v. Mounts*, 36 W. Va. 186, Lucas, J., referred to the constitutional separation of the legislative and executive departments, and said: "The governor has no legislative functions to perform. His approval of the law passed by the legislature does, it is true, give it vitality as a law; but, should he decline to approve, a bare majority in each of the two houses may pass the law over his veto, thus showing that it was not intended that he should have any legislative power, not even the casting vote. His veto amounts to an appeal for 'reconsideration' by the legislative branch, and not to a defeat of the passage of the bill."

In *Illinois*, the council of revision, as such, as a power to revise all laws passed by the general assembly, is not abolished by the present constitution of the state. The power, instead of being deposited with the governor and justices of the supreme court, is now deposited with the governor alone. He is, to all intents and purposes, if the design of such a power is regarded, and not a tenacious adherence to terms, the council of revision. *People v. Hatch*, 33 Ill. 9.

2. *Fowler v. Peirce*, 2 Cal. 165, since overruled on another point; *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204; *State v. Crounse* (Neb. 1893), 55 N.W. Rep. 246. See *People v. Bowen*, 21 N. Y. 521.

In the territories, by the organic law, it is provided that the legislative power is vested in the governor and the two houses of the legislature. *School Trustees v. Ormsby County*, 1 Nev. 340; *Thornbury v. Hermann*, 1 Nev. 473.

In *Fowler v. Peirce*, 2 Cal. 173, the court said: "The executive is, by the

constitution, a component part of the law-making power. In approving a law he is not supposed to act in the capacity of the executive magistrate of the state, whose duty it is to see that the laws are properly executed, but as a part of the legislative branch of the government. This power is a unit, though distributed; and the parts can only act in unison. Whenever a part ceases to act, the whole becomes inoperative. The executive act owes its vitality to the existence of the legislative body."

In *Florida*, the governor asked the opinion of the justices of the court as to his duty to disapprove certain bills, as beyond the power of the legislature to pass at its then pending session, though otherwise unobjectionable. The constitution makes it a duty of the courts to interpret the constitution, at the request of the governor, upon any question affecting his "executive powers and duties." The court declined to give the opinion, because the question asked affected a legislative and not an executive, duty of the governor, and said: "Is the opinion you desire one relating to your 'executive powers and duties?' The exact legal meaning of the word 'executive' has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution before the duty of executing it can exist. Any duty imposed by the constitution on the governor in reference to a bill, before it becomes a law, is not an executive duty. The enactment of laws is a legislative duty, and when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative, and is performed by you as a part of the law-making power, and not as the law-executing power." Opinion of Judges, 23 Fla. 298.

3. See various subdivisions of this title.

*b. TIME ALLOWED FOR DELIBERATION AND ACTION—(1) Effect of Adjournment.*—Sometimes the constitutional provision is that “if the governor approves the bill he must sign it,” nothing being said about a specified time, and no provision being made for the effect of an adjournment of the legislature on the right of executive approval. Here, an approval after adjournment is generally invalid.<sup>1</sup>

The rule which prevails more generally, and which is perhaps more satisfactory, is that the same length of time limited by the constitution for returning the bill with objections, to the legislature when in session, is given the governor for deliberation, and a bill approved by him after the adjournment of the legislature, but within the said time, is valid.<sup>2</sup> In some states it is provided that where the legislature adjourns before the time for approval

1. *Fowler v. Peirce*, 2 Cal. 165; since overruled, but not on this point. The following language of Alvey, C. J., in *Lankford v. Somerset County*, 73 Md. 115, is pertinent. “It seems that the general practice of requiring bills to be presented to and signed by the President of the United States before the adjournment of congress has been established and adhered to from the first congress under the constitution to the present. That practice, however, seems to have originated in the operation of certain joint rules of the two houses of congress, adopted on the 6th of August, 1789, whereby all enrolled bills are placed under the charge of a joint standing committee of the two houses, and whose duty it is to procure the bills to be signed in each house by the presiding officer thereof, and then to present the same to the President for his approval, and report the fact and time of such presentation to their respective houses. (Joint Rules 6, 7, 8 and 9 of two houses of congress. See also Jefferson's Manual, § 48, tit. Assent.) But while such is the congressional practice, in placing bills before the President for his approval, we are not aware of any judicial construction of the clause of the constitution which affirms that a bill presented to the President *after the adjournment* of congress, and signed by him within ten days from the time of such presentation, would not be valid as a law of congress. On the contrary, we think it may be fairly inferred from the reasoning and judgment of the supreme court of the United States in the case of *Seven Hickory v. Ellery*, 103 U. S. 423, that a bill so presented and signed, if by congressional au-

thority would be maintained as a valid law.”

In *School Trustees v. Ormsby County*, 1 Nev. 340, and *Thornbury v. Hermann*, 1 Nev. 477, it was held that the territorial governor could not approve a bill after the legislative adjournment, the provision of the organic law being that the legislative power and authority of the territory should be vested in the governor and the legislative assembly.

2. *People v. Bowen*, 21 N. Y. 520; *Solomon v. Cartersville*, 41 Ga. 157; *State v. Fagan*, 22 La. Ann. 545; *Seven Hickory v. Ellery*, 103 U. S. 423; *State v. Coahoma County*, 64 Miss. 365.

In *Mississippi*, the provision is that “every bill passed by the two houses is to be presented to the governor. If he approves he shall sign it; if not, he shall return it with objections within five days (Sunday excepted) to the house in which it originated, or it shall be a law without his signature, unless the legislature by adjournment prevent, in which case it shall be a law at the end of three days after the next meeting of the legislature, if not sent back by the governor with his objections in that time.” The court said, concerning this provision: “If the legislature, by an adjournment, before the governor has had five days to act on the bill, prevent a return of it with his objections, he is allowed all of the time before the three days after the next meeting of the legislature shall expire, to send back the bill disapproved, and if he does not so return it, it shall be a law by mere effluxion of time. *A fortiori* should it be a law when the governor approves and signs it. . . . The finishing act

expires, the governor shall have a further specified time to approve bills presented to him before the adjournment.<sup>1</sup>

by which a bill is transformed into a law, is the governor's approval, as shown by his signing, and that may be as long as he has the bill in his hands for his official action. So long as he may return it with his objections he may convert the bill into a law by his approval and signing. So long as he may disapprove and return the bill with his objections he may assent to the expressed will of the two houses, and, as governor, unite with the legislature in passing a bill into a law." *State v. Coahoma County*, 64 Miss. 365.

In *Louisiana*, the constitution provides that the governor shall return all bills which he does not approve, with his objections thereto, to the house in which they may have originated, in five days from the day of presentation, except where such return is prevented by an adjournment. In that case the governor is required to return all such bills as he does not approve, on the first day of the next general assembly. It has been held that by this article of the constitution, the governor has until the meeting of the next general assembly to deliberate as to whether he will approve or disapprove any bill that has passed less than five days before adjournment, and in case he approves any bill thus situated, he may sign it at any time before the meeting of the next general assembly, and such act becomes a law from the moment he signifies his approval by affixing his signature thereto. *State v. Fagan*, 22 La. Ann. 545.

In *Solomon v. Cartersville*, 41 Ga. 161, Warner, J., said: "If this was an original question, independent of any construction heretofore given by the executive department of the state government to this clause of the constitution, we should be inclined to hold that the governor could not approve and sign any bill after the adjournment of the general assembly; but on looking into the past history of our legislation, we find that it has been the practice for many years for the governor to take five days after the adjournment of the general assembly, for the revision of bills passed by that body, and to approve and sign the same within that time, but not afterwards, and that a large number of the most important acts now upon the statute books of the state have been so approved and signed,

which usage and practice of the executive department of the state government should not now, in our judgment, be disturbed or set aside."

An act was regularly passed by both houses of the general assembly; but in its enrollment two provisions, which had been reported by a conference committee and incorporated in the act by way of amendment, were omitted. In this form the act was sent to the governor and was approved by him; on the following day the legislature adjourned, after which the omissions were discovered; a correct enrollment was then made, and the bill signed by the president of the senate and speaker of the house was again laid before the governor, who approved it. It was held that under the constitution it is not required that all bills be presented to the governor before the adjournment of the assembly, and the first presentation of the bill being ineffectual, because it was not the same that had been passed, the legislative officers had the power after the adjournment to submit to the governor for his approval a correct enrollment of the bill as it was passed. *Dow v. Beidelman*, 49 Ark. 325.

In *Maryland*, where the constitution requires an act when passed by both houses of the legislature "to be sealed with the great seal, and to be presented to the governor as soon thereafter as practicable," it has been held that an act may be presented to the governor and approved by him after the adjournment of the legislature. *Lankford v. Somerset County*, 73 Md. 105, *distinguishing* *Hamilton v. State*, 61 Md. 14.

1. See various state constitutions. See as bearing upon their provisions, *Burns v. Sewell* (Minn. 1892), 51 N. W. Rep. 224; *People v. Bowen*, 21 N. Y. 520; *Arnold v. McKellar*, 9 S. Car. 335; *People v. Hatch*, 33 Ill. 9; *State v. Coahoma County*, 64 Miss. 358; *McKenzie v. Moore* (Ky. 1891), 17 S. W. Rep. 483.

In *Darling v. Boesch*, 67 Iowa 706. it was held that a bill presented to the governor within the last three days of the legislative session, and neither signed nor returned with objections before the adjournment, became a law only in case of his subsequent approval.

(2) *Specific Time; How Computed.*—The time allowed varies generally from three days to ten.<sup>1</sup> In computing the time the day of presentation is excluded and the last day included.<sup>2</sup> An intervening Sunday is generally excluded.<sup>3</sup> A day, in this connection, means twenty-four hours generally beginning and ending at midnight.<sup>4</sup> Whether a bill was returned in time is a question of fact.<sup>5</sup>

c. APPROVAL.—The executive when he approves a bill signs

1. See various state constitutions.

2. *Iron Mountain Co. v. Haight*, 39 Cal. 540; *Price v. Whitman*, 8 Cal. 412; *People v. Hatch*, 33 Ill. 139; *Beaudeau v. Cape Girardeau*, 71 Mo. 392; *Corwin v. Comptroller Gen'l*, 6 Rich. (S. Car.) 390; *In re Senate Resolution*, 9 Colo. 632; *McNeil v. Com.*, 12 Bush. (Ky.) 727. But see *Opinion of Justices*, 45 N. H. 613.

3. See *Stinson v. Smith*, 8 Minn. 366; *Farwell Co. v. Matheis*, 48 Fed. Rep. 363; *Ex parte Cowert*, 92 Ala. 94; *In re Senate Resolution*, 9 Colo. 633; *Opinion of Justices*, 45 N. H. 607; *Corwin v. Attorney Gen'l*, 6 Rich. (S. Car.) 390; *Price v. Whitman*, 8 Cal. 412.

4. *Opinion of Justices*, 45 N. H. 610; *People v. Hatch*, 33 Ill. 137.

Where the constitution provided that a bill presented to the governor one day previous to the adjournment of the legislature, and not returned to the house where it originated before its adjournment, should become a law and have the same force and effect as if signed by the governor, the day and hour of adjournment being customarily fixed by a resolution passed several days prior thereto, it was held that the question of time was one of intention, and the governor must be allowed the twenty-four hours prior to the fixed hour of adjournment; and that therefore, a bill presented to him the day before the adjournment, but within the last twenty-four hours of the session, did not become a law by his failure to return it to the legislature before adjournment. *Hyde v. White*, 24 Tex. 137.

5. *U. S. v. Allen*, 36 Fed. Rep. 174; citing *Gardner v. Barney*, 6 Wall. (U. S.) 499. Here it appeared that a vetoed measure, in order to prevent a bill from becoming a law under the constitution, should have been returned to the legislature on February 24, 1887. The journal of the legislature contained an entry under date of February 25, 1887, that the bill and message in question was "laid before the house by the

speaker." There was no other entry in the journal tending to show when the message was actually received. On the other hand a minute book, kept by the journal clerk of the same house, under date of February 24, 1887, contained the following memorandum: "A message in writing was received from the President of the United States, which was laid on the speaker's table." Concerning this minute book and the entry therein the journal clerk testified that such memorandums were usually made by him in his minute book on receipt of messages from the President, for the purpose of identification in case of several messages being received on the same day; and that a careful search of the journal of the house, as well as the clerk's minute book, showed that no message was received from the President on that day to which the memorandum could relate except the one in question. The journal clerk further testified that the message to which the entry in his minute book, under date of February 24, 1887, related, was undoubtedly the one containing the President's veto; that it was received between four and five o'clock on February 24, 1887; was opened for identification and laid on the speaker's table, and that according to the practices under the house rules a message received at that hour in the day would not be laid before the house by the speaker until the next day. It was therefore held, that the clerk's minute-book was not inconsistent with the journal entry, and that the evidence established conclusively the fact that the vetoed message was received on February 24, 1887, in due time.

In *Fowler v. Peirce*, 2 Cal. 165, parol evidence was admitted for the purpose of showing that a bill purporting on its face to have been signed on the last day of the session was in fact signed on the next day; but this decision was overruled in *Sherman v. Story*, 30 Cal. 280; 89 Am. Dec. 93.



it.<sup>1</sup> When he intentionally parts with the control and gives up the possession of a signed bill to the person authorized by law to receive and take charge of bills approved, the signature is conclusive as to the fact of approval, even though he may afterwards wish to withdraw it, as, for instance, by sending a message to the house in which the bill originated expressing his objections to it.<sup>2</sup> But until he so parts with the bill he may withdraw his approval, even though he has signed the bill.<sup>3</sup>

The return of an approved bill or notification of the fact of approval is usually an act of courtesy rather than a legal duty.<sup>4</sup> The bill approved must be that passed. A change made after the passage and before the approval invalidates the act in those

1. In *National Land, etc., Co. v. Mead*, 60 Vt. 257, it appeared that the bill was presented to the governor in due time, and that he signed it immediately below the signatures of the presiding officers of the legislature; that he afterwards discovered that the signatures were at the bottom of the first page of the bill, at the end of a section thereof, and not at the end of the entire bill; and that he then had all the names erased and sent the bill back to the officers of the legislature for re-signature, and it was by them so signed in the proper place, all before the time for the governor's approval had passed. In the hurry at the end of the session the governor failed to sign the bill a second time, but later, after the prescribed time had expired, signed the bill as of the date of the first signature. The validity of the bill was attacked, on the ground that it was not approved within the constitutional time, but its validity was sustained on the ground that the first signature of the governor's was sufficient, the court saying: "This bill passed both the senate and house, was presented to the governor, was carefully examined by him, and was by him approved and signed intentionally and understandingly. The bill thereby became a law. That which took place afterwards did not annul this enactment. It was not even so intended if the power existed. The governor did not attempt to withdraw his approval. The place of signing was as effectual as though it had been at the end of the bill; the fact appearing that it was intended as a signing and approval of the whole bill. The constitution does not require that a bill shall be signed at the end, or subscribed."

2. *State v. Whisner*, 35 Kan. 271; *People v. Hatch*, 19 Ill. 281.

3. In *People v. Hatch*, 19 Ill. 290, the

governor had inadvertently placed his approval and name to an act of the legislature, which signing and approval had been announced by his private secretary in his routine of business, but without the knowledge of the governor, to the legislature, and it was held that this did not deprive the governor of his privilege of striking his approval from the act if the bill remained in his custody, the court saying: "The prominent fact in this case is that the bill in question was not, for a moment, out of the possession and control of the governor, after he had placed his name to it, as the facts show inadvertently, until he had erased his name, and returned the bill, with his objections, to the house in which it originated. During all this time he had complete control of it, and had he placed his approval to it, designedly and understandingly, he could withdraw it. As in every other department of the government, so in the executive, whilst the matter before it is *in fieri*, there is the *locus penitentiae*—the right to reconsider—to change an opinion expressed, and to cancel a signature of approval. A power to rectify an error at the proper time, exists with all departments of the government, for they are all liable to err; it is an infirmity of our nature, from which the governor cannot claim exemption. The executive, in his judgment on a bill, is only concluded by his final act upon it."

4. *State v. Whisner*, 35 Kan. 271; *People v. Hatch*, 19 Ill. 287; *State v. Coahoma County*, 64 Miss. 366.

In *Burns v. Sewell* (Minn. 1892), 51 N. W. Rep. 224, it was said that if the governor approves a bill he shall sign and deposit it in the office of the secretary of state, and notify the house where it originated; but this was a *dictum* only.

states where the enrollment is not conclusive.<sup>1</sup> If, however, that added or changed is distinguishable from and independent of the rest, the statute may be good in part.<sup>2</sup> The omission in the enrolled bill of words not essential to its substance or effect will not render the act invalid.<sup>3</sup> A material variance between the subject expressed in the title of the bill passed as shown by the legislative journal and that approved, is fatal, otherwise if the variance is immaterial.<sup>4</sup>

*d. RETURN—(1) In General.*—Generally it is required that the executive, if he disapproves a bill, shall return it to the house in

1. *Jones v. Hutchinson*, 43 Ala. 721; *Moog v. Randolph*, 77 Ala. 597; *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446; 20 Am. Rep. 69; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *Smithee v. Campbell*, 41 Ark. 471.

In *Jones v. Hutchinson*, 43 Ala. 721, a bill making judgments of courts of record a lien on all the property of the judgment debtor throughout the state was passed in the senate; in the house it was amended by restricting the lien to property in the county where the judgment should be recorded. The senate refused to concur in the amendment, and later both houses receded from the amendment and passed the original bill by itself. The enrolled bill presented to the governor, and signed by him, contained the said amendments, and the law was held invalid as a whole, on the ground that as signed it was an entirely different act from that passed by the legislature.

The rule in the text was upheld in *Brady v. West*, 50 Miss. 68. This case, however, was overruled in *Ex parte Wren*, 63 Miss. 512; 56 Am. Rep. 825, on the ground that the enrolled law approved by the governor and signed by the presiding officer of the legislature, was conclusive evidence of its valid enactment, and that therefore the courts could not look behind the statute to see whether or not the bill as approved differed from that passed by the legislature.

2. *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446; 20 Am. Rep. 69; *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647. See *infra*, this title, *Statutes Unconstitutional in Part*.

In *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647, the 19th section of "an act to revise, simplify and abridge the

rules, practices, pleading and form of the courts" of the state as approved by the governor, provided among other things that the courts for the county of Barnwell should be held at "Barnwell," but the act as passed by the legislature provided that the courts in the said county should be held at "Blackville." So much of section 19 as attempted to designate the place of holding court was held invalid as being different in legal effect from that passed by the legislature, while all the rest of the act was held valid.

Where a railroad company was granted a charter which provided that its road, commenced in 1873, must be finished within four years thereafter, or in 1877, or the charter would be forfeited, and in 1874 an amendatory act was passed, extending the time to finish the railroad, as its preamble showed, one section of such act as signed by the governor providing that if the said railroad was not finished within five years from 1870 (thus diminishing the time), the charter and amendment would be void, and the amendatory bill as passed had contained the date 1875 instead of 1870, this clause of the bill was held invalid while the rest of the act being distinct and severable was held valid. *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446; 20 Am. Rep. 69.

Bracketed words not in the bill as it was approved by the governor have no part in the law. *Robertson v. Baxter*, 57 Mich. 127.

3. *Sharp v. Merrill*, 41 Minn. 492; *State v. Robertson*, 41 Kan. 200; *Territory v. O'Connor*, 5 Dakota 397; *State v. Rabbitts*, 46 Ohio St. 178; *Walnut v. Wade*, 103 U. S. 683.

4. *Stein v. Leeper*, 78 Ala. 517. An immaterial change not altering the sense of the title will be disregarded. *Plummer v. People*, 74 Ill. 361; *People v. Onondaga*, 16 Mich. 254.

which it originated with his objections expressed in writing.<sup>1</sup> He must treat the bill as a whole; he cannot approve part and object to part.<sup>2</sup> Usually the time within which the return must be made is limited, and if the return is not made within such time, the bill becomes a law as it would if approved.<sup>3</sup>

Courts cannot inquire into the sufficiency of the objections of the governor to a bill, and a disapproval for any reason, however trivial or unsound, authorizes a return of the bill to the legislature, and prevents its becoming a law by lapse of time.<sup>4</sup>

(2) *Mode*.—The mode of return of a bill, like that of its presentation to the governor, must be such that his time for deliberation is ended and that of the legislature begun; the bill with objections must pass from the possession and control of the executive into the possession, actual or potential, of the legislature itself, so that the latter may have the opportunity for reconsideration.<sup>5</sup> In returning a bill the governor may make

1. See various state constitutions.

2. In *Porter v. Hughes* (Arizona, 1893), 32 Pac. Rep. 165, the governor signed the approved bill, and added after his signature that he approved the same, except as to a specified subdivision of a specified section, and returned the bill to the house in which it originated, where the veto was sustained. It was held, however, that the bill as a whole was approved, since the governor had no power to veto a single item of it.

3. *Purpose of Limitation as to Time*.—"The spirit of these limitations as to time was not to either disparage the importance of the functions of the governor or as to legislation, or relieve him from a faithful performance of his duty in considering and forming an intelligent opinion of the bill presented, but it was to secure promptness of action on his part, and, in the case of the ten-day limitation, the purpose was also to extend his powers as to legislation beyond the end of the session of the legislature, whereas without it his powers would have expired with the session. The purpose of the section of the constitution was to require of the governor careful consideration of every bill before it can become a law, and the exercise of his judgment as a public official as to the wisdom of the proposed legislation, in the light of public interest, and to require an indication of such judgment by express approval, or by silent acquiescence after investigation, or by express disapproval. The authorities speak of the governor as being a component part of the law-making power in the exer-

cise of these functions." Opinion in *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204.

The provision as to the time was intended to prevent the possibility of the governor withholding a bill and thus preventing its becoming a law. *Tarlton v. Peggs*, 18 Ind. 25.

4. Where the objection was, that the bill had not been signed by the secretary of state, the governor believing that this was fatal to the validity of the bill, the objection was held sufficient. *Birdsall v. Carrick*, 3 Nev. 154.

5. *Harpending v. Haight*, 39 Cal. 199; 2 Am. Rep. 432. In this case the messenger of the governor stepped into the senate chamber with the intent to return a bill and objections to the senate, but that body having adjourned for the day he returned the bill with the objections to the governor, who kept them in his control; this was held not a proper return to prevent the bill becoming a law.

Where an enrolled bill was, within the time prescribed for his action, delivered by the governor, with his objections thereto in writing, to the lieutenant-governor, by him to be presented to the senate, where it originated, on the first day of the next session thereof, which was the constitutional time for its proper return, who delivered the same to the secretary of state for safe custody only, till required for such presentation, with directions to keep the same in a secure and private place till that time, subject to be redelivered to the lieutenant-governor, or other person authorized by the governor to re-

use of a messenger in sending it, provided the messenger properly announces his message.<sup>1</sup> Where it is important that a return shall be made on a particular day, and the legislature has adjourned for that day, or taken a recess, the bill and message can be delivered to the presiding or other officer of the legislature, to be called to its attention as soon as an opportunity thereafter may occur.<sup>2</sup>

(3) *Prevention by Adjournment.*—Where the return within the time prescribed is prevented by adjournment, an extension of

ceive and present them, it was held, that the secretary of state could not be compelled by *mandamus* to give a copy of it even, much less to certify it as a law, because the bill was not in his possession as secretary of state, as a law. *People v. Hatch*, 33 Ill. 9.

1. "We are also of the opinion that the governor might send this message by any officer or member of the house, or other proper person, and if properly announced, as in this case it was, we see no reason why that would not be sufficient. If the governor returns the bill to the house in which it originated, and the house is properly notified that it is a message from the governor, neither the house nor the speaker can prevent its effect by refusing to receive it. The duty of the governor is performed when he returns the bill with his objections to the house in which the bill originated and gives them proper notice, whether it is received or not." *Opinion of Justices*, 45 N. H. 609. See *Harpending v. Haight*, 39 Cal. 199; 2 Am. Rep. 432. So where a bill was returned, with objections, to the proper house and given to the minute-clerk thereof, though it was not announced to the house until the next morning, such a return was considered sufficient. *U. S. v. Allen*, 36 Fed. Rep. 174.

2. *Harpending v. Haight*, 39 Cal. 203; 2 Am. Rep. 432; *Opinion of Justices*, 45 N. H. 610; *Corwin v. Comptroller Gen'l*, 6 Rich. (S. Car.) 390.

In *Harpending v. Haight*, 39 Cal. 203; 2 Am. Rep. 432, the court said: "It was the duty of the messenger to communicate to the senate the message which he bore from the executive on that occasion. This was to be done in the most direct manner that circumstances would permit. It was impossible for him to immediately announce it to the senate, for that body was not in session. It had a right to be in recess, if it desired so to be, and it was not in the power of the executive or his messen-

ger to recall it to its sittings. But its right to be in recess was no greater or higher than was the right of the executive to return the bill in question for its reconsideration; nor is there any reason why the free exercise of these admitted rights upon the part of the senate and governor, respectively, should bring them into collision. The senate has the unqualified constitutional power to adjourn for three consecutive days. (Art. IV, § 15, Constitution.) It must often happen that these three days will include the last day allowed the executive for the exercise of the veto power against the passage of a particular senate bill. Now, if the mere fact of the recess of the senate, thus constitutionally taken, does operate to defeat, in a measure, the exercise of the veto power conferred on the executive by the constitution, then we have the strange spectacle of an irreconcilable conflict between the several clauses of that instrument itself, by which the senate, by the mere exercise of its own admitted constitutional authority to adjourn, violates the equally clear constitutional right of the executive to have it kept in session. We are of the opinion that the adjournment of the senate on March 31st did not curtail the veto power of the executive over the bill in question, nor should it even have embarrassed him in its exercise. The return should have been made in such manner as the circumstances would permit; it should, at all events, have left the bill and message beyond the executive control, and, if need be, in the immediate custody of some proper person who would be likely to deliver it to the senate at the first opportunity. The best return that the circumstances would admit would, in our judgment, be a proper return. The maxim *lex non cogit ad impossibilia* would be applicable to such a condition of affairs. We know of no other rule, either, upon which the clear right of the governor

time is usually provided for.<sup>1</sup> The adjournment must be a final adjournment, and not an adjournment from day to day.<sup>2</sup> It has been held that the fact of adjournment might be shown by parol evidence.<sup>3</sup> Where the executive takes action on a bill, or by failing to act allows it to become a law after adjournment has precluded a return, he is required usually to file the bill in the office of the secretary of state;<sup>4</sup> thus he precludes himself from changing his decision, even though the time within which he might have acted has not expired.<sup>5</sup>

9. **Enactment Without Executive Approval.**—If the executive neither signs a bill approving it, nor returns it to the house where it originated, with his objections, within the time allowed him, the bill, as a rule, becomes a law.<sup>6</sup> The bill is none the less

to make the return to the senate can be reconciled with the equally clear right of the senate to be in recess at the time."

1. See various state constitutions.

The *Massachusetts* Constitution declares that "in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law;" nothing being said as to the effect of an adjournment of the legislature within the prescribed five days. But it was held in *Opinion of the Justices*, 3 Mass. 567, that where the bill was laid before the governor for his approval less than five days before the final adjournment of the legislature and not acted on by him, it had not the force of law.

2. *Harpending v. Haight*, 39 Cal. 205; 2 Am. Rep. 432; *Opinion of Justices*, 45 N. H. 610; *Corwin v. Comptroller Gen'l*, 6 Rich. (S. Car.) 390; *Opinion of Justices*, 3 Mass. 567.

"Upon this point there can be no doubt; the adjournment referred to in a provision of the constitution is not, we think, the ordinary recess, or adjournment from time to time during the session, but the final adjournment at the end of the session; in fact this is the only adjournment, we think, which can prevent a return of a bill within the time limited." *Opinion of Justices*, 45 N. H. 610.

A bill retained by the governor for more than three days while the legislature was in actual session, thereby became a law under the constitution of *Nebraska*, notwithstanding that soon after it was presented to him for his approval the legislature adjourned from the 29th of March to the 30th of May of that year. "The constitutional

restriction applies to an adjournment *sine die* and not to one from time to time." *Muller v. Hurford*, 11 Neb. 377.

A case of importance arose in *Illinois*. The two houses of the legislature could not agree as to the time of adjournment, and the governor assuming that a sufficient disagreement existed to justify a resort to his constitutional power, attempted to adjourn the legislature by proclamation. Both houses formally protested against this, but most of the members settled their accounts with the state and left the capital. No sessions of the legislature were held and no entries made on the journal for more than ten days. It was held that even though there had been no formal joint resolution for adjournment in accordance with the rules of the legislature, the legislature, having no power to take a recess for more than two days at a time, had, under the constitution, *finally* adjourned and prevented a return of the bill by the governor. *People v. Hatch*, 33 Ill. 153.

3. *People v. Hatch*, 33 Ill. 9.

4. See *infra*, this title, *Filing of Enrolled Bills*.

5. *Tarlton v. Peggs*, 18 Ind. 24; *Corwin v. Comptroller Gen'l*, 6 Rich. (S. Car.) 390.

6. *Danielly v. Cabaniss*, 52 Ga. 211; *McNeil v. Com.*, 12 Bush. (Ky.) 727; *Tarlton v. Peggs*, 18 Ind. 24. See *Seven Hickory v. Ellery*, 103 U. S. 423. Where a bill was presented to the governor which he stated that he should veto, and which the legislature allowed the member offering it to withdraw, and the member kept possession of it for a long time, it was held that under the circumstances the governor's time for disapproval had been unduly shortened, and that the bill did not become

a law although the executive may have sent a veto message after the time had expired.<sup>1</sup>

**10. Passage Over Veto.**—If a bill is returned with objections from the executive, it may still become a law by passage through both houses with the necessary majority required by the constitution. In such a case the enactment is complete upon the prescribed vote of both houses.<sup>2</sup>

**11. Authentication.**—An enrolled bill duly passed and approved is authenticated sufficiently by the signatures of the presiding officers of each legislative branch and of the governor.<sup>3</sup> The legislative journal may be appealed to to show that an act has been vetoed and passed over the veto.<sup>4</sup> In such case the bill need not be attested by the presiding officers of the legislature a second time.<sup>5</sup>

**12. Filing of Enrolled Bills.**—Under constitution, statute or usage, it is usually the duty of that person, or body, at whose hands a bill receives its final sanction, to deliver it for filing to the officer authorized to receive and preserve it; this is usually the secretary of state.<sup>6</sup>

a law by the failure of the governor to return it within the prescribed time. *McKenzie v. Moore* (Ky. 1891), 17 S. W. Rep. 483.

The rule in the text is not necessarily applicable where the return by the executive is prevented by the adjournment of the legislature. See *supra*, this title, "*Prevention by Adjournment.*"

1. *Corwin v. Comptroller Gen'l*, 6 Rich. (S. Car.) 390; *Tarleton v. Peggs*, 18 Ind. 25.

2. See various state constitutions; also *Evansville v. State*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449.

3. *Wabash R. Co. v. Hughes*, 38 Ill. 185. See *State v. Klesewetter*, 45 Ohio St. 258; *Scarborough v. Robinson*, 81 N. Car. 418; *Speer v. Plank Road Co.*, 22 Pa. St. 276.

4. *Evansville v. State*, 118 Ind. 434, *distinguishing* *Evans v. Browne*, 30 Ind. 515; 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Madison County v. Burford*, 93 Ind. 383; *State v. Denny*, 118 Ind. 449. See also *Ex parte Wren*, 63 Miss. 535; 56 Am. Rep. 825; *In re Welman*, 20 Vt. 656.

5. *State v. Denny*, 118 Ind. 449.

6. *Harpending v. Haight*, 39 Cal. 208; 2 Am. Rep. 432; *People v. Hatch*, 33 Ill. 9.

In *Illinois* it is provided by statute that "all public acts, laws and resolutions which have been or shall be passed by the general assembly of this

state, shall be carefully deposited in the office of secretary of state, and the secretary of state is hereby charged with the safe-keeping of said office and all laws, acts, resolutions and records deposited, or which shall hereafter be deposited therein." This law does not prescribe the mode in which the laws shall be conveyed to the secretary's office, but that duty imperatively devolves upon that department in whose hands or by whose action they become finished and acquire vitality. If a law receives the last sanction required by the constitution to give it vitality, in the hands of the governor, either by being approved and signed by him or remaining in his hands for ten days, then the duty of depositing it in the secretary's office may reasonably devolve upon him, while a law which has been vetoed by the governor, and subsequently passed by both houses, with the constitutional majority, would properly be sent to the secretary's office from the house in which it was last passed." *Caton, J.*, in *People v. Hatch*, 19 Ill. 286.

In *Kansas* there is a similar statute and ruling. *State v. Whisner*, 35 Kan. 280.

In *State v. Young*, 32 N. J. L. 33, the court said: "From the earliest times, so far as I have been able to ascertain, it has been the invariable course of legislative practice in this state, for the speaker of each house to

**13. Legislative Journal—*a*.** IN GENERAL.—That each house of the legislature must keep a journal of its proceedings is a common requirement in state constitutions,<sup>1</sup> and where the record therein of specific action taken, as, for instance, of a yea and nay vote on the final passage of a bill, or the signature of the presiding officers to the bill, is also required by the constitution, the failure of

sign the bill as finally engrossed and passed. It is likewise certified by indorsement by the clerk of the house in which it originated. With these attestations of authenticity upon it, it is then filed in the office of the secretary of state. This has been the course of proceeding from certainly a very remote period to the present time; under our present constitution the written approval of the governor is requisite. There seems, therefore, to be no doubt whatever that these copies, thus authenticated and filed, are to be regarded as enrolled bills, corresponding in their general character, and partaking, if not in all, at least in most respects, of the nature of parliamentary rolls. In the statute book they are frequently referred to as enrolled bills; and if we go back to provincial times, we find indorsed upon these copies, with the executive approval, a direction to enroll them, which meant nothing more than that they were to be filed. These are the characteristics and nature of the copies of legislative bills deposited according to the ordinary routine in the office of the secretary of state."

In *New York*, "it is the duty of the secretary of state to receive and deposit in his office every bill which shall have passed the senate and assembly and which shall have been approved and signed by the governor. (1 R. S. 187. §§ 10, 11.) 'He shall certify and indorse upon every such bill the day, month and year when the same became a law, and such certificate shall be conclusive evidence of the facts therein declared.' The fact that the bill has passed the senate and assembly is evidence to the governor by the certificates of both the presiding officers of those houses, and then when the governor approves and signs the bill and the same is deposited in the office of the secretary of state, and by him indorsed, the record is made up and completed, the bill has become an act, and the act has become one of the statute laws of the state." *Campbell, J., in People v. Devlin*, 33 N. Y. 282; 88 Am. Dec. 377.

1. The constitution of *Missouri* does not expressly require a journal to be kept, though one is evidently contemplated. *Pacific R. Co. v. Governor*, 23 Mo. 365; 66 Am. Dec. 673.

The provision of the *Illinois* constitution does not require that the officers of the general assembly shall sign a record of the proceedings of either house, or that the copying clerks shall certify to the accuracy of their work. *Miller v. Goodwin*, 70 Ill. 659.

A supplement to the journal printed as part thereof by order of the legislature constitutes a portion of the journal. *Detroit v. Assessors*, 91 Mich. 78.

The constitution of *Minnesota* provides that each house shall keep a journal of its proceedings and from time to time publish the same; and the yeas and nays when taken on any question, shall be entered in such journals. And this provision requires that when the yeas and nays are taken, they must be so entered in the journal. *Lincoln v. Haugan*, 45 Minn. 451.

Where the constitution provided that "each house shall keep a journal of its proceedings and cause the same to be published immediately after the close of the session; and when practicable the minutes of each day's session shall be printed and placed in the hands of members on the day following; and the original journal shall be preserved after publication in the office of secretary of state, but there shall be required no other record thereof," and in pursuance of that article the legislature enacted that "the state printers shall supply each house of the general assembly with proof sheets of its official journal containing the proceedings of the previous day of meeting; and that within two days after the journal of each house shall have been approved the state printer shall publish the same as so approved once in the official journal of the state, and the same matter so published shall be made up in book form as provided elsewhere in the act;" it was held that the journals published in the official journal and afterwards bound in volumes constituted the offi-

a journal to show compliance with such a requirement is, in states where the journal is evidence, fatal to the validity of the bill passed.<sup>1</sup> In such states the journal is a public record, of which the courts take judicial notice.<sup>2</sup>

While courts differ as to the propriety of resorting to the journal for the purpose of impeaching the validity of an act passed by the legislature, the courts of all states agree in asserting their right to consult the journal for the purpose of ascertaining the existence of specific facts not tending to bring in question the validity of a legislative enactment.<sup>3</sup>

cial journal, and not the proof sheets furnished to the legislators as provided. *State v. Mason*, 43 La. Ann. 590.

1. *Hunt v. State*, 22 Tex. App. 396; *State v. Buckley*, 54 Ala. 599; *Perry v. Selma, etc.*, R. Co., 58 Ala. 546; *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 153; *People v. Starnes*, 35 Ill. 131; 85 Am. Dec. 348; *Wabash R. Co. v. Hughes*, 38 Ill. 175; *Glidewell v. Martin*, 51 Ark. 559; *Smithee v. Garth*, 33 Ark. 17; *Osburn v. Staley*, 5 W. Va. 92; 13 Am. Rep. 640; *Fordyce v. Godman*, 20 Ohio St. 1; *Hull v. Miller*, 4 Neb. 506; *Pacific R. Co. v. Governor*, 23 Mo. 364; 66 Am. Dec. 673. See *infra*, this title, *The Enrolled Bill*.

2. *People v. Mahaney*, 13 Mich. 481; *State v. Buckley*, 54 Ala. 602; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119; *Rockford, etc., R. Co. v. Lynch*, 67 Ill. 149; *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 151; *Miller v. State*, 3 Ohio St. 475; *State v. Moffitt*, 5 Ohio 358; *Fordyce v. Godman*, 20 Ohio St. 1; *Southwark Bank v. Com.*, 26 Pa. St. 446; *People v. Chennango County*, 8 N. Y. 317; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *McCulloch v. State*, 11 Ind. 430; *State v. Denny*, 118 Ind. 449; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *Houston, etc., R. Co. v. Odum*, 53 Tex. 343; *South Ottawa v. Perkins*, 94 U. S. 260; *Gardiner v. Barney*, 6 Wall. (U. S.) 499; *McDonald v. State*, 80 Wis. 407; *In re Ryan*, 80 Wis. 414.

In *Iowa* the journals certified by the secretaries of the respective houses are by statute made proof of legislative proceedings. *Koehler v. Hill*, 60 Iowa 552.

In *Illinois*, it is held that although for some purposes the court may take

judicial notice of legislative journals, yet it is not the province of the court, at the suggestion or request of counsel, to undertake to explore the journal for the purpose of ascertaining the manner in which a law, duly certified, went through the legislature and into the hands of the governor. If the party desires to raise this question, he must make the requisite proof of the fact by means of the legislative journals and introduce that proof into the record. *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77, citing *Spangler v. Jacoby*, 14 Ill. 299; 58 Am. Dec. 571; *Grob v. Cushman*, 45 Ill. 119.

The journals will not be judicially noticed on appeal when not put in evidence at the trial. *Bedard v. Hall*, 44 Ill. 91.

#### Journal Not a Record in Other States.

—In other states where the enrolled bill is held to be conclusive, the journal is not a public record. See *Com. v. Martin*, 107 Pa. St. 190; *Green v. Weller*, 32 Miss. 650. In this latter case it was held that the journals did not import absolute verity.

"If a bill of this character did not receive the vote of a majority of all the members, or was not passed in the manner required by the constitution, the only mode of reaching the question is by an allegation of that fact in an appropriate pleading, and copies of the journals of the general assembly printed by the public printer offered as evidence to sustain the defense. Such seems to have been contemplated by the general statutes, and a proper construction of those statutes would repel the idea that the courts of the state can take judicial notice of what appears on the legislative journals." *Auditor v. Haycraft*, 14 Bush (Ky.) 288.

3. *U. S. v. Ballin*, 144 U. S. 1; *Pacific R. Co. v. Governor*, 23 Mo. 364; 66 Am. Dec. 673; *Hollingsworth v.*



**b. CONCLUSIVENESS.**—Where the journal is consulted, whether to ascertain the existence of a collateral fact or to impeach directly the validity of a law, the record there found is conclusive as to the facts recited. They cannot be impeached in the courts by parol evidence for either mistake, fraud, or collusion. The legislature alone has the power to correct its record.<sup>1</sup>

Thompson (45 La. Ann.), 12 So. Rep. 1; Strauss v. Heiss, 48 Md. 295; Evansville v. State, 118 Ind. 434.

In Field v. Clark, 143 U. S. 678, which case is the leading one of the United States Supreme Court, declaring that a duly authenticated enrolled law in the secretary of state's office cannot be impeached as to its validity by the journals of Congress, the rule in the text was declared, and Gardner v. Barney, 6 Wall. (U. S.) 511, distinguished, on the ground that in that case the date of taking effect, not the validity or invalidity of the law, was to be ascertained from the journals.

"Whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." Miller, J., in Gardner v. Barney, 6 Wall. (U. S.) 499, quoted by Bradley, J., in U. S. v. Ballin, 144 U. S. 3, where it was decided that the constitution providing that "the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal," it could be assumed by reason of this clause that reference may be had to the journal to see whether the yeas and nays were ordered, and if so, what was the vote disclosed thereby.

In *Ex parte Wren*, 63 Miss. 535; 56 Am. Rep. 825, which case decided that the courts could not go behind the enrolled act and inspect the journal for the purpose of impeaching the validity of the act, the court said: "Undoubtedly the journals may be evidence and may be resorted to in some cases and must be as to some matters. They were properly looked to in Gardner v. Barney, 6 Wall. (U. S.) 499, in the effort to fix the date of approval of a bill

by the President. They must furnish the evidence that a bill returned by the governor without his signature and with his objections was so dealt with as to become a law, for it is only by the approval of two-thirds of both houses determined by yeas and nays entered on the journal of each house that such a bill can become a law. And as the constitution so provides and has not prescribed any means of attesting or authenticating the concurrence of those requisites to such a bill becoming a law, it rests necessarily on the journal, which must show that although the bill was not signed by the governor but returned with objections it nevertheless became a law according to the constitution. The case is peculiar and extraordinary and not governed by the rules applicable to the ordinary case where the governor signs the bill. The provision for the signing of bills by the presiding officers does not apply here, and whether the bill on reconsideration became a law may depend on those things prescribed and which cannot be shown except by the journals of both houses. Had the constitution provided any means of authentication of such action by the two houses, as to make a bill returned by the governor with his objections a law, it would have been exclusive, but in the absence of such provisions the journals are the memorial of the action which converts a bill returned by the governor with his objections into a law."

In *Edgar v. Randolph County*, 70 Ind. 338, the journals were looked to for the purpose of ascertaining the intent of the legislature in passing a bill which was being construed by the court.

So the legislative journals are evidence for the purpose of identifying a bill to which another act passed by the legislature referred. *Southwark Bank v. Com.*, 26 Pa. St. 446.

1. *McCulloch v. State*, 11 Ind. 424; *Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710; *Berry v. Baltimore, etc.*, R. Co., 44 Md. 446; 20 Am. Rep. 69; *Annapolis v. Harwood*, 32 Md. 471; *Attorney Gen'l v. Menominee County*, 89

Mich. 552; *Attorney Gen'l v. Rice*, 64 Mich. 391; *Detroit v. Assessors*, 91 Mich. 84; *Wise v. Bigger*, 79 Va. 269; *Koehler v. Hill*, 60 Iowa 543; *Division of Howard County*, 15 Kan. 194; *State v. Moffitt*, 5 Ohio 363; *Miller v. State*, 3 Ohio St. 475; *Fordyce v. Godman*, 20 Ohio St. 1; *White v. Hinton*, 3 Wyoming 753; *State v. Swift*, 10 Nev. 176; 21 Am. Rep. 721; *Weeks v. Smith*, 81 Me. 538. See *Andrews v. Boylston*, 110 Mass. 214.

"Assuming, though without deciding, that the facts which the constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, yet, if reference may be had to such journal, it must be assumed to speak the truth. It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved, and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force to the impeachment." *Brewer, J.*, in *U. S. v. Ballin*, 144 U. S. 4.

The journal must be held conclusive evidence of the facts which appear on its face, because it must be presumed that the members as a body inspected it and made all necessary corrections before they allowed it to assume the character of a journal of their proceedings. . . . The house keeping the journal is the only tribunal by which it can be corrected, and until corrected by such authority it must be considered conclusive as to the facts which it contains. *McCulloch v. State*, 11 Ind. 424; quoted with approval in *Detroit v. Assessors*, 91 Mich. 85.

"By a consensus of authority almost unanimous, these records (journals and records in the secretary of state's office) are conclusive. Parol testimony cannot be admitted to impeach them. From these records the statutes are published for the information of the people and the courts. To these records resort is had in case of any question as to the correctness of the published statutes. On these records reliance is had by the bench, the bar, and the public, of necessity and of right. Resort cannot be had to the recollection of individuals to show what the law is or is not, or to impeach these solemn records made by the members and officers of the legislature, and by the governor and the secretary under the sanction of their official

oaths, and to prove against the records, and in spite of them, the astounding proposition that the governor and both houses of the legislature falsely and illegally concerted together to falsify the record of the two houses and of the secretary's office. It is possible that all this might, in the course of history, occur. It is much more probable that parol testimony to that effect would, in any particular instance, be mistaken or false. If it should result from these principles that on rare occasions validity should be given to legislation not strictly regular in its enactment, the evil would be much less than the unsettling of the evidentiary foundation of all statutory law, and the weakening of public faith in all existing legislative enactments, which would result from throwing open the records of legislative action to impeachment by parol testimony whenever the interest or caprice of individuals may prompt them to such a course. It is not to be tolerated that the courts or the people should depend upon or resort to the recollection of individuals for the statutory law." *Conaway, J.*, in *White v. Hinton*, 3 Wyoming 753.

"Out of a multitude of citations not one is found in which any court has assumed to go beyond the proceedings of the legislature, as recorded in the journals required to be kept in each of its branches, on the question whether a law has been adopted. And if reasons for this limitation upon judicial inquiry in such matters have not generally been stated, it doubtless arises from the fact that they are apparent. Imperative reasons of public policy require that the authenticity of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired to-day upon the faith of what has been declared to be law shall not be destroyed to-morrow, or at some remote period of time, by facts resting only in the memory of individuals. . . . The possible consequences of limiting judicial inquiry to what is shown by the journal is much exaggerated. It is not perceived how any limited number of members, without the acquiescence, or such indifference as would amount to acquiescence, of the majority, could make up a journal that would revolutionize the legislature and deprive the people of their duly elected representatives. The sup-

The same legislature which passed the law may correct its journals at the same or a subsequent session so as to make the truth appear.<sup>1</sup>

c. PROOF.—The printed journals of the legislature made up and printed pursuant to a statute of the state and published by its authority, are competent evidence of the contents of the original journals.<sup>2</sup> Where the original written journals on file in the office of the secretary of state differ in any material particular from the

posed case of less than a majority of this court causing a judgment to be entered of record is not *apropos*. For if it were done the only remedy would be in this court, for the reason that there is no other tribunal or department of the government that could afford one. And by parity of reasoning the only correction that can be made in a legislative journal is by the body that caused it to be made. The suggestion that fraud or bad motives in those who caused it to be made might defeat the remedy would apply to the one case as well as to the other. But confidence must be reposed somewhere, and why not in a legislative body, as to the keeping of its journals, as well as in this court, as to the keeping of its records? Besides, the people are the final tribunal before whom, as a rule, such delinquencies must be settled." Minshall, J., in *State v. Smith*, 44 Ohio St. 348.

*Compare State v. Secretary of State*, 43 La. Ann. 625, which case apparently allowed evidence to be admitted for the purpose of altering the journal, though the court said: "Of course the official journals import absolute verity and form conclusive proof as to the proceedings themselves, when considered in reference to any other evidence of such proceedings; but the question here is as to what constitutes the journals, and whether the printed journals have been made the actual repository of the proceedings of the two houses of the assembly as they transpired. . . . It is quite clear to our mind that we should most certainly assume much too great and too grave a responsibility, and extend the doctrine of legal presumptions much too far if we were to venture the assertion that legislative journals form conclusive proof of legislative proceedings, and decline to entertain and consider evidence of unauthorized alterations and interpolations in the journals whereby it could be made to appear that they did not faithfully and truthfully recite the proceed-

ings as they did transpire. The true distinction to be taken, in our opinion, is that no extrinsic proof is admissible to contradict the facts which are established by the journal; but fraud, error, mistake, or the improper exercise of judgment on the part of a state agent or representative existing intrinsically may be shown. This is not a question of what proof is furnished by the journals as contradistinguished from other proof of a given state of facts; but it is a question of the journals being in themselves a correct exposition of the facts as they happened."

1. *Turley v. Logan Co.*, 17 Ill. 150; *Detroit v. Assessors*, 91 Mich. 86; *McCulloch v. State*, 11 Ind. 424.

Under a resolution of the state senate dispensing with the reading of the daily journal before the session, and authorizing the secretary of the house to make all necessary corrections in the journal from day to day, he is held authorized to correct an entry which by mistake stated that the vote taken on the passage of a bill was reconsidered, by stating, at the close of the journal on a page before his certificate under the head of "*errata* in the record of bills," that the vote reconsidered was that by which the senate had concurred in certain house amendments to the bill, which correction might be so made at any time prior to the final adjournment. *People v. Burch*, 84 Mich. 408.

Where the secretary was so authorized to make corrections in the journal, and it does not affirmatively appear at what time the secretary made the correction, it will be presumed to have been made on or before the date of his certificate; and if the final adjournment was had on that day, it will also be presumed to have been made before such adjournment, and that it was authorized by the senate, and that the true journal entry of the proceeding is as corrected by the "*errata*." *People v. Burch*, 84 Mich. 408.

2. *Lincoln v. Haugan*, 45 Minn. 451;

printed journals, the original written journals are the authentic official records and must control.<sup>1</sup>

*d. JOURNAL AS EVIDENCE.*—See *infra*, this title, *The Enrolled Bill*.

**14. The Enrolled Bill**—*a. PRIMA FACIE VALIDITY.*—The enrolled bill is the original act,<sup>2</sup> and is to be looked to when the act as printed in the statute book is attacked.<sup>3</sup> If the two differ, the bill as enrolled controls.<sup>4</sup> If authenticated properly, it is presumed

*Post v. Kendall County*, 105 U. S. 667; *Miller v. Goodwin*, 70 Ill. 659. See *Root v. King*, 7 Cow. (N. Y.) 613. So a transcript from the journal record of either house of the legislature, of its proceedings, properly certified, is admissible in evidence to prove the facts therein recorded. It is not necessary to produce the original minutes made by the officers of the respective houses, or copies thereof. *Miller v. Goodwin*, 70 Ill. 659; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77.

1. *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Chicot County v. Davies*, 40 Ark. 200.

Where the bound volume of the journal at the end of the session differs from the parts thereof officially published from day to day during the session, it will be presumed that the differences are the result of amendment by the house, and the bound volume is held conclusive. *Detroit v. Assessors*, 91 Mich. 86.

In *Missouri*, by statute, it is declared that the printed journals of the senate and house of representatives and all public documents and reports therein contained, and all reports or documents printed by order of the state or of either house of the general assembly, or purporting to be printed by authority thereof, shall be *prima facie* evidence to the same extent that duly authenticated copies of the originals would be. And where the validity of a statute was questioned for the first time on an appeal on the ground that it was not passed by the necessary constitutional majority, and, to establish that fact, the journals of the legislature were referred to, the court held that the question not having been raised in the circuit court it could not be considered for the first time on appeal; giving as a reason that the printed journals were only *prima facie* evidence under the statute, liable to be rebutted, and that on an appeal the right of rebuttal could not be allowed. *Bradley v. West*, 60 Mo. 33.

2. *Koehler v. Hill*, 60 Iowa 554.

In *Iowa*, it is provided by statute that the original acts of the general assembly shall be deposited with and kept by the secretary of state. There is no provision in the constitution or by statute for the enrollment of a bill, act, or joint resolution which has passed the general assembly. "There is an implication in the constitution that the bills which are introduced shall be signed by the presiding officers of each house, but the legislative practice has always been to enroll a bill or joint resolution, and it is such that are always presented to the presiding officers of each house, signed by them, and filed and preserved in the office of the secretary of state. This practice existed prior to the adoption of the present constitution and no doubt was well known to the members of the constitutional convention. We, therefore, incline to think the enrolled bill is and should be regarded as the original act; but it is difficult to say enrollment is essential to the validity of a law or statute. If the enrollment was omitted, and the original bill, as introduced and passed by the general assembly, was signed by the presiding officers of the two houses and approved by the governor, we are not prepared to say it would not be a valid and constitutional law." Seevers, J., in *Koehler v. Hill*, 60 Iowa 554.

3. *Purdy v. People*, 4 Hill (N. Y.) 384; *De Bow v. People*, 1 Den. (N. Y.) 9; *Com. v. Martin*, 107 Pa. St. 192.

Where there are errors in copies of the act, the court will inform itself by appealing to the original act on file in office of the secretary of state. *State v. Clare*, 5 Iowa 509.

4. *Epstin v. Severson*, 79 Ga. 718; *Potter v. State*, 92 Ala. 37.

The punctuation of a printed act which had been accepted by the legislature has been preferred to the punctuation of the enrolled act. *Ward v. Beale* (Ky. 1889), 14 S. W. Rep. 967.

"It will be noticed that the legisla-

in all the states, in the absence of proof to the contrary, to have been enacted in conformity to constitutional provisions.<sup>1</sup> To contradict the enrolled bill in those states where it is not conclusive, the legislative journals are the best evidence.<sup>2</sup> In some states,

tive journals and the enrolled bills are the only records required by law to be kept for the purpose of showing any of the legislative proceedings. There is no provision for preserving the engrossed bills as a record of the legislative proceedings; and, as the legislative journals and the enrolled bills are, by law, records, and the only records, of legislative proceedings, they must of course import absolute verity, and be conclusive proof as to whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not." Valentine, J., in Division of Howard County, 15 Kan. 166.

1. *Jennings v. Russell*, 92 Ala. 603; *Walker v. Griffith*, 60 Ala. 361; *Harrison v. Gordy*, 57 Ala. 49; *Worthan v. Badgett*, 32 Ark. 516; *English v. Oliver*, 28 Ark. 317; *In re Roberts*, 5 Colo. 525; *Eld v. Gorham*, 20 Conn. 7; *Spangler v. Jacoby*, 14 Ill. 297; *People v. Starne*, 35 Ill. 121; *Turley v. Logan Co.*, 17 Ill. 151; *Bedard v. Hall*, 44 Ill. 91; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Binz v. Weber*, 81 Ill. 288; *Schuyler County v. People*, 25 Ill. 181; *Ryan v. Lynch*, 68 Ill. 160; *Hensoldt v. Petersburg*, 63 Ill. 157; *Larrison v. Peoria, etc.*, R. Co., 77 Ill. 11; *McCulloch v. State*, 11 Ind. 424; *Duncombe v. Prindle*, 12 Iowa 1; *Chicago, etc.*, R. Co. v. Manhattan, 45 Kan. 419; *Division of Howard County*, 15 Kan. 166; *In re Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545; *Hollingsworth v. Thompson* (45 La. Ann.), 12 So. Rep. 1; *Berry v. Baltimore, etc.*, R. Co., 41 Md. 446; 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Annapolis v. Harwood*, 32 Md. 471; *People v. McElroy*, 72 Mich. 446; *State v. Hastings*, 24 Minn. 78; *Lowell v. North*, 4 Minn. 32; *State v. Peterson*, 38 Minn. 143; *Brady v. West*, 50 Miss. 68; *Bradley v. West*, 60 Mo. 33; *State v. Wray*, 109 Mo. 594; *Hull v. Miller*, 4 Neb. 503; *State v. Swift*, 10 Nev. 176; *Opinion of Justices*, 35 N. H. 579; *Opinion of Justices*, 52 N. H. 622; *People v. Chenango County*, 8 N. Y. 317; *People v. Briggs*, 50 N. Y. 558; *State v. Rabbits*, 46 Ohio St. 178; *Miller v. State*, 3 Ohio St. 475; *Currie v. Southern Pac. Co.*, 21 Oregon 566; *Erie, etc.*, R. Co.

*v. Casey*, 26 Pa. St. 287; *Speer v. Plank-Road Co.*, 22 Pa. St. 376; *State v. Brown*, 33 S. Car. 151; *State v. McConnell*, 3 Lea (Tenn.) 332; *Gains v. Horrigan*, 4 Lea (Tenn.) 608; *Usener v. State*, 8 Tex. App. 177; *Blessing v. Galveston*, 42 Tex. 641; *Illinois Cent. R. Co. v. People* (Ill. 1892), 33 N. E. Rep. 174.

The enrolled statute on file in the office of the secretary of state is very strong presumptive evidence of the regularity of the passage of the statute and of its validity; and it is conclusive evidence of such regularity and validity, unless the journals of the legislature fairly, concisely, and beyond a doubt show that the act was not passed regularly or legally. *State v. Francis*, 26 Kan. 724.

The certificate of the secretary of state indorsed on the enrolled bill, showing what proceedings were had in either branch of the general assembly in relation to the passage of a bill, is competent evidence to show whether or not the same was passed in the constitutional mode. And where such certificate in due form purports to give all the proceedings, there can be no inference that any further proceedings were had in relation to the passage of the bill. *Ryan v. Lynch*, 68 Ill. 160.

Where the journals of the legislature were not before the court, and from a certified copy of the original draft of an act of the legislature it appeared that the draft was upon paper headed "a joint resolution," which words were marked out and the words "a bill" substituted, it was presumed, in the absence of marginal notes, that the substitution was made by the draftsman and that the original paper was introduced as a bill and not as a joint resolution. *State v. Browne*, 33 S. Car. 151.

Where an indictment was demurred to on the ground that the statute on which it was based was not constitutionally passed, in the absence of the legislative journals the law was presumed to be validly enacted, and the indictment was sustained. *State v. Wray*, 109 Mo. 594.

2. As to the states in which the enrolled bill is conclusive, and as to those

where the journal is evidence, but not the only evidence, the original engrossed bill has been admitted in evidence.<sup>1</sup> In either case the evidence must be clear and convincing and show the defect beyond doubt, or the statute will be upheld.<sup>2</sup> If, however, the

in which the journals may be resorted to, see, *infra*; this title, *First View—Second View*.

1. *Berry v. Baltimore, etc., R. Co.*, 41 Md. 463; 20 Am. Rep. 69.

It has been held that only the enrolled statute, the engrossed bills, and the journals can be admitted. *Hughes v. Felton*, 11 Colo. 489, citing Division of Howard County, 15 Kan. 195.

In *Hollingsworth v. Thompson* (45 La. Ann.), 12 So. Rep. 1, the original engrossed house bill with all indorsements thereon, including the original senate amendment attached thereto, was received in evidence against the objection that "the journals of the house are the best and exclusive evidence of the proceedings of said house, and that no other of any kind is admissible." And the court decided on appeal that the bill was properly admitted.

In *Arkansas*, where the engrossed bill is filed by law in the office of the secretary of state, it was held admissible. *Chicot County v. Davies*, 40 Ark. 212; *Loflin v. Watson*, 32 Ark. 414; *Haney v. State*, 34 Ark. 263; *Scott v. Clark County*, 34 Ark. 283.

"But, at all events, it is urged that we cannot go behind the journals for the purpose of examining the draft of the bill. In *Loflin v. Watson*, 32 Ark. 414, and in *Haney v. State*, 34 Ark. 263, this court did examine the original bills introduced into the legislature. The true rule upon this subject was enunciated in *Gardner v. Barney*, 6 Wall. (U. S.) 499: 'We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, as of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which, in its nature, is most appropriate, unless the positive law has enacted a different rule.'" *Smith, J., in Chicot County v. Davies*, 40 Ark. 211.

**Parol Evidence.**—In *California*, parol

evidence was admitted to show that the governor approved of a bill one day later than the time appearing for such approval on the face of the enrolled bill. *Fowler v. Peirce*, 2 Cal. 155. Afterwards overruled by *Sherman v. Story*, 30 Cal. 253; 89 Am. Dec. 93.

Where the time of the return of a bill by the governor with his objections to the legislature was in question, the testimony of the journal clerk and his private minute book were admitted in evidence to determine the fact, but not to contradict the journal. *U. S. v. Allen*, 36 Fed. Rep. 174, citing *Gardner v. Barney*, 6 Wall. (U. S.) 499.

2. *State v. Peterson*, 38 Minn. 143; *Larrison v. Peoria, etc., R. Co.*, 77 Ill. 18. See cases cited in the preceding notes.

Where a bill was duly passed by both branches of the legislature many years before an attempt to impeach it was made, and the senate journal showed that the senate concurred in certain slight amendments made to the bill by the house, but does not show affirmatively whether the yeas and nays were taken on said concurrence, and the yeas and nays on such concurrence are not entered in the journal, the act was held valid; it having been generally considered so, and many rights having accrued thereunder. *Leavenworth County v. Higginbotham*, 17 Kan. 62.

"If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid." *Valentine, J., in State v. Francis*, 26 Kan. 731.

In *Tennessee*, an act was passed on Feb. 8, 1870, and on the following day steps were taken under it, on which the validity of bonds issued rested, and afterwards the validity of the bonds was attacked on the ground that the bill was not actually signed by the presiding officers of the legislature until after the aforesaid steps were taken. The journal entries of the senate showed, one on Feb. 18th that the committee on enrolled bills reported to

enrolled bill is not properly authenticated, the presumption of regularity is gone, and the court usually looks behind the act to the journals of the legislature to ascertain the facts.<sup>1</sup>

In *Illinois*, it has been held that where an act was not authenticated as prescribed by the revised statutes, the court had no legal evidence of the existence of the law before it, and therefore would not take notice of such law, or act thereon.<sup>2</sup>

**b. EVIDENCE TO IMPEACH.**—The validity of an enactment depends on whether constitutional provisions governing the mode of enactment have been complied with. Generally speaking, if this has been done, the act is valid; otherwise, it is void.<sup>3</sup> The rule generally accepted is that the only competent evidence to

the senate that they had examined the bill and found "it correctly enrolled;" and one on Feb. 21st, that a message was received by the senate from the house returning the said bill signed. It was contended that it appeared from this that the bill was not enrolled in the senate until Feb. 21st, at which date the house transmitted the bill to the senate. For the support of this proposition it was asserted that a bill is never signed by the speaker until it is enrolled or engrossed. The court held that the above entries did not necessarily prove the date of the enrollment of the bill, for it might have been enrolled prior to that date, or it might have been signed before it was enrolled; there being, therefore, doubt as to the matter, the act was held valid. *Nelson v. Haywood County*, 91 Tenn. 596.

1. *Rumsey v. New York, etc., R. Co.*, 130 N. Y. 92; *Ewing v. Duncan*, 81 Tex. 230; *People v. Com'rs of Highways*, 54 N. Y. 276; 13 Am. Rep. 581; *Leavenworth County v. Higgenbotham*, 17 Kan. 62; *Burr v. Ross*, 19 Ark. 250.

"But if the record of the act itself carry its death's wound in itself, then, it is true, that the parchment—no, nor the great seal, either, to the original act or to the exemplification of it—will not serve, as in the 4 H. 7, 18, where the act was by the king, with the consent of the lords (omitting the commons), and was judged therefore void." *Rex v. Arundel*, Hob. 110.

In *Burr v. Ross*, 19 Ark. 250, doubt of passage of the bill appeared on the face of the act itself, and the court, looking to the journal, discovered that the bill had not been passed, and declared the act void.

Where, however, an act duly passed by the legislature was not in any way

authenticated, the court refused either to enforce it or to compel its authentication. *State v. Robinson*, 81 N. Car. 409.

Where there is a manifest error in the certificate of the secretary of one of the houses of the legislature attached to the bill, the journal of that house will be examined. *Ewing v. Duncan*, 81 Tex. 230.

In *New York*, it is provided that the assent of two-thirds of the members elected to each branch of the legislature is requisite to every bill appropriating the public moneys or property for local or private purposes, and no bill shall be deemed to have passed by the assent of two-thirds of the members elected to each house unless so certified by the presiding officer of each house. And where the enrolled statute stated that it had been passed by a two-thirds' vote, but the certificate of the presiding officer of the assembly failed to state whether it had so passed, it was held that, the certificate being defective, the enrolled act was not conclusive to overcome the presumption created by the statement of the secretary in the session laws; and that in such case the journal of the house whose presiding officer had made the defective certificate must be resorted to for the purpose of determining the fact. *Rumsey v. New York, etc., R. Co.*, 130 N. Y. 88. But see *People v. Com'rs of Highways*, 54 N. Y. 276; 13 Am. Rep. 581.

2. *Wabash R. Co. v. Hughes*, 38 Ill. 189; *Burritt v. Com'rs of State Contracts*, 120 Ill. 332. The *Arizona* court follows the same rule, *Graves v. Alsop*, 1 Arizona 274.

It was held incompetent to show by parol evidence that an act had passed where the journal only stated that the bill had been reported. *Covington v. Ludlow*, 1 Metc. (Ky.) 295.

3. *Currie v. Southern Pac. Co.*, 21

impeach the enrolled bill, is the legislative journal, and that parol evidence of what actually was done by the legislature is incompetent to contradict either the enrolled bill or the journal.<sup>1</sup> The legislative motive in passing the bill may not be shown.<sup>2</sup>

The decisions may be classified into those where the enrolled bill is deemed conclusive, and those recognizing the doctrine that the bill may be impeached by the legislative journals.<sup>3</sup> The fed-

Oregon 566; *State v. Rogers*, 22 Oregon 348; *State v. Buckley*, 54 Ala. 602; *Jones v. Hutchinson*, 43 Ala. 721.

1. See *infra*, this title, *The Enrolled Bill—Prima Facie Validity*.

Parol testimony of members of the legislature, of the proceedings in that body, and of the contents of a bill for which a substitute was introduced, is inadmissible. *Sackrider v. Saginaw County Supervisors*, 79 Mich. 59.

The draftsman of a bill was not permitted to testify to words of an original statute omitted from the amendatory act by inadvertence. *Combined Saw, etc., Co. v. Flournoy*, 88 Va. 1029.

2. *Wichita v. Burleigh*, 36 Kan. 34; *State v. Smith*, 44 Ohio St. 348; *Slack v. Jacob*, 8 W. Va. 613; *McCulloch v. State*, 11 Ind. 431; *Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710; *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 278; *Harpending v. Haight*, 39 Cal. 202; 2 Am. Rep. 432; *Miller v. State*, 3 Ohio St. 484; *Fowler v. Peirce*, 2 Cal. 168; *State v. Fagan*, 22 La. Ann. 545; *People v. Bigler*, 5 Cal. 23; *Sherman v. Story*, 30 Cal. 266; 89 Am. Dec. 93; *Wright v. Defrees*, 8 Ind. 303; *Fletcher v. Peck*, 6 Cranch (U. S.) 131; *People v. Petrea*, 92 N. Y. 139.

The courts cannot inquire into the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in a bill enacted. It must be assumed that the legislature acted in good faith and meant what the bill expressed, although it may be possible to show outside of its language in terms that in fact all or the larger part of its benefits will inure to a few individuals. *Waterloo, etc., Mfg. Co. v. Shanahan*, 128 N. Y. 345.

The fact that a certain bill was inspired by private persons for their own advantage, and was the result of an agreement between such persons and members of the legislature, furnishes no ground for the interference of the courts, they having nothing to do with either the policy or the motives of legislation. *Williams v. Nashville*, 89

Tenn. 487; *Lynn v. Polk*, 8 Lea (Tenn.) 293; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 634.

When the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expense of making the same shall be paid by the owners of such adjacent property, the courts have nothing to do with the correctness or incorrectness of the determination, but must assume the facts to be as the legislature assumes or declares them. *People v. Lawrence*, 36 Barb. (N. Y.) 177; *affirmed* 41 N. Y. 137.

The courts cannot, even on the complaint of the state, inquire into the motives by which members of the general assembly were governed in the enactment of a statute. *McCulloch v. State*, 11 Ind. 424; *Wright v. Defrees*, 8 Ind. 298.

Where the legislature violates sound political principles in the passage of an act, but not the constitution, the act cannot be declared void. *People v. Mahaney*, 13 Mich. 489.

3. In *Ex parte Wren*, 63 Miss. 527, 56 Am. Rep. 825, the court stated that there were three theories upon which the decisions of different states might be arranged, adding to those in the text a third, based on a *dictum* in *People v. Starne*, 35 Ill. 136, to the effect that in *Illinois* "the journals must affirmatively show conformity to every requirement of the constitution in the progress of a bill through its several stages to become a law, or else the presumption will hold that these requirements have been disregarded and the bill will never become a law."

But in *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 761, the second view in the text was followed, and it was decided that the failure of the journal to show compliance with constitutional provisions, not required to be recorded therein, did not invalidate the law. In the opinion, the court distinguished the *Illinois* cases on this point as follows: "The earliest case in the Supreme Court of *Illinois* upon this general subject to



which our attention has been called is *Spangler v. Jacoby*, 4 Ill. 297. The court there said: 'In our opinion, it is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation. The constitution requires each house to keep a journal, and declares that certain facts made essential to the passage of a law shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act receive the constitutional assent of the body, it will so appear on the face of the journal, and, when a contest arises as to whether an act was thus passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is that an act thus verified became a law pursuant to the requirements of the constitution; but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be contended that the proper entry was made in the journal; but when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall.' This decision is cited by counsel to support the proposition that the mere silence of the journal as to whether a bill was or not read on three different days—the journal not being lost or destroyed—is itself fatal to the validity of the act. But we are not satisfied that the court intended to express an opinion upon that precise point. Although it did not appear, in that case, that the bill was read the third time before it went to the senate, or that the ayes and noes were called, no special comment was made by the court upon the silence of the journal as to the bill not being read the third time. Plainly, its language had reference to the fact that the journal did not show the passage of the bill by ayes and noes. It was with reference to the fact that the language above quoted was

used. In *Turley v. Logan County*, 17 Ill. 152, the court said that 'the journals should show the readings, and the passage of the law by a constitutional vote;' but nothing was said as to what would be the result where the journal did not show that each of the required readings was had. The general language above quoted seems to have been unnecessary to the decision, for the court finally sustained the validity of the act there in question, upon the ground that the same legislature, in extra session, caused its journals to be amended so as to show what, according to the minutes of the clerk of the house, was the fact—that the bill had been read the required number of times. That we do not misinterpret these decisions is shown in *Schuyler County v. People*, 25 Ill. 181, where one of the grounds of objection to an act was that the senate journal did not show that the bill was read three times before it was put on its final passage. The court said: 'The constitution does require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law; but the constitution does not say that these several readings shall be entered on the journals. Some acts performed in the passage of laws are required by the constitution to be entered on the journals, in order to make them valid, and among these are the entries of the ayes and nays on the final passage of every bill; and we held in the case of *Spangler v. Jacoby*, 14 Ill. 297, that, where the journal did not show this, the act never became a law. But, where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not; and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done, unless the journal affirmatively shows that it was not done.' This decision was expressly reaffirmed in *Wabash R. Co. v. Hughes*, 38 Ill. 186. Nothing to the contrary was decided in *People v. Starne* 35 Ill. 141, or in *Ryan v. Lynch*, 68 Ill. 161, which is relied upon as modifying or overruling *Schuyler Co. v. People*. The case in 35 Ill. recognizes the doctrine of the *Schuyler Co. Case*, and goes upon the ground that the ayes and the noes were not called, and spread upon the journals of the house,

eral courts apply the rule of the courts of the state.<sup>1</sup> The two views are set forth in the next ensuing sections.

(1) *First View—Conclusiveness of Bill.*—The first view is that the enrolled act, signed by the presiding officers of both houses and by the executive, is the sole expositor of its own contents and the conclusive evidence of its existence and valid enactment, and that it is not allowable to look to the journals of the houses or to other extrinsic sources for the history of the act or its provisions, or to attack the manner of its enactment.<sup>2</sup>

on the passage of the bill. In *Ryan v. Lynch* it appeared from the journal that the bill was read twice in the senate; but the journal was silent as to a third reading, and did not show any call of the ayes and noes on the final passage of the bill. The decision was that as the proceedings in the senate, certified by the secretary of state, were competent proof of the facts therein stated, the failure of the journal to show a call of the ayes and noes was fatal to the bill. Nothing was said as to the effect to be given to the mere silence of the senate journal as to the third reading of the bill. Indeed, we do not find that any of the numerous decisions of the state court relating to the passage of bills by the legislature have modified or overruled the doctrine announced in *Schuyler Co. v. People*, 25 Ill. 181. With that doctrine we are entirely satisfied. It is in harmony with the adjudications in many of the states whose constitutions have provisions similar to those in the constitution of *Illinois* which we have been considering."

In *Burritt v. Com'rs of State Contracts*, 120 Ill. 332, the court recognized the rule in *Schuyler County v. People*, 25 Ill. 181, that where the journal is silent as to matters not specifically required to be entered in it, the requisite facts will be presumed to exist, but decided that the act under consideration not being authenticated was not even *prima facie* valid, and therefore the doctrine of presumption could not apply.

1. *South Ottawa v. Perkins*, 94 U. S. 260; *Walnut v. Wade*, 103 U. S. 683; *Ohio v. Frank*, 103 U. S. 697; *Post v. Kendall County*, 105 U. S. 667.

In *South Ottawa v. Perkins*, 94 U. S. 260, Bradley, J., delivering the opinion of the court, said: "It is declared by the judiciary act as a fundamental principle that the laws of the several states, except where the constitution, treaties, or statutes of the *United States* shall otherwise require or provide, shall be

regarded as rules of decision in trials at common law in the courts of the *United States* in cases where they apply.' And this court has always held that the laws of the states are to receive their authoritative construction from the state courts, except where the federal constitution and laws are concerned; and the state constitutions, in like manner, are to be construed as the state courts construe them. This has been so often laid down as the proper rule and is in itself so obviously correct that it is unnecessary to refer to the authorities. If, therefore, the law in question had never been passed upon by the state courts, the courts of the *United States* would nevertheless be bound to give to the constitution of *Illinois* the same construction which the state courts give to it, and to hold a pretended act of the legislature void, and not a law which the state courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same state, differing as to the validity and existence of a statute of that state, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decision upon the other. As a matter of propriety and right, the decision of the state courts on the question as to what are the laws of the state is binding upon those of the *United States*."

2. The following authorities tend to support this view:

*United States.*—*Field v. Clark*, 143 U. S. 649. In this case the validity of the *Tariff Act* of 1890, as officially promulgated, was attacked, on the ground that it appeared from the congressional records of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by act of Congress having reference to the act (House bill 9416) that a section of

the bill, as it finally passed, was not in the bill authenticated by the signatures of the presiding officers of the respective houses of Congress and approved by the President. Harlan, J., who delivered the opinion of the court, after observing that the precise question before the court was the nature of the evidence upon which a court may act when the issue is made as to whether a bill was or was not passed by Congress, and that the question was presented for the first time in that court, continued: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the court to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the constitution." The court distinguished the case of *Gardner v. Barney*, 6 Wall. (U. S.) 511, on the ground that in that case the journals were looked to only to ascertain the time when an act of Congress took effect, not to impeach the validity of the act. *South Ottawa v. Perkins*, 94 U. S. 260; *Walnut v. Wade*, 103 U. S. 683; and *Post v. Kendall County*, 105 U. S. 667, were also distinguished

on the ground that the principle in the text was not passed on, but, in deference to the decisions of the Supreme Court of *Illinois* interpreting the constitution of that state, the United States courts decided that the journals might be examined to determine the validity of an enrolled act.

*California*.—*Sherman v. Story*, 30 Cal. 253; 89 Am. Dec. 93, overruling *Fowler v. Peirce*, 2 Cal. 165; *People v. Burt*, 43 Cal. 560. But after these decisions a new constitution was adopted, and in *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 722, *Sawyer, J.*, said: "While we think the case of *Sherman v. Story*, 30 Cal. 253, correctly decided under the constitution as it then was, we are of the opinion that the change in the constitution requires a change in the rule. When *California* adopted from other states the provision now found in its constitution, substantially as found in the constitution of *Illinois*, it must be deemed to have adopted with the provision the settled construction put upon it by the courts of the state from which it was taken."

In *Weill v. Kenfield*, 54 Cal. 111, the journals were examined, though the question at issue was neither discussed nor decided. In a later case, *Oakland Paving Co. v. Hilton*, 69 Cal. 489, the court asserted its right to examine the journals as to the proper passage of a constitutional amendment, but expressly distinguished *Sherman v. Story*, 30 Cal. 253, on the ground that that case concerned only the enactment of statutes.

In *People v. Dunn*, 80 Cal. 212, it was decided that if the journals were looked to, a defect in the enactment of a law must affirmatively appear in order to render the latter void; but the court said: "The case does not present the question as to the power of this court to go behind the enrolled bill in order to determine from the journals of the two houses whether the bill was properly passed or not." It would, therefore, appear that *Sherman v. Story*, 30 Cal. 253; 89 Am. Dec. 93, is still law in this state.

*Connecticut*.—*Eld v. Gorham*, 20 Conn. 8.

*Indiana*.—*Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Madison v. Burford*, 93 Ind. 383; *Stout v. Grant County*, 107 Ind. 343.

In *Edger v. Randolph County*, 70 Ind. 331, the rule in the text was up-

held, but the journals were consulted to ascertain the intent of the legislature in passing the bill which the court was construing. In *Evansville v. State*, 118 Ind. 434, the journals were examined to ascertain if a bill had passed over the governor's veto, but the court expressly distinguished the leading cases above, recognizing the general principle in the text.

It was formerly the rule in *Indiana* to consult the journal to impeach the enrolled bill, but the doctrine was overruled. See *Skinner v. Deming*, 2 Ind. 558; 54 Am. Dec. 463; *Coleman v. Dobbins*, 8 Ind. 156; *McCulloch v. State*, 11 Ind. 424; *Coburn v. Dodd*, 14 Ind. 347.

*Louisiana*.—*Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602; *Whited v. Lewis*, 25 La. Ann. 568. Compare *Hollingsworth v. Thompson* (45 La. Ann.), 12 So. Rep. 1. In this case the journals were admitted in evidence, no objection being made to them, so that the appellate court did not directly decide the question of admissibility, but relying on the *dictum* in *Gardner v. Barney*, 6 Wall. (U. S.) 499 (since distinguished and disapproved on the point in question, in *Field v. Clark*, 143 U. S. 678), and without citing or mentioning *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602 (relied on in *Field v. Clark*, 143 U. S. 678), decided that the original engrossed house bill was admissible in evidence in connection with the journals kept of legislative proceedings, to determine the true character and value of the published volumes which purport to be the official journals. See also *State v. Secretary of State*, 43 La. Ann. 613.

*Maine*.—*Weeks v. Smith*, 81 Me. 538; relied on in *Field v. Clark*, 143 U. S. 676.

*Mississippi*.—*Green v. Weller*, 32 Miss. 650; *Greene v. Weller*, 33 Miss. 735; *Swann v. Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512; 56 Am. Rep. 825 (overruling *Brady v. West*, 50 Miss. 68, and relied on in *Field v. Clark*, 143 U. S. 676).

*Nevada*.—*State v. Swift*, 10 Nev. 176; *State v. Rogers*, 10 Nev. 250; 21 Am. Rep. 738; *State v. Glenn* 18 Nev. 34. Constitutional amendments, however, must be entered at length on the journals and the compliance with this requirement will be investigated by examining the journal. *State v. Tufty*, 19 Nev. 391.

*New Jersey*.—*State v. Young*, 32 N. J. L. 29; chiefly relied on in *Field v. Clark*, 143 U. S. 673; *Passaic County v. Stevenson*, 46 N. J. L. 184; *Standard Underground Co. v. Attorney-Gen'l*, 46 N. J. Eq. 276; 19 Am. St. Rep. 394.

*New York*.—In this state the question of the conclusiveness of the enrolled bill seems never to have been squarely met and decided. Nearly all the cases attacking the validity of the enactments of laws have arisen on the point whether or not bills, requiring by the constitution for their passage a two-thirds vote, have been validly passed. Peculiar provisions of the constitution and statutes have influenced the decisions. In such cases, it is provided by statute that the addition of the words "by a two-thirds vote" to the certificate of the secretary of state inserted in the published laws shall be presumptive evidence that the bill was certified by the presiding officers as having been passed by the assent of two-thirds of the members elected to each house, and the absence of such words shall be presumptive evidence that the bill was not so certified by the presiding officers. Under this statute, the courts decided that the printed statute book was not conclusive, and that the enrolled act on file in the office of the secretary of state could be examined to see whether it was properly certified. *People v. Purdy*, 2 Hill (N. Y.) 34; 4 Hill (N. Y.) 394; *De Bow v. People*, 1 Den. (N. Y.) 9; *Commercial bank v. Sparrow*, 2 Den. (N. Y.) 97; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9; *Warner v. Beers*, 23 Wend. (N. Y.) 103; *Hunt v. Van Alstyne*, 25 Wend. (N. Y.) 603.

It is also provided by statute that "no bill shall be deemed to have been passed by the assent of two-thirds of the members elected to each house unless so certified by the presiding officer of each house." And under this statute it was held that where the passage by a proper vote was not shown on the face of the enrolled bill, the law was invalid. *People v. Com'rs of Highways*, 54 N. Y. 276; 13 Am. Rep. 581.

In a later case, however, where the indorsement of the presiding officer of one house of the legislature failed to state either that the bill had passed by the requisite majority, or that it had not, it was held that the journal of that house could be examined to ascertain the fact, and, the journal showing that the bill had been properly passed, the law was held valid. *Rumsey v. New*

York, etc., R. Co., 130 N. Y. 92, apparently overruling *People v. Com'rs of Highways*, 54 N. Y. 276; 13 Am. Rep. 581, on the effect of the defective certificate,

It will be seen that in these cases it has been decided only that where the printed statute is attacked, the original bill can be inspected; and also, where the bill is defective on its face, that either the law is void or that the journal may be examined to ascertain the facts. In none of them was it decided that the duly authenticated bill, valid on its face, on file in the office of the secretary of state, could be impeached by the journal.

In *People v. Petrea*, 92 N. Y. 128, the verdict of the jury in a criminal case was attacked on the ground that the law under which the grand jurors, who found the indictment, were appointed, was invalid, under the constitutional provision forbidding the passage of a "local or private bill for selecting, drawing, summoning, or impaneling grand or petit jurors," and an offer was made to show by the legislative journals that the said act had not been reported to the legislature by the commissioners appointed by law to revise the statutes, and so was not within the exception of a section of the constitution exempting from the operation of the aforesaid provision bills reported by the said commission. The offer was rejected, and on appeal held to be error, though the case was decided against the appellant, on the ground that an amendment to a "local bill" is not in the same category with the local bill itself as far as its passage is concerned. The court said that the case was of the same nature as *People v. Purdy*, 2 Hill (N. Y.) 31, but arose upon a different limitation of legislative power, and continued: "The proof offered did not contradict any fact asserted on the face of the statute, nor, so far as appears, in any legislative record. On the contrary, the offer was to show by the journal of the legislature and by the original act the facts averred in the plea. The constitution would afford very slight protection against legislative usurpation; and the objects sought to be accomplished by the amendment in question could be easily frustrated if the mere fact that the legislature had passed a local or private bill in one of the enumerated cases created a conclusive presumption that the bill was originally reported by commis-

sioners and was within the exception of the constitution. The tendency of judicial authority supports the proposition that whenever a question arises as to the constitutionality of a statute, the court may resort to any source of information which in its nature is original evidence of any fact relevant to the inquiry." This statement is a *dictum*, as are those to the same general effect in *Warner v. Beers*, 23 Wend. (N. Y.) 125; *People v. Purdy*, 4 Hill (N. Y.) 384; *De Bow v. People*, 1 Den. (N. Y.) 14.

To the contrary is the following from opinion in *People v. Devlin*, 33 N. Y. 279; 88 Am. Dec. 377. Here the court said: "I am of opinion that the legislative journals were not legitimate evidence to impeach the statute produced. They are not made evidence by the constitution. They are not made so by the statute; they were never made so at common law. They are doubtless evidence from the necessity of the case, on grounds of public convenience and from the public character of the facts they contain, to prove the proceedings of the body whose records they are, because the constitution requires them to be kept. Whenever any act of proceedings of such a body becomes necessary to be shown as evidence, such journals may be received; but to impeach the force and effect of a solemn statute duly certified, no authority can be found within the limits of common research to admit them to be legitimate evidence, but much authority may be found to the contrary;" *citing* cases in other states to the effect that the journal cannot be used to impeach the validity of an enrolled bill. See also *People v. Chenango County*, 8 N. Y. 327.

Again in *People v. Com'rs of Highways*, 54 N. Y. 279; 13 Am. Rep. 581, the words of Johnson, J., were: "When it is necessary to inquire by what vote a law was passed, the judges are to determine from the printed statutes, or from the laws on file in the secretary of state's office, whether the requisite vote was received; upon such an inquiry the printed volume is presumptively correct and the original act is conclusive." While in *Rumsey v. New York*, etc., R. Co., 130 N. Y. 92, this expression of opinion was given by Haight, J.: "It is quite possible, however, that the courts would not be justified in going back of the original act on file in the secretary of state's office and the

In *England*, the enrolled statute on file in the proper office has long been held conclusive,<sup>1</sup> and such, it may be said, was the rule of the common law in the *United States*.<sup>2</sup>

By most constitutions it is provided that a journal must be kept, but the particular method of keeping it and of its authentication

certificates thereto attached for the purpose of impeaching them;" citing *People v. Devlin*, 33 N. Y. 269; 88 Am. Dec. 377.

The weight of opinion, therefore, in *New York* seems to be in favor of the conclusiveness of the enrolled bill.

*North Carolina*.—*Brodnax v. Groom*, 64 N. Car. 244; *State v. Robinson*, 81 N. Car. 409, disapproving *dictum* in *Gatlin v. Tarboro*, 78 N. Car. 119.

*Pennsylvania*.—*Kilgore v. Magee*, 85 Pa. St. 412; *Com. v. Martin*, 107 Pa. St. 185; *Speer v. Plank Road Co.*, 22 Pa. St. 376.

In *Southwark Bank v. Com.*, 26 Pa. St. 446, the journals were looked to, but not to impeach the validity of the statute.

*Texas*.—*Central R. Co. v. Hearne*, 32 Tex. 546; *Blessing v. Galveston*, 42 Tex. 641; *Houston, etc., Co. v. Odum*, 53 Tex. 343; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Usener v. State*, 8 Tex. App. 177.

In *Hunt v. State*, 22 Tex. App. 396, it was decided that the courts could go to the journals to ascertain whether matters affirmatively required by the constitution to be entered in journals were so entered, though as to other matters the enrolled bill was said to be conclusive.

In *Ex parte Tipton*, 28 Tex. App. 438, the courts asserted the general principle that the enrolled bill is conclusive, citing the leading cases in this note, but also cited *Hunt v. State*, 22 Tex. App. 396, without expressly disapproving it, and decided that the principal case did not come within the doctrine of *Hunt v. State*. But in *Williams v. Taylor*, 84 Tex. 667, it was definitely decided in a well-considered opinion that the enrolled bill is conclusive.

*Vermont*.—The law on this point is not settled in this state. There is, however, an intimation as to the rule by *Prentiss, J.*, of the United States district court, *In re Welman*, 20 Vt. 656, where it is said: "By a standing general enactment, the act, when approved and signed, is to be forthwith lodged in the department of state and published; and the act so lodged in the department

of state, or a certified transcript or authorized printed copy of it, is, of course, the only proper evidence, not only of its existence as a law, but of the time of its commencement."

1. *Rex v. Arundel*, Hob. 110; 12 Coke 58; *College of Physicians, etc., v. Herbert*, 3 Keb. 587.

"But now suppose that the journals were in every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which, being a high record, must be tried by itself, *teste meipso*. Now, journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity—neither have they always been. They are like dockets of prothonotaries, or the particular to the king's patent. . . . The journal is of good use for the observation of the generality and materiality of proceedings and deliberations as to the three readings of any bill, the intercourses between the two houses and the like; but when the act is passed the journal is expired. And in this journal there appears but one reading of the bill in the upper house when it passed, which is unlikely." *Rex v. Arundel*, Hob. 110.

2. *Sherman v. Story*, 30 Cal. 253, 275; 89 Am. Dec. 93; *People v. Burt*, 43 Cal. 560; *Pacific R. Co. v. Governor*, 23 Mo. 363; 66 Am. Dec. 673.

In *State v. Young*, 32 N. J. L. 29, *Beasley, C. J.*, said: "This doctrine, which is founded on still earlier decisions, reported in the year books, has been, I am satisfied, the undisputed law of the English courts from that day to the present. . . . Nor can it, I think, be denied that a statute properly attested by seal, everywhere in the common law, is regarded as a method of evidence, equal and equivalent to the copy of the judgment formally exemplified. They each import absolute verity; to neither can the plea of *nul tiel* record be applied; their existence and contents can be tried only by inspection. No English judge, as far as I am aware, has ever dropped a hint that, as an instrument of evidence, a statute does not stand on the same level with a judgment. I think that

is not generally specified; while, on the other hand, the method of authenticating and filing the enrolled bill is either so specifically prescribed, or was so well established,<sup>1</sup> that it may be presumed that the framers of the constitutions intended that the authenticated bill and not the journals should constitute the solemn record.<sup>2</sup> The constitutional requirement that journals shall be kept, is rather to insure publicity to legislative proceedings than to

all persons must admit that this is the rule of the common law."

See in 37 Albany L. J. 428, an article by Guy C. H. Corliss, Esq. See also cases cited *infra*, this title, *Second View—Impeachment by Journal*.

1. "From the earliest times, so far as I have been able to ascertain, it has been the invariable course of legislative practice in this state, for the speaker of each house to sign the bill as finally engrossed and passed. It is likewise certified by the indorsement of the clerk of the house in which it originated. With these attestations of authenticity upon it, it is then filed in the office of the secretary of state. This has been the course of proceeding from certainly a very remote period to the present time; under our present constitution the written approval of the governor is requisite. There seems, therefore, to be no doubt whatever that these copies, thus authenticated and filed, are to be regarded as enrolled bills, corresponding in their general character to, and partaking, if not in all, at least in most respects of, the nature of parliamentary rolls. In the statute book they are frequently referred to as enrolled bills; and if we go back to provincial times, we find indorsed upon these copies, with the executive approval, a direction to enroll them, which meant nothing more than that they were to be filed. These are the characteristics and nature of the copies of legislative bills deposited according to the ordinary routine in the office of the secretary of state." Beasley, C. J., in *State v. Young*, 32 N. J. L. 33.

2. *Pacific R. Co. v. Governor*, 23 Mo. 363; 66 Am. Dec. 673; *Sherman v. Story*, 30 Cal. 278; 89 Am. Dec. 93; *Evans v. Browne*, 30 Ind. 533; 95 Am. Dec. 710.

In *State v. Young*, 32 N. J. L. 35, Beasley, C. J., said: "The first consideration which naturally suggests itself in this connection is, that the legislature has, with care and a wise precaution, adopted a mode of certifying its own acts in an authentic form. And,

indeed, so completely has this purpose been effected, that it appears hardly practicable to suggest additional safeguards. To the correctness of the present bill, for example, we have the signature of the presiding officer of each house. In its present form, it was exhibited to the governor as the bill which had been enacted, and as such received his approval, as is evidenced by his signature. It was then immediately made public by being filed in the office of the secretary of state. These are the sanctions which the legislature has provided for the authentication of its own acts, both to the public and to the judicial tribunals; and the question is therefore presented, whether such authentication must not be deemed conclusive, or in other words, whether the legislature does not possess the right of declaring what shall be the supreme evidence of the authenticity of its own statutes. This question, in my opinion, must be answered in the affirmative. How can it be otherwise? The body that passes a law must of necessity promulgate it in some form. In point of fact, the legislative power over the certification of its own laws is of necessity almost unlimited, as will appear from the circumstance that, with regard to the body of an act, there is no evidence of any kind but that which the legislature itself furnishes in the copy deposited in the state archives. The journals do not purport to contain more than the amendments, so that the legislative control is absolute with regard to the essential parts of the law which are enacted. We are also to reflect that it is the power which passes the law, which can best determine what the law is which itself has created. The legislature in this case has certified to this court, by the hands of its two principal officers, that the act now before us is the identical statute which it approves, and, in my opinion, it is not competent for this court to institute an inquiry into the truth of the fact thus solemnly attested."

In *Williams v. Taylor*, 84 Tex. 667,

make the journals the best or the conclusive evidence on the question whether a bill was in fact passed.<sup>1</sup>

(2) *Second View—Impeachment by Journal.*—The second view is that the journals may be looked to in order to ascertain whether constitutional provisions have been complied with<sup>2</sup> and

Gaines, J., said: "Our constitution provides that after the passage of a bill it shall be signed by the presiding officer of each house, in the presence of the house; and we are of the opinion that when a bill has been so signed, and has been submitted to and approved by the governor, it was intended that it should afford conclusive evidence that the act had been passed in the manner required by the constitution. Such being the rule of the common law, we think, in the absence of something in the constitution expressly showing a contrary intention, it is fair to presume that it was intended that the same rule should prevail in this state. There is no provision of the constitution indicating in any direct manner such contrary intention; and the fact that it is provided that journals shall be kept, and that certain things shall be entered thereon, we think insufficient to show any such purpose."

1. *Field v. Clark*, 143 U. S. 670; *Williams v. Taylor*, 84 Tex. 667; *Passaic County v. Stevenson*, 46 N. J. L. 184. See also *Ex parte Wren*, 63 Miss. 533; 56 Am. Rep. 825; *State v. Young*, 32 N. J. L. 29; *Pacific R. Co. v. Governor*, 23 Mo. 369; 66 Am. Dec. 673; *Evans v. Browne*, 30 Ind. 526; 95 Am. Dec. 710.

In *Weeks v. Smith*, 81 Me. 438, it was said by Haskell, J.: "Legislative journals are made amid the confusion of a dispatch of business, and are therefore much more likely to contain errors than the certificates of the presiding officers are to be untrue. Moreover, public policy requires that the enrolled statutes of our state, fair upon their faces, should not be put in question, after the public have given faith to their validity. No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and president of the senate and approved by the governor, is a statute or not."

In *Williams v. Taylor*, 84 Tex. 667, Gaines, J., said: "The journals are the work of the clerks, perhaps hastily performed, and, as the official copies in this state, in some instances at least,

will show, their reading is frequently dispensed with by vote. When such is the case, the journals are merely the work of the recording clerk, and even when read there is no assurance that the reading has led to the correction of every error."

2. The following authorities tend to support this view:—

*Alabama.*—*Dew v. Cunningham*, 28 Ala. 466; 65 Am. Dec. 362; *State v. Buckley*, 54 Ala. 599; *Harrison v. Gordy*, 57 Ala. 49; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Walker v. Griffith*, 60 Ala. 361; *Moog v. Randolph*, 77 Ala. 597; *Sayre v. Pollard*, 77 Ala. 608; *Abernathy v. State*, 78 Ala. 411; *Stein v. Leeper*, 78 Ala. 517; *Hall v. Steele*, 82 Ala. 562; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Henderson v. State*, 94 Ala. 95.

*Arkansas.*—*Burr v. Ross*, 19 Ark. 250; *Vinsant v. Knox*, 27 Ark. 266; *English v. Oliver*, 28 Ark. 317; *State v. Little Rock, etc., R. Co.*, 31 Ark. 701; *Worthen v. Badgett*, 32 Ark. 496; *Smithee v. Garth*, 33 Ark. 17; *State v. Crawford*, 35 Ark. 237; *Chicot County v. Davies*, 40 Ark. 200; *Smithee v. Campbell*, 41 Ark. 471; *Webster v. Little Rock*, 44 Ark. 536; *Davis v. Gaines*, 48 Ark. 370; *Dow v. Beidelman*, 49 Ark. 325; *Glidewell v. Martin*, 51 Ark. 559.

*Colorado.*—*In re Roberts*, 5 Colo. 525; *Hughes v. Felton*, 11 Colo. 489. Compare *In re General Appropriation Bill*, 16 Colo. 539.

*Dakota.*—The question under discussion seems not to have been determined in this state, though it has been decided that where the journal is silent, compliance with provisions not required to be entered therein will be presumed. *Territory v. O'Connor*, 5 Dakota 397.

*Florida.*—*State v. Brown*, 20 Fla. 407; *State v. Deal*, 24 Fla. 293.

*Illinois.*—*Spangler v. Jacoby*, 14 Ill. 297; *Turley v. Logan County*, 17 Ill. 151; *People v. Hatch*, 19 Ill. 283; *Prescott v. Illinois, etc., Canal*, 19 Ill. 324; *Schuyler County v. People*, 25 Ill. 181; *People v. Starne*, 35 Ill. 121; *Wabash R. Co. v. Hughes*, 38 Ill. 174; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Bed-*



ard v. Hall, 44 Ill. 91; Grob v. Cushman, 45 Ill. 119; People v. De Wolf, 62 Ill. 253; Hensoldt v. Petersburg, 63 Ill. 157; Ryan v. Lynch, 68 Ill. 160; Happel v. Brethauer, 70 Ill. 166; 22 Am. Rep. 70; Miller v. Goodwin, 70 Ill. 659; Plummer v. People, 74 Ill. 361; Larrison v. Peoria, etc., R. Co., 77 Ill. 11; Binz v. Weber, 81 Ill. 288; People v. Loewenthal, 93 Ill. 191; Wenner v. Thornton, 98 Ill. 156; Burritt v. Com'rs State Contract, 120 Ill. 332; Illinois Cent. R. Co. v. People (Ill. 1892), 33 N. E. Rep. 174; Leach v. People, 122 Ill. 420; South Ottawa v. Perkins, 94 U. S. 260; Walnut v. Wade, 103 U. S. 683; Ohio v. Frank, 103 U. S. 697; Post v. Kendall County, 105 U. S. 667.

*Iowa.*—Koehler v. Hill, 60 Iowa 543; *distinguishing* State v. Clare, 5 Iowa 509, and Duncombe v. Prindle, 12 Iowa 1, on the ground that those cases decided only that where there is a conflict between the printed act and the enrolled act, the latter is the ultimate proof of the legislative will. It may be said, however, that Koehler v. Hill, 60 Iowa 543, decided only that the journals might be consulted for the purpose of inquiring into the validity of a constitutional amendment.

*Kansas.*—Haynes v. Heller, 12 Kan. 384, Reporter's Note; Division of Howard County, 15 Kan. 194; Leavenworth County v. Higginbotham, 17 Kan. 62; Prohibitory Amendment Cases, 24 Kan. 700; State v. Francis, 26 Kan. 724; *In re* Vanderberg, 28 Kan. 243; Weyand v. Stover, 35 Kan. 545; State v. Robertson, 41 Kan. 200; Chicago, etc., R. Co. v. Manhattan, 45 Kan. 419.

*Kentucky.*—In this state the question has not been squarely met, but there is an intimation that the journals are evidence. Auditor v. Haycraft, 14 Bush (Ky.) 288. See Com. v. Jackson, 5 Bush (Ky.) 680.

*Maryland.*—Berry v. Baltimore, etc., R. Co., 41 Md. 446; 20 Am. Rep. 69; Legg v. Annapolis, 42 Md. 203; Strauss v. Heiss, 48 Md. 292. Formerly under the old constitution in this state the enrolled bill had been held conclusive. See Fouke v. Fleming, 13 Md. 392; Annapolis v. Harwood, 32 Md. 471.

*Michigan.*—Southworth v. Palmyra, etc., R. Co., 2 Mich. 287; Green v. Graves, 1 Dougl. (Mich.) 351; Hurlbut v. Britain, 2 Dougl. (Mich.) 191; People v. Mahaney, 13 Mich. 481; People v. Onondaga, 16 Mich. 254; Steck-

ert v. East Saginaw, 22 Mich. 104; Pack v. Barton, 47 Mich. 520; Attorney Gen'l v. Joy, 55 Mich. 94; Callaghan v. Chipman, 59 Mich. 610; Attorney Gen'l v. Rice, 64 Mich. 385; People v. McElroy, 72 Mich. 446; Sack-rider v. Saginaw County, 79 Mich. 59; Stow v. Grand Rapids, 79 Mich. 595; Rode v. Phelps, 80 Mich. 598; Caldwell v. Ward, 83 Mich. 13; People v. Burch, 84 Mich. 408.

*Minnesota.*—Ramsey County v. Heenan, 2 Minn. 330; State v. Hastings, 24 Minn. 78; Burt v. Winona, etc., R. Co., 31 Minn. 472; State v. Peterson, 38 Minn. 143; Lincoln v. Haugan, 45 Minn. 451. But see Comstock v. Tracey, 46 Fed. Rep. 162, where the court refused to consult the journals in a collateral proceeding. State v. Gould, 31 Minn. 189.

*Missouri.*—State v. Mead, 71 Mo. 270, *overruling* Pacific R. Co. v. Governor, 23 Mo. 353; 66 Am. Dec. 673, on the ground of a change in the constitution. See Bradley v. West, 60 Mo. 33, where it is intimated that the enrolled bill is not conclusive.

In an early *Missouri* case the journals were examined to ascertain whether a constitutional amendment received a proper majority. State v. McBride, 4 Mo. 303; 29 Am. Dec. 636.

*Nebraska.*—Hull v. Miller, 4 Neb. 503; State v. Leidtke, 9 Neb. 462; Cottrel v. State, 9 Neb. 125; Ballou v. Black, 17 Neb. 389; State v. McLelland, 18 Neb. 236; State v. Robinson, 20 Neb. 96; *In re* Groff, 21 Neb. 647; 59 Am. Rep. 859; State v. Van Duyn, 24 Neb. 586; State v. Moore (Neb. 1893), 55 N. W. Rep. 299.

*New Hampshire.*—Opinion of Justices, 35 N. H. 579; Opinion of Justices, 45 N. H. 607; Opinion of Justices, 52 N. H. 622.

*Ohio.*—State v. Moffitt, 5 Ohio 358; Miller v. State, 3 Ohio St. 475; Fordyce v. Godman, 20 Ohio St. 1; State v. Smith, 44 Ohio St. 348; State v. Kiese-wetter, 45 Ohio St. 254; State v. Rab-bitt, 46 Ohio St. 178.

*Oregon.*—Mumford v. Sewall, 11 Oregon 71; 50 Am. Rep. 462; State v. Wright, 14 Oregon 365; Currie v. Southern Pac. R. Co., 21 Oregon 566.

*South Carolina.*—State v. Platt, 2 S. Car. 150; 16 Am. Rep. 651; State v. Small, 11 S. Car. 262; Walker v. State, 12 S. Car. 200; State v. Hagood, 13 S. Car. 46.

*Tennessee.*—State v. McConnell, 3 Lea (Tenn.) 332; Gaines v. Horrigan,

whether the enrolled bill is identical with that passed.<sup>1</sup> It is to be presumed that the requirements of the constitution were followed, and an omission in the journals of matters which the constitution does not require to be entered there will not affect the validity of the statute;<sup>2</sup> otherwise as to those matters, the entry

4 Lea (Tenn.) 608; Williams v. State, 6 Lea (Tenn.) 549; Brewer v. Huntingdon, 86 Tenn. 732; State v. Algood, 87 Tenn. 163; Nelson v. Haywood Co., 91 Tenn. 596.

*Virginia.*—Wise v. Biggar, 79 Va. 269.

*West Virginia.*—Osburn v. Staley, 5 W. Va. 85; 13 Am. Rep. 640.

*Wisconsin.*—Watertown v. Cady, 20 Wis. 501; Bound v. Wisconsin Cent. R. Co., 45 Wis. 543; Meracle v. Down, 64 Wis. 323.

*Wyoming.*—Brown v. Nash, 1 Wyoming Ter. 85; Union Pac. R. Co. v. Carr, 1 Wyoming Ter. 96.

1. "If the formalities of the enrollment do not prevent us from looking into the journals, in order to see that the bill had its proper readings, of what value will that be to us, if we are estopped by the enrollment from inquiry as to what bill the journals have relation? To give full force and effect to the constitution, if an issue of identity is raised, we must look into the bill or act, at each step of its progress, to determine that that which has received part of the formalities requisite to its validity as law is the same with that which has received the residue of such formalities. Hitherto this question has been considered in the simplest form in which it is likely to arise—that is, upon the supposition that the act, regarded as a whole, is not the same, as appearing by the enrollment, with that which has passed through the preceding pages of enactment. In regard to this assumed case, we have no doubt but that we may look at the journals for the purpose of ascertaining the action of the houses, and into any evidence that may be appropriate to show the nature of the bill, the subject of such action." Willard, J., State v. Platt, 2 S. Car. 150; 16 Am. Rep. 652.

2. Clarke v. Jack, 60 Ala. 271; Walker v. Griffith, 60 Ala. 361; Webster v. Little Rock, 44 Ark. 536; State v. Little Rock, etc., R. Co., 31 Ark. 717; English v. Oliver, 28 Ark. 317; Vinsant v. Knox, 27 Ark. 279; Chicot County v. Davies, 40 Ark. 200; Worthen v. Badgett, 32 Ark. 496; Smithee v.

Garth, 33 Ark. 1; People v. Dunn, 80 Cal. 211; 13 Am. St. Rep. 118; Territory v. O'Connor, 5 Dakota 397; State v. Brown, 20 Fla. 407; Butler v. State, 89 Ga. 821; Larrison v. Peoria, etc., R. Co., 77 Ill. 11; Wabash R. Co. v. Hughes, 38 Ill. 178; Schuyler County v. People, 25 Ill. 181; McCulloch v. State, 11 Ind. 424; Weyand v. Stover, 35 Kan. 545; State v. Francis, 26 Kan. 724; Hollingsworth v. Thompson (45 La. Ann.), 12 So. Rep. 1; Barry v. Baltimore, etc., R. Co., 41 Md. 446; 20 Am. Rep. 69; State v. Peterson, 38 Minn. 143; State v. Hastings, 24 Minn. 78; State v. Mead, 71 Mo. 266; Taylor v. Wilson, 17 Neb. 88; Miller v. State, 3 Ohio St. 475; Currie v. Southern Pac. Co., 21 Oregon 566; State v. Algood, 87 Tenn. 163; State v. McConnell, 3 Lea (Tenn.) 333; Williams v. State, 6 Lea (Tenn.) 549; Blessing v. Galveston, 42 Tex. 641; disapproved in Hunt v. State, 22 Tex. App. 396; Hays v. State (Tenn. 1887, not reported), cited by Snodgrass, J., in Brewer v. Huntingdon, 86 Tenn. 737; State v. Rogers, 22 Oregon, 348; Glidewell v. Martin, 51 Ark. 559; Hall v. Steele, 82 Ala. 562; Illinois v. Illinois Cent. R. Co., 33 Fed. Rep. 760.

"While the journals furnish evidence of legislative proceedings, so far as they go, yet courts are not bound to hold that nothing was done except what appears therein. Their silence is conclusive only in those matters where the constitution requires them affirmatively to show the action taken. It is notorious that these journals are loosely kept and their entries often unintelligible; that they are constructed out of hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly; that the reading of them each morning is frequently dispensed with, and there is not a single guaranty of their accuracy or their truth, which is not in practice usually ignored. Nobody vouches for them, and upon the final passage of a bill, they are not searched to know whether they contain enough to insure the law's validity." Smith, J., in Chicot County v. Davies, 40 Ark. 215.

In Glidewell v. Martin, 51 Ark. 559,

of which is required and which the journals do not show.<sup>1</sup> If it appears from the journals that the requirements of the constitution were not observed, the statute may not stand, even though the

the court said: "From considerations of public policy and because of the respect due the action of a co-ordinate department of government, the courts long since began to supply the omission of journal clerks by presumptions as to the regularity of the proceedings of the general assembly. This has been found most salutary; and the attitude assumed by the judiciary in this regard has gone far towards establishing and maintaining public confidence in the stability of legislative action.

. . . The courts are gravitating towards the English rule; . . . for while they say that the enrolled bill is not conclusive of the valid enactment of a law, and that we may look beyond it to the journals, they supply, by presumption, everything necessary to its validity, save when the journal affirmatively shows a violation of the constitution."

The constitution of *Oregon* requires that every bill shall be read section by section on its final passage, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays. But there is no provision that either of these facts shall be entered in the journal except the vote shall be entered when demanded by two members, or upon the passage of a bill notwithstanding the objections of the executive. Where the journal failed to state the compliance with these constitutional provisions, it was held that it would not be presumed from the mere silence of the journal that either house had exceeded its authority or disregarded constitutional requirements in the passage of legislative acts. *State v. Rogers*, 22 *Oregon* 348.

Where the journals of the two houses failed to show the passage of a bill at the time it purported to have been passed, this was held not to indicate that it was not in fact passed at that time, for the omission might have been accidental. *Nelson v. Haywood County*, 91 *Tenn.* 596.

It has been held that since an amendment to a pending bill is not required by either the constitution or the statute to be printed in the journals, and since the constitution requires that concurrence by one house in an amendment made by the other shall be evidenced by

a vote of a majority only of all the members, the absence of one of the amendments to a bill from the journal of the house does not make the act void. *Hollingsworth v. Thompson* (45 *La. Ann.*), 12 *So. Rep.* 1.

Where an entry appeared in the bound volume of the journal as of a date prior to the clerk's certificate made and dated on the day of adjournment, the entry was presumed to have been made before the adjournment, and to have been authorized. *Detroit v. Board of Assessors*, 91 *Mich.* 78.

1. See *supra*, this title, *Legislative Journal*. See also cases cited in last note.

"In the instance we are considering the constitution expressly requires that the journal shall show the fact of the signing of the bill by the presiding officer of each house, etc. This is an imperative requirement and as plain as the English language could make it. . . . Such fact cannot be presumed or established by any other evidence while the journals are in existence, because the constitution expressly requires the journals to show the fact and thereby, as long as said journals exist, makes them the best, the only, and the conclusive evidence of the fact. If there was not an express requirement that the journals should show the fact of signing, then the mere silence of the journals as to such signing would not affect the validity of the statute, because in such case, the legal presumption would prevail that the bill had been signed in the manner required." *Wilson, J., in Hunt v. State*, 22 *Tex. App.* 401.

"We think the only safe rule for interpreting clauses of the constitution which command certain things to be done or certain methods to be observed in the enactment of statutes, is to hold that when it is affirmatively shown by legal evidence that in the attempt to legislate, some mandate of the constitution has been disregarded, such attempt never becomes a law. We do not mean to be understood as affirming that in all cases the silence of the journals proves some constitutional requirement was omitted. It is only when the constitution requires that certain things shall be spread on the journal that its silence affects the constitutionality.

journals need not have shown this.<sup>1</sup> If the journals are lost or destroyed, the presumption is that the act is valid.<sup>2</sup>

This second view of the question is more or less the result of peculiar provisions in constitutions or statutes, which expressly or by implication make the journals evidence.<sup>3</sup> And even where the rule is followed, an inclination toward the first view has been expressed.<sup>4</sup> A reason for the rule has been said to be that the

The presumption in the absence of proof is always in favor of official propriety, and except as to those matters which the constitution declares shall appear in the journal, the rule is to infer everything was rightly done unless the journals show affirmatively that some constitutional command was disregarded." Stone, J., in *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; quoted in *Hunt v. State*, 22 Tex. App. 401.

1. *Brewer v. Huntingdon*, 86 Tenn. 737; *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *Currie v. Southern Pac. Co.*, 21 Oregon 566; *State v. Rogers*, 20 Oregon 348; *State v. Francis*, 26 Kan. 734; *Berry v. Baltimore*, etc., R. Co., 41 Md. 446; 20 Am. Rep. 69.

Although an enrolled bill, bearing the signatures of the presiding officers of the senate and house and the approval of the governor, was filed in the office of the secretary of state, it was held that it was not a law because the journal of the senate showed that "the bill failed to pass." *Currie v. Southern Pac. Co.*, 21 Oregon 566.

2. *Spangler v. Jacoby*, 14 Ill. 297.

3. *Simonton, J.*, in *Com. v. Martin*, 107 Pa. St. 192, said: "There are, it is true, some [cases] which hold a contrary doctrine, but most of these are influenced by the provisions of the modern constitutions on the subject of legislation, and hold doctrines which are opposed to those in our own recent cases declaring that 'when a bill has received the sanction of the senate and house of representatives and the executive's approval, it is a law, and the highest evidence of its authenticity is the enrollment in the secretary's office.'"

In *New Hampshire*, the constitution provides that the journals of the legislature shall be printed and published with the statutes passed. And, therefore, the court held that the journals were evidence of the history of the bill. *Opinion of Justices*, 35 N. H. 579.

In *Iowa*, journals certified by the secretaries of the houses of the legislature are made by statute proof of leg-

islative proceedings. *Koehler v. Hill*, 60 Iowa 552.

In *Sherman v. Story*, 30 Cal. 277; 89 Am. Dec. 93, the court, after stating that the common law made the enrolled bill a conclusive record, said: "There has been no departure from the principles of common law in this respect in the *United States*, except in instances where a departure has been grounded on or taken in pursuance of some express constitutional or statutory provision requiring some relaxation of the rule in order that full effect might be given to such provisions, and in such instances the rule has been relaxed by judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature."

"Were it not for the somewhat peculiar provision of our constitution, which requires that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect, a bill thus signed and approved would be conclusive of its validity and binding force as a law." *Walker, C. J.*, in *People v. Starne*, 35 Ill. 361.

In *Field v. Clark*, 143 U. S. 677, where the enrolled bill was held conclusive, the court said: "There are cases in other state courts which proceed upon opposite grounds from those we have indicated as proper, but it will be found upon examination that many of them rested upon constitutional or statutory provisions of a peculiar character which expressly or by necessary implication required or authorized the court to go behind the enrolled act when the question was whether the act as authenticated and deposited in the proper office was duly passed by the legislature."

4. "We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the legislature and

requirement that a journal should be kept imported that it should be evidence;<sup>1</sup> so it has been said that the rule is required by public policy.<sup>2</sup>

**IV. TIME OF TAKING EFFECT—1. Early Rule.**—By the common law, statutes took effect from the first day of the session of Parliament at which they were enacted, unless another day were named.<sup>3</sup> Even where an act declared that it should take effect "from and after the passing of the act," it was held to operate by legal fiction from the first day of the session.<sup>4</sup> This doctrine of relation was calculated to work gross injustice—in one instance having the effect of rendering that murder which was not so at the time it was committed.<sup>5</sup> The common-law rule was followed in several of the states of the Union until changed by statute.<sup>6</sup> And in *England* by Stat. Geo. III, ch. 13, it was declared that statutes should take effect only from the time they received the royal assent, and the former rule was abrogated, to use the words of the statute, because of "its great and manifest injustice."<sup>7</sup> Under this statutory rule, although the act expressly declares that it shall operate from a day named therein, yet if the royal assent is not given until a later day, it will not take effect until then.<sup>8</sup>

**2. When No Time Is Fixed.**—If no time is specified when a statute shall be in force, it becomes effective from and after its passage; that is, from and after the point of time when its existence is perfected.<sup>9</sup> When the governor's approval is necessary, an act

the executive to guard the public interest in this regard, or to become responsible for its neglect." Walker, C. J., in *People v. Starne*, 35 Ill. 136.

"The courts are gravitating toward the English rule, so thoroughly discussed by Mr. Justice Smith, in *Chicot County v. Davies*, 40 Ark. 200; for, while they say that the enrolled bill is not conclusive of the valid enactment of a law, and that we may look beyond it to the journals, they supply by presumption everything necessary to its validity, save where the journal affirmatively shows a violation of the constitution." Sandels, J., in *Glidewell v. Martin*, 51 Ark. 566.

1. *State v. Francis*, 26 Kan. 731; *Opinion of Justices*, 35 N. H. 580; *Hunt v. State*, 22 Tex. App. 404; *Brady v. West*, 50 Miss. 79; *State v. McClelland*, 18 Neb. 243; *Chicot County v. Davies*, 40 Ark. 211; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 651; *Legg v. Annapolis*, 42 Md. 221; *Fowler v. Peirce*, 2 Cal. 165; *Osborn v. Staley*, 5 W. Va. 91; 13 Am. Rep. 640.

2. *Brady v. West*, 50 Miss. 68; *Berry v. Baltimore*, etc., R. Co., 41 Md. 462; 20 Am. Rep. 69; *Rode v. Phelps*, 80 Mich. 508.

3. *Rex v. Thurston*, 1 Lev. 91; *Partridge v. Strange*, 1 Plow. 79; *Attorney Gen'l v. Panter*, 6 Bro. P. C. 553. Formerly in *England* the rolls of Parliament were strung together as one act, the only date being that of the assembling of Parliament. In that case the presumption was that the act took effect from the first day of the session, the record being the sole guide. *Latless v. Holmes*, 4 T. R. 660.

4. *Latless v. Holmes*, 4 T. R. 660.

5. *Rex v. Thurston*, 1 Lev. 91.

6. *North Carolina*.—*Weeks v. Weeks*, 5 Ired. Eq. (N. Car.) 111; 47 Am. Dec. 358; *Hamlet v. Taylor*, 5 Jones (N. Car.) 36; *State v. Bank of S. Car.*, 12 Rich. (S. Car.) 609.

*New Jersey*.—*Austin v. Nelson*, 6 N. J. L. 381.

7. *Tomlinson v. Bullock*, 4 Q. B. Div. 230.

8. *Burn v. Carvalho*, 4 N. & M. 893.

9. *State v. Click*, 2 Ala. 26; *Matthews v. Zane*, 7 Wheat. (U. S.) 164; *The Brigg Ann*, 1 Gall. (U. S.) 62; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Heard v. Heard*, 8 Ga. 380; *Weatherford v. Weatherford*, 8 Port. (Ala.) 171; *Rathbone v. Bradford*, 1 Ala. 312.

is considered perfected from the time of such approval; <sup>1</sup> if passed over his veto, then from the date of the final vote.<sup>2</sup>

**3. From Passage.**—There are three distinct doctrines as to the precise time of the taking effect of a statute, when, by its terms, it is declared to be in force "from its passage." According to one view the day of the passage of the act is excluded, and its operation dates from the day following.<sup>3</sup> It is claimed that this rule has the advantage over the one next stated in that it does not give a retroactive effect to the statute, thereby avoiding hardship and injustice in many cases; and over the third view, in that it obviates the necessity of resorting to conjecture or the uncertainty of parol proof, or anything extrinsic to the law itself, and the authenticated recorded proceeding in passing it, in order to ascertain the exact hour of executive approval.<sup>4</sup>

An act of the legislature is passed only when it has gone through all the forms made necessary by the constitution to give it force and validity as a binding rule of conduct for the citizen. It is of no force while pending before the governor. Whether it receives the signature of the governor or remains in his hands unreturned the requisite number of days, or being vetoed is carried by the requisite majority of both houses, its passage is dated from the time it ceased to be a mere proposition or bill and passed into a law. *Wartman v. Philadelphia*, 33 Pa. St. 202.

**Legislative Intent.**—The *Texas* Act of Feb. 14, 1860 (Paschal's Dig., art. 3962), which required judgment, before it could operate as a lien, to be filed for registration, took effect from its passage. The act being complete in itself, and clearly indicating the legislative intent that it should be operative from the time of its passage, such intent may not be defeated by a failure in the act to make a specific designation of the time it should go into effect as required by a pre-existing statute. *Baker v. Compton*, 52 Tex. 252.

1. *People v. Clark*, 1 Cal. 406; *Malory v. Hiles*, 4 Metc. (Ky.) 53; *Dowling v. Smith*, 9 Md. 242; *Goodsell v. Boynton*, 2 Ill. 555; *Logan v. State*, 3 Heisk. (Tenn.) 442; *Hill v. State*, 5 Lea (Tenn.) 725.

But in *Ohio*, where the constitution does not provide for executive approval of bills, an act is perfected when it has been signed by the presiding officers of the legislature. *State v. O'Brien*, 47 Ohio St. 464.

2. *Biggs v. McBride*, 17 Oregon 640; *Logan v. State*, 3 Heisk. (Tenn.) 442.

3. *King v. Moore*, Jeff. (Va.) 9;

*Parkinson v. Brandenburg*, 35 Minn. 294; 59 Am. Rep. 326.

4. In *Parkinson v. Brandenburg*, 35 Minn. 294; 59 Am. Rep. 326, Mitchell, J., in delivering the opinion of the court, said: "When a legislature declare that an act shall take effect 'from and after its passage,' or 'from and after the day of its passage,' it may be fairly presumed that they used these terms as exclusive of the day of the passage of the act. This furnishes a certain and convenient rule which avoids serious practical difficulties resulting from holding that the day of the passage of the act is to be included. Some of the authorities which hold that such a statute takes effect on the day of its passage take the position that it is to be deemed in force from the earliest moment of that day, and that any inquiry as to the exact hour of its passage is inadmissible. But it would seem wrong in principle that laws designed as rules of conduct should be by a mere legal fiction made retroactive even for a fraction of a day. To avoid this result the tendency now is to hold that the statute takes effect only from the exact moment of its approval, and that when necessary to determine conflicting rights, courts of justice will inquire as to the exact hour of its passage. The objection to this is, that while all right in theory, it is difficult of application in practice. There is usually no satisfactory means of ascertaining the exact hour at which the executive approved any given statute. The question must generally be decided on mere conjecture or by indulging in presumption. . . . It certainly does not seem fit and proper that the time

A second view is that such a statute becomes effective from the day of its approval, and has relation to the first moment of the day—this upon the principle that the law will not take cognizance of the fractions of a day.<sup>1</sup> The third view, and the one which seems to be supported by the weight of authority, is that a bill becomes operative only from the time of its approval; that the doctrine, that in law there is no fraction of a day, is a legal fiction which may be overthrown by the fact when necessary in order to accomplish substantial justice. Accordingly, whenever a question arises as to the time when a statute took effect, the court may resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to the question, the best and most satisfactory evidence in all cases being required.<sup>2</sup>

for the commencement of a law, whenever the question arises, should be left to depend upon the uncertainty of parol proof or upon anything intrinsic to the law itself, and the authenticated recorded proceeding in passing it. By excluding the day of the passage of the act and holding that it takes effect at the beginning of the following day, all these practical difficulties are avoided, and the rule established, which is not only certain and convenient, but, as we think, entirely in accord with recognized canons of construction. It is also in harmony with the usual method of computing time in other cases." See also *Duncan v. Cobb*, 32 Minn. 460.

1. In *Mallroy v. Hiles*, 4 Metc. (Ky.) 53, a judgment was rendered on the 24th of May, 1861, for debt due by note, the same day on which the governor approved the act entitled "An act to suspend the circuit and other courts in this commonwealth and for other purposes," by which the rendition of such judgments was prohibited from the passage of the act until the 1st day of January, 1862. It did not appear at what hour the act was approved, nor at what hour the judgment was rendered. It was held that the judgment was improperly rendered, because the act was in force during the whole of the day.

The statute repealing the bankrupt act took effect the day it was approved, which was March 3, 1843, and as there can be no fractions of a day in a question of this nature, it must be considered as being in force from the first moment of that day. *In re Howes*, 21 Vt. 619; *In re Welman*, 20 Vt. 654.

And where two statutes went into ef-

fect the same day, it was said that there was no doubt that they took effect the same instant. *Griswold v. Atlantic Dock Co.*, 21 Barb. (N. Y.) 225.

In *Wood v. Fort*, 42 Ala. 641, the court said: "Upon authority and principles of policy and convenience . . . we decide that a public statute remedial in its character, and not prescribing punishments and penalties, is of force during the entire day of its approval, and that the law in reference thereto does not recognize any fractions of a day; yet we concede that the decisions are not entirely harmonious."

2. *Strauss v. Heiss*, 48 Md. 292; *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469.

In *Kennedy v. Palmer*, 6 Gray (Mass.) 316, it was held that an action commenced before a justice of the peace on the day of the passage of a statute which vested exclusive jurisdiction of all such actions, not already pending, in a police court, and which took effect from and after its passage, cannot be dismissed for want of jurisdiction without proof that it was commenced at a later hour than the approval of the act by the governor.

In *People v. Clark*, 1 Cal. 406, the facts were as follows: Clark was elected county judge at an election regularly appointed and held. On that day the legislature passed an act repealing the one by virtue of which the election was held, and conferring upon the governor the power of appointment. The repealing act was approved the same day, but at what hour of the day did not appear. Some days thereafter the relator was appointed county judge by the governor. The court sustained the

validity of the election, remarking that "the time of the approval of the executive is a fact which can be ascertained and proven, and in all cases where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question when the event (the passage of the act) occurred, should be had."

The question was discussed with fullness by Mr. Justice Story in *Richardson's Case*, 2 Story (U. S.) 571. There a petition for the benefit of the bankrupt act was filed in the district court on the 3d day of March, 1843, about noon. The act of the 3d of March, 1843, repealing the bankrupt act, passed Congress and was approved by the President late in the evening of the same day. It was held that the court had jurisdiction of the petition at the time when it was filed and acted upon, and that it had full jurisdiction to entertain all proceedings thereon to the close thereof, according to the provisions of the bankrupt act. After reviewing the English cases, the court said: "So that we see that there is no reason to assert that any such general rule prevails as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day whenever it will promote the purposes of substantial justice."

In *Lapeyre v. U. S.*, 17 Wall. (U. S.) 198, it was said that an act of Congress, unless it is otherwise declared by law, becomes operative from the first moment of the day of its passage; and, further, that "fractions of a day" are not recognized, and "an inquiry involving that subject is inadmissible." But it will be seen upon an examination of this case that the question presented for determination was not as to the fractions of a day, but whether a proclamation of the President bearing date June 24, 1865, took effect on that day or on the 27th of June, 1865, when it was first promulgated by publication in the newspapers. And in *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469, the court says that the language above quoted from the opinion must, therefore, be taken as a declaration of the general rule which obtains when the evidence does not show the necessity of regarding fractions of a day.

In *U. S. v. Norton*, 97 U. S. 170, the court, while declaring upon the authority of *Lapeyre v. U. S.*, 17 Wall. (U.

S.) 198, that the President's proclamation took effect as of the beginning of June 24, 1865, and covered all the transactions of that day to which it was applicable, said: "We do not think this is a case in which fractions of a day should be taken into account." "This language of the chief justice," it is said in *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469, "implies that there are cases in which the court would regard fractions of a day. Besides there was no question in that case, nor any proof made as to the particular hour of the day when the proclamation of the President was issued."

In *Plowman v. Williams*, 3 Tenn. Ch. 181, it is said: "A day is in legal contemplation *punctum temporis*, without fractions, yet for the ends of justice a day may be divided."

And in *In re Ankrine*, 3 McLean (U. S.) 285, the court says: "Like many technicalities which have grown out of judicial action, the fiction is sustained neither by justice nor reason." Again, in *Grosvenor v. Magill*, 37 Ill. 239, it was held, that while for many purposes the law knows no divisions of a day, yet whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into the fractions of a day as readily as into the fractions of any other unit of time. See also *Metts v. Bright*, 4 Dev. & B. (N. Car.) 173; *Savage v. State*, 18 Fla. 970; *Burgess v. Salmon*, 97 U. S. 381.

The provisions of the *New York* laws 1891, ch. 215, extending the collateral inheritance tax act to legacies or distributive shares of the widow and immediate relatives when exceeding \$10,000 in value, do not apply to the estate of a decedent who died on the morning of the day on which the act was signed by the governor, but before the time of such signing, although § 4 of the act declared that it should take effect immediately. In such case, the rights of the legatee having vested and the act not being intended to be retroactive, the legacy is not subject to the tax. *In re Dreyfous*, 28 Abb. N. Cas. (N. Y.) 27.

In *Gardner v. Barney*, 6 Wall. (U. S.) 499, it was held that whenever a question arises as to the time when a statute took effect, the court may resort to any source of information, unless the positive law has enacted a different rule.

There are decisions in the English courts in line with the above. Thus, in



**4. From Future Day Named.**—When by virtue of a provision of the constitution, a statutory rule, or by force of its own terms, a statute is to take effect a certain number of days after its enactment, the day of enactment is to be excluded in computing the time.<sup>1</sup> When there is a general law providing that statutes shall take effect a certain number of days after passage, unless a different time be named therein, and there is nothing in a given statute indicating a legislative intent that it is to be excepted from the general rule, it may not be excepted.<sup>2</sup> A statute passed to take effect at a future day must be understood as speaking from the

*Roe v. Hersey*, 3 Wils. 274, the court characterized as a mere fiction of law the general proposition that there are no fractions of a day; that "by fiction of law the whole time of the Assizes and the whole session of parliament may be, and sometimes are, considered as one day;" yet the matter of fact shall overturn the fiction in order to do justice between the parties.

In *Combe v. Pitt*, 3 Burr. 1423, Lord Mansfield expresses similar views. He said: "But though the law does not in general allow of fractions of a day, yet it admits it in cases where it is necessary to distinguish, and I do not see why the very hour of the day may not be so too when it is necessary and can be done, for it is not like a mathematical point which cannot be divided."

**Presumption.—But Not Conclusive.**—April 18, 1883, the *Ohio* legislature passed an act (80 *Ohio Laws* 169) amending section 6710 of the Revised Statutes, which allowed petitions in error to be filed in the Supreme Court without leave, so as to require leave to be first granted. It repealed the original section and enacted that the section "shall take effect and be in force from and after its passage, and apply to all cases hereafter brought in or into the Supreme Court." On the same day, but whether before or after this act was passed it did not appear, a petition in error was filed in this case without leave of the Supreme Court. On motion to dismiss it was held, 1st. This act took effect on the day of its passage, and by presumption of law from the commencement of the day, and not from its expiration. 2d. This presumption will not prevail where its application would work injustice. In such case the exact time of the day may be shown. 3d. In the absence of proof by the plaintiff in error showing that his case was pending on that day before the act was passed and took effect, the pre-

sumption of law will prevail that the act took effect from the commencement of the day. *Arrowsmith v. Hamering*, 39 *Ohio St.* 573.

1. Thus if a statute is to take effect in thirty days from and after its passage, passing on the 1st of March, it would go into operation on the 31st of March. *Sutherland Stat. Constr.* § 111; *Bemis v. Leonard*, 118 *Mass.* 502; 19 *Am. Rep.* 470; *Bigelow v. Willson*, 1 *Pick. (Mass.)* 494.

And when a statute is to take effect thirty days after the recess of the legislature, the day of adjournment is to be excluded in computing the time. *Simmons v. Jacobs*, 52 *Me.* 147.

In computing the ninety days required by the *West Virginia Const.*, art. 6, § 30, it is immaterial whether the day of passage is counted, and the ninety-day rejected, or whether the ninety-day is included and the day of passage excluded. An act passed on the 27th of February, 1891, will, under said constitutional provision, take effect on the 28th day of May following. *State v. Mounts*, 36 *W. Va.* 179.

2. *Jackman v. Garland*, 64 *Me.* 133.

The *New York Collateral Inheritance Act* (ch. 483, *New York Laws* 1885), is covered by the provision of the Revised Statutes (1 *N. Y. Rev. Stat.* 157, § 12), declaring that "every law, unless a different time shall be prescribed therein, shall commence and take effect . . . on and not before the 20th day after the day of its final passage as certified by the secretary of state." Accordingly, where a testatrix died after the passage of the act, but before the expiration of the 20 days, it was held that no tax was payable upon a legacy contained in the will. *In re Howe*, 112 *N. Y.* 100.

But where there is a legislative intent that a particular statute shall be taken out of the general rule and made operative immediately, such intent need not

time it goes into operation and not from the time of passage: Thus, the words "heretofore," "hereafter" and the like, have reference to the time the statute becomes effective as a law, and not to the time of passage.<sup>1</sup> Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms—it is equivalent to a legislative declaration that the statute shall have no effect until the designated day. For example, where the act creating a new county provided that it should not take effect until a future day mentioned, an appointment by the executive of the commonwealth to an office in the county before such day, was adjudged void;<sup>2</sup> and where a statute made an act a crime, a person committing the forbidden act after

be affirmatively expressed; it may be inferred from the intention of the legislature in passing the statute. *Swann v. Buck*, 40 Miss. 269.

1. *Price v. Hopkin*, 13 Mich. 318; *Rice v. Ruddiman*, 10 Mich. 125; *Davenport v. Davenport*, etc., R. Co., 37 Iowa 624; *Charles v. Lamberson*, 1 Iowa 435; 63 Am. Dec. 457; *Bennett v. Bevard*, 6 Iowa 82; *Evansville*, etc., R. Co. v. *Barbee*, 74 Ind. 169. The exception of injuries "already sustained," in the *Maine* Act of 1874, ch. 215, must be referred to the time when the act took effect, and not to its date. In legal contemplation the words are spoken when the act becomes a law. *Jackman v. Garland*, 64 Me. 133. The *Iowa* act January 24, 1857, repealed all prior acts permitting a pre-emption on swamp lands, but with a proviso saving actual settlers on said lands at the time of the passage of the act. It was held that said proviso referred to the time of taking effect of the act, and not to that of its passage. *Rogers v. Vass*, 6 Iowa 405.

Constitution of *Colorado*, art. 5, § 19, provides that no act shall take effect until 90 days after passage, except in case of emergency. General statutes of the state, § 2621, provides that "the state board of medical examiners, within 90 days after the passage of the act shall," etc. It was held that the phrase "after the passage of the act," refers to the time when the act takes effect. *Harding v. People*, 10 Colo. 387.

The 30th section of art. 6 of the constitution of *West Virginia* concludes as follows: "And no act of the legislature, except such as may be passed at the first session under this constitution, shall take effect until the expiration of 90 days after its passage, unless the legislature shall, by a vote of two-thirds of

the members elected to each house taken by yeas and nays, otherwise direct. It was held that the word "passage" in this section relates to the date of the passage of the act by the two houses, and not to the date of its approval by the governor, and that the act in question having passed both houses on the 27th of Feb., 1891, became effective on the 28th day of May following. *State v. Mounts*, 36 W. Va. 179.

2. *Com. v. Fowler*, 10 Mass. 290.

In *Price v. Hopkin*, 13 Mich. 318, it was said that the period intervening between the time of passage and the day fixed for the statute to take effect is allowed to enable the public to become acquainted with its provisions.

In *Rice v. Ruddiman*, 10 Mich. 125, it was said that a law passed to take effect on a future day must be construed as if passed on that day, and ordered to take immediate effect.

The late Bankrupt Law of the *United States* was enacted on August 19, 1841. It expressly provided that it should take effect only from and after February 1, 1842. This is equivalent to declaring that it should have no effect until that day, and hence it did not suspend the operation of the *Maryland Insolvent Laws* until that day. *Larabee v. Talbott*, 5 Gill (Md.) 426; 46 Am. Dec. 637.

By section 323 of the Political Code of *California*, an act of the legislature, not in terms prescribing when it shall take effect, does not go into operation until the 60th day after its passage. Therefore, the *California* act of March 9, 1885, authorizing municipal corporations of the fifth class to obtain public water works, not prescribing when it should take effect, did not become a law until May 8, 1885; and bonds issued by a municipality of that class for

the passage of the statute, but before the day appointed for its operation, was held not punishable thereunder.<sup>1</sup>

But it seems that a code regulating proceedings in penal actions, which is to go into effect on a future day, operates when the day arrives upon indictments found before it.<sup>2</sup> The statute is not rendered inoperative by the fact that the designated day falls on Sunday, as the legislature has full power to regulate what shall be done or prohibited on that day.<sup>3</sup>

**5. From Publication.**—When a statute provides that it shall take effect “from and after its publication,” the day of its publication is to be included in computing the time when it takes effect; but the precise time of its publication may be shown, if the hour of publication affects in any wise an act done on the same day.<sup>4</sup>

If the act is to take effect from its publication in two newspapers, it will not become effective upon publication in one only.<sup>5</sup> The publication in two local papers will not satisfy a requirement that it be published in the state paper.<sup>6</sup>

But a general law has been regarded as duly published, although printed in the volume of private laws, instead of the volume of public laws as provided by statute.<sup>7</sup>

Where a statute is, by its express terms, not to take effect until publication in a certain newspaper, every one is charged with notice of this fact, and if before such publication negotiable paper is issued under it, the purchasers can acquire no rights thereby.<sup>8</sup>

A mere verbal omission or inaccuracy in the publication of a statute, which does not change its substance or legal meaning, does not invalidate the publication.<sup>9</sup> But the publication of a

the purchase of water works in pursuance of authority attempted to be conferred by an election held prior to the taking effect of the act, were null and void. *Santa Cruz Water Co. v. Kron*, 74 Cal. 222.

Where, by an act of the general assembly, a vote was to be taken “after the present war is over,” and it was taken the fourth Thursday of May, 1866, before the proclamation of the President of the *United States*, declaring that the war was at an end and that peace and tranquillity reigned throughout the whole country (issued on the 20th day of August, 1866), such vote is a nullity, being taken before the act had validity. *Conley v. Calhoun County*, 2 W. Va. 416.

**Notice from Date of Passage—Though Operation Postponed.**—Though a general law, by its terms, is not to go into operation until a future day, all persons are required to take notice of its existence from the date of its approval, or at any rate from its publication. *Stine v. Bennett*, 13 Minn. 153.

1. *State v. Bond*, 4 Jones (N. Car.) 9.

2. *Laughlin v. Com.*, 13 Bush (Ky.) 261.

3. *Bloomington v. Seligman*, 22 Abb. N. Cas. (N. Y.) 98.

4. *Leavenworth Coal Co. v. Barber*, 47 Kan. 29. See *supra*, this title, *From Passage*.

5. *Welch v. Battern*, 47 Iowa 147. In this case, it was further held that the certificate of the secretary of state that the act had been published in one newspaper would not justify the inference that it had been properly published.

6. *Clark v. Janesville*, 10 Wis. 136. See also *Hendrickson v. Hendrickson*, 7 Ind. 13; *McCool v. State*, 7 Ind. 378.

7. *In re Boyle*, 9 Wis. 264.

8. *McClure v. Oxford*, 94 U. S. 129.

9. In the original publication of chap. 220, *Wisconsin Laws*, 1859, there were the following omissions: In section 3, providing for the notice of sale of mortgaged premises, it is first required that such notice shall be published in a newspaper in the county where the premises are situated, if there be one,

statute omitting entirely the enacting clause obviously does not constitute a valid publication.<sup>1</sup>

A constitutional provision that "no act shall take effect until the same shall have been published and circulated in the several counties," etc., means that such act shall not take effect in any county until it has been distributed and published in all.<sup>2</sup>

In some of the states, a joint resolution of a general nature requires the same publication as any other law.<sup>3</sup>

and then proceeds as follows: "And if no newspaper be printed or published in said county," then it is to be printed in an adjoining county, etc. In the above quotation the words "printed or" are left out, so that it reads: "If no newspaper be published in said county," etc. In reference to this omission the court said: "It does not seem that this could change substantially the meaning of the provision. For whatever distinction there may be between printing and publishing the laws as applied to our system of first publishing them in a newspaper and then printing them in a volume, it can hardly be supposed, though they use the disjunctive form of speech, that the legislature had in view any real distinction between the printing and publishing of a newspaper, so far as the object of publishing the notice of sale of mortgaged premises was concerned. For the language fairly implies that the notice might be published in a newspaper that was 'printed' in the county. And assuming that the paper was merely 'printed' there, and not published, it is difficult to see how the notice could be considered 'published,' or how such an insertion would at all subserve the purposes of the statute. The word 'published' would apply as well to a paper printed in the county and circulated there, as to one where the mere printing might be done elsewhere, but which was first published or circulated there. So that this word really expressed the whole meaning of the legislature." The act contained a proviso that "the provisions of this act shall not apply," etc. In the first publication the word "this" was omitted. The court held that the meaning was obviously the same without this word, as no court would hesitate to say even without it that the act referred to was the one of which the proviso was a part. *Smith v. Hoyt*, 14 Wis. 252.

The same question was involved in *Mead v. Bagnall*, 15 Wis. 156, and the above ruling was followed.

1. *In re Swartz*, 47 Kan. 157. But it has been held that an act was duly published so as to give it effect, notwithstanding the signatures of the presiding officers of the legislature affixed thereto were not published. *Leavenworth County v. Higginbotham*, 17 Kan. 62.

2. *Jones v. Cavins*, 4 Ind. 305. Whenever the acts, or any portion of them, are distributed in a bound volume in a manner and shape not substantially contrary to the statute on that subject, by the secretary of state, through his agents appointed for that purpose, in all the counties of the state, they are distributed or published by authority. And the fact that directory provisions as to the form and binding, character or color of material, division into volumes, etc., may not be strictly followed by the secretary of state, does not make the distribution of such as are prepared and distributed by him any the less a publication by authority. *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405.

Under the former constitution of *Indiana* a statute took effect in every part of the state from the time it was published by authority at any place within the state, unless the act itself directed otherwise. *Tredway v. Gapin*, 1 Blackf. (Ind.) 298.

The constitution of *Maryland*, art. 3, § 34, providing that every law shall be recorded, printed, published and certified to the courts, was not intended to prevent a law from going into operation until publication thereof. *Parkinson v. State*, 14 Md. 185; 74 Am. Dec. 522.

In *Louisiana* a law is not obligatory until promulgated. Thus, a court created by statute continues to exist until the act repealing that statute has been promulgated. And the mere publication of a legislative act in the official journal is not necessarily a promulgation of the act. Promulgation must be made by the officers, and in the manner prescribed by law. *State v. Judge*, 29 La. Ann. 223.

3. *State v. Board of Com'rs, etc., of School Fund*, 4 Kan. 261.

Where the act published is a *verbatim* copy of the original law as filed with the secretary of state, it takes effect according to its terms as published, although the act as published subsequently in the session laws may not correspond with it.<sup>1</sup>

8. **Upon a Contingency.**—It is competent for the legislature to enact a law, the ultimate operation of which, may, by its own terms, be made to depend upon a contingency.<sup>2</sup> And the contingency may be some action on the part of the legislature of another state,<sup>3</sup> or the result of a vote of the people of the locality to be affected by the law,<sup>4</sup>—indeed, it makes no essential difference what the nature of the contingency is, so it be an equal and

1. *State v. Donehev*, 8 Iowa 396.

**Ultimate Proof of the Law—Original Act.**—In *State v. Clare*, 5 Iowa 509, it was held that the original act on file in the office of the secretary of state is the ultimate proof of the law, whatever errors there may be in what purports to be copies thereof.

In *State v. Donehey*, 8 Iowa 396, it was deemed unnecessary to go to the extent of holding that in any event the original act in the secretary's office is the ultimate proof of the law, as the offense was charged to have been committed after the publication of the law in newspapers, and before the publication in pamphlet form, and it could make no difference to the defendant that a mistake was made in the publication of the law after he had committed the offense charged.

**True Date of Publication—Certificate of Secretary of State.**—In the absence of any suggestion which might lead to a more accurate inquiry, the date of the certificate of the secretary of state appended to the published volumes of the laws will be taken to be the true date of their publication. *In re Boyle*, 9 Wis. 264; *State v. Foote*, 11 Wis. 15; *Berliner v. Waterloo*, 14 Wis. 378; *Clark v. Janesville*, 10 Wis. 119.

2. *Brig Aurora v. U. S.*, 7 Cranch (U. S.) 382; *In re Olliver*, 17 Wis. 682; *Lathrop v. Stedman*, 42 Conn. 683; *Peck v. Weddell*, 17 Ohio St. 271; *State v. Kirkley*, 29 Md. 85; *Walton v. Greenwood*, 60 Me. 356; *Baltimore v. Clunet*, 23 Md. 449; *Crease v. Babcock*, 23 Pick. (Mass.) 334; 34 Am. Dec. 61; *Burlington v. Leebrick*, 43 Iowa 252; *State v. Hunter*, 38 Kan. 578; *Guild v. Chicago*, 82 Ill. 472.

3. Section 17 of the *Kansas* Act relating to insurance, ch. 50a, Compiled Laws 1879, so far as it provides that when the laws of any other state impose upon the corporations of this

state applying to transact business within its limits other and more onerous burdens and conditions than those prescribed by the general provisions of said chapter for corporations seeking to transact business in this state, the same burdens and conditions shall be imposed upon corporations from that state applying to enter this, is a complete and absolute expression of the legislative will, and though its operation depends upon the contingency of legislative action in other states, is nevertheless valid. The contingency named in said section arises when the laws of another state impose additional burdens and conditions, and is not delayed until some corporation of this state is actually subjected to such burdens and conditions. *Phoenix Ins. Co. v. Welch*, 29 Kan. 672. In pronouncing judgment in this case, Mr. Justice Brewer observed that: "Our laws abound in cases in which a statute is made dependent upon the action of some tribunal or body, or upon some other contingency, and is therefore practically dormant until such action takes place or contingency happens." To same effect is *Home Ins. Co. v. Swigert*, 104 Ill. 653. But in *Alabama* a similar law was adjudged void. *Clark v. Mobile*, 67 Ala. 217.

4. *People v. Salomon*, 51 Ill. 37; *State v. Pond*, 93 Mo. 606; *St. Louis v. Alexander*, 23 Mo. 483; *State v. Noyes*, 30 N. H. 279; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Noffziger v. McAllister*, 12 Kan. 315; *In re Petition of Cleveland*, 52 N. J. L. 188; *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716; *Groesch v. State*, 42 Ind. 547; *Caldwell v. Barrett*, 73 Ga. 604; *Com. v. Weller*, 14 Bush (Ky.) 218; 29 Am. Rep. 407; *State v. Cooke*, 24 Minn. 247; 31 Am. Rep. 344; *Alcorn v. Hamer*, 38 Miss. 653; *Com. v. Bennett*, 108 Mass. 27; 11 Am. Rep. 304; *State v. Wilcox*,

a fair one, a moral and legal one, and so far connected with the purpose of the statute as not to be a mere idle and arbitrary one.<sup>1</sup> But the statute must be a complete and absolute expression of the legislative will—a law *in presenti*, to take effect *in futuro*.<sup>2</sup> And the statute cannot be made effective before the event happens, by any acts or series of supplements passed upon the assumption that the event has happened, and that the law is in force.<sup>3</sup>

7. **When Containing Emergency Clause.**—In many of the states a discretion is vested in the legislature, in cases of emergency, to dispense with the constitutional provision fixing the time for statutes to take effect, and direct that a law shall have effect before that time. In such a case, the legislature is the sole judge of the emergency which shall induce them to anticipate the constitutional period, and their discretion may not be reviewed by the courts.<sup>4</sup> But the direction must be made in a clear, distinct, and

42 Conn. 364; 19 Am. Rep. 536; *Bancroft v. Dumas*, 21 Vt. 456; *Boyd v. Bryant*, 35 Ark. 69; 37 Am. Rep. 6; *People v. Butte*, 4 Mont. 179; 47 Am. Rep. 346; *People v. Fleming*, 10 Colo. 553; *Clarke v. Jack*, 60 Ala. 271; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252; *New Orleans v. Graihle*, 9 La. Ann. 561; *Stone v. Charlestown*, 114 Mass. 214; *Bull v. Read*, 13 Gratt. (Va.) 78; *State v. Copeland*, 3 R. I. 33; *Slinger v. Hennerman*, 38 Wis. 504; *Smith v. Janesville*, 26 Wis. 291.

*Compare* *Santo v. State*, 2 Iowa 164; 63 Am. Dec. 487; *State v. Geebrick*, 5 Iowa 491; *State v. Beneke*, 9 Iowa 164; *State v. Weir*, 33 Iowa 134; 11 Am. Rep. 115; *Rice v. Foster*, 4 Harr. (Del.) 479; *Ex parte Wall*, 48 Cal. 279; 17 Am. Rep. 425; *State v. Swisher*, 17 Tex. 441; *Maize v. State*, 4 Ind. 342; where it is held that the result of a vote of the people is not a contingency upon which a law may be made to depend.

But the decided preponderance of judicial opinion is otherwise. And in *Sutherland Stat. Constr.*, p. 82, it is said that these cases "are now exceptional, and are simply out of harmony with the law as generally held throughout the country."

1. *State v. Parker*, 26 Vt. 357. A statute may be passed to take effect upon the failure of a corporation to make up a deficiency in its assets. *Lathrop v. Stedman*, 42 Conn. 583. And the operation of a statute in regard to the stopping of railroad trains may be made conditional upon the erecting of a station at a particular place by the

inhabitants. *State v. New Haven, etc., Co.*, 43 Conn. 351.

2. *Alcorn v. Hamer*, 38 Miss. 652. The act which was adjudged unconstitutional in *Barto v. Himrod*, 8 N. Y. 483; 59 Am. Dec. 506; *Cole v. Stevens*, 9 Barb. (N. Y.) 676; *Thorne v. Cramer*, 15 Barb. (N. Y.) 112; *Bradley v. Baxter*, 15 Barb. (N. Y.) 122, was submitted to a vote of the people in the following terms: By the tenth section, it was provided, that "the electors shall determine by ballot, at the annual election, to be held in November next, whether this act shall or not become a law," and by the fourteenth section, "that in case a majority of all the votes of the state shall be cast for the new school law, then this act shall become a law, and shall take effect." The act was held to be a plan or project prepared by the legislature "to be submitted to the people to be passed or rejected," and therefore did not derive its sanction from the legislative will, but depended upon the popular vote for its force as law.

3. *State v. Kirkley*, 29 Md. 85.

4. *Carpenter v. Montgomery*, 7 Blackf. (Ind.) 415; *Gentile v. State*, 29 Ind. 409; *Wheeler v. Chubbuck*, 16 Ill. 361; *Biggs v. McBride*, 17 Oregon 640. In this case it is said, the constitution has vested in the legislature the power to declare in the body or preamble of an act the emergencies by which it may be put in force less than 90 days after the adjournment of the legislature, and when the emergency is specified in the act, the same is conclusive upon the courts.

In *Colorado*, the emergency clause,

unequivocal provision, and cannot be helped out by any sort of intendment or implication.<sup>1</sup>

If the emergency must be declared in the preamble or body of the act, it may not be incorporated with effect, in a supplementary act.<sup>2</sup>

It has been held that the fact that the legislative journals show that a bill contained an emergency clause, when the final vote in both houses was taken thereon, cannot control in the absence from the bill of such clause at the time it was signed by the executive and presiding officers of the two houses.<sup>3</sup>

**8. Postponement of Operation of Part.**—There is no legal objection to different provisions of the same statute taking effect at differ-

in order to be effective, must receive a two-thirds vote of all the members elected to each branch of the legislature, and if not so adopted it should be struck out before enrollment, even though the bill be otherwise constitutionally passed. *In re Emergency Clause* (Colo. 1893), 32 Pac. Rep. 647.

1. *Wheeler v. Chubbuck*, 16 Ill. 361. A declaration by the legislature that an act shall take effect on a future day specified, is not of itself a declaration of the emergency in the constitutional sense. *Hendrickson v. Hendrickson*, 7 Ind. 13. See also *McCool v. State*, 7 Ind. 378; *Mark v. State*, 15 Ind. 98.

In order to take an act out of the operation of § 23, art. 3, of *Illinois* constitution of 1848, that no public act of the general assembly shall take effect or be in force until the expiration of 60 days from the end of the session at which the same may be passed, unless in case of emergency the legislature shall otherwise direct, the legislature must direct that the act as a whole and entirely shall take effect at a different time, and it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period.

Where, therefore, an act to authorize an election for the removal of a county seat, directed an election to be held on a day prior to the termination of the session, and the election was so held, but the act contained no emergency clause, it was held that an emergency had not been sufficiently declared—that the act had not taken effect when the election was held, and, therefore, the election was unauthorized. *Iriquois County v. Keady*, 34 Ill. 293.

The emergency clause in the *Indiana* act of June 14, 1852, regulating the remission of fines and forfeitures, declared

the act to be in force from and after its being filed with the clerks of the circuit courts in their respective counties. It was held that the legislature intended the act to be brought into force as soon as it could be distributed to the several counties, and though there is no express direction to the secretary of state to distribute it, the emergency clause implies such a direction; also, that the secretary of state is presumed to have done his duty, and, hence that the act was in force on the 20th day of December 1852. *State v. Dunning*, 9 Ind. 20.

An act which passes both houses of the legislature, and which contains an emergency clause followed by the words, that the same "shall take effect and be in force from and after its approval by the governor," but which the governor never approves, but vetoes, and the same is then duly passed by both houses by the requisite majorities, notwithstanding the veto, takes effect and is in force from and after its passage. *Biggs v. McBride*, 17 Oregon 640.

When the legislature, on the day of its final adjournment, in the due course of legislation sends a bill to the governor for his official action, and he on the same day and after the final adjournment of the legislature files the bill in the office of the secretary of state, without approval or objections thereto, it becomes a law, and he may not thereafter file objections, and if the bill contains an emergency clause requiring it to take effect from and after its passage, it must be deemed to be in force from and after such filing. *Tarleton v. Peggs*, 18 Ind. 24.

2. *Cain v. Goda*, 84 Ind. 209.

3. *In re General Appropriation Bill*, 16 Colo. 539.

ent times, at the will of the legislature.<sup>1</sup> And the circumstance, that before the time appointed for the operation of the deferred parts they are rendered inoperative by the adoption of a new constitution, will not affect the parts already in force.<sup>2</sup>

**V. VALIDITY AND EFFECT—1. Generally.**—The principle of the English law that Parliament is omnipotent, and that an act of that body delivered in clear and intelligible terms may not be questioned, or its authority controlled in any court of justice,<sup>3</sup> does not obtain in the *United States*, where, on the contrary, a legislative act, to have the force of law, must conform to the constitution.<sup>4</sup> A statute may be within the inhibitions of the constitution as well by implication as by expression.<sup>5</sup> In several early cases, the courts went so far as to declare that statutes passed against the plain and obvious principles of common right and common reason were void so far as calculated to operate in contravention thereto.<sup>6</sup> But the more recent authorities are opposed to this view.<sup>7</sup> In dealing with constitutional objections to a statute, heed must be given to the canon of construction that

1. *Plummer v. Jones*, 84 Me. 58. In this case it was held that the *Maine Laws* 1891, ch. 34, §§ 1 and 2, providing for the appointment of a board of registration, etc., "immediately upon the approval of this Act" became operative by their own terms upon the approval of the act; while the remaining provisions of the act, as to which no time was mentioned, took effect, by virtue of *Maine R. St. ch. 1, § 5*, thirty days after the recess of the legislature. *Massachusetts St.* 1873, ch. 286, uniting the cities of Charlestown and Boston, is not void for providing that it shall take effect for different purposes at different times. *Stone v. Charlestown*, 114 Mass. 214. See also *Clarke v. Rochester*, 24 Barb. (N. Y.) 446.

2. *People v. Whiting*, 64 Cal. 67. See *infra*, this title, *Statutes Unconstitutional In Part*.

3. 1 Bl. Com. pp. 91, 160, 186.

4. 1 Kent Com. 448; *Loan Association v. Topeka*, 20 Wall. (U. S.) 655; *Marbury v. Madison*, 1 Cranch (U. S.) 137. In *Com. v. Maxwell*, 27 Pa. St. 456, it is said a law is unconstitutional because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or state constitution.

5. *Evansville v. State*, 118 Ind. 426; *Page v. Allen*, 58 Pa. St. 338; 98 Am. Dec. 272. See generally CONSTITUTIONAL LAW, vol. 3, p. 670.

6. *Hamm v. M'Claws*, 1 Bay. (S.

Car.) 93; *University of Maryland v. Williams*, 9 Gill & J. (Md.) 365; 31 Am. Dec. 72; *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; 25 Am. Dec. 677.

In *Bowman v. Middleton*, 1 Bay. (S. Car.) 252, a statute taking away the freehold of one man and vesting it in another without any compensation or any previous attempt to determine the right, was adjudged void as against common right and the principles of Magna Charta.

And in *Morrison v. Barksdale*, Harper (S. Car.) 101, it was held that if consequences manifestly against common reason, arise collaterally out of a statute, it is void *pro tanto*.

7. In *Maxwell v. Fulton*, 119 Ind. 23, it was held that the court may not overthrow a statute upon the ground that it encroaches upon the natural rights of a citizen, unless such rights are guaranteed by constitutional provisions.

In *Whittington v. Polk*, 1 Har. & J. (Md.) 236, an act which the court regarded as "incompatible with the principles of justice," was adjudged valid.

It is said by the court in *People v. Gallagher*, 4 Mich. 244, that it is questionable whether the judiciary has power to pronounce an act void because it is repugnant to fundamental principles not expressly declared, but necessarily implied, in a republican constitution.

And in *Cooley's Const. Lim.* (6th ed.) p. 197, *et seq.*, it is laid down that a



when a statute is challenged as in conflict with the fundamental law a clear and substantial conflict must be found to exist, to justify its condemnation.<sup>1</sup> A statute unauthorized by the state constitution at the time of its passage, is void and may not be validated by the subsequent adoption of a constitutional amendment.<sup>2</sup> A territorial statute contrary to the Federal constitution, or the organic act, is invalid without the express disapproval of Congress.<sup>3</sup>

**2. Statutes Unconstitutional in Part.**—Part of a statute may be unconstitutional and void, and the residue constitutional and valid.<sup>4</sup> The test is not whether the void and valid parts are contained in

statute may not be declared unconstitutional and void by the courts "solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the constitution; except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. . . .

While the parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power, except, *first*, as it may have been limited by the constitution of the United States; and, *second*, as it may have been limited by the constitution of the state. A legislative act cannot, therefore, be declared void unless its conflict with one of these two instruments can be pointed out."

1. *Sweet v. Syracuse*, 129 N. Y. 350; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518. See *infra*, this title, *Interpretation*.

2. *State v. Tuffy*, 20 Nev. 427; 19 Am. St. Rep. 324.

But it has been held that an act which is defective on constitutional grounds may be cured by subsequent enactment in the form of an amendment or supplement. *State v. Ryno*, 49 N. J. L. 603; *State v. Yard*, 42 N. J. L. 357; *Sweet v. Syracuse*, 129 N. Y. 337.

And *In re Van Vliet*, 43 Fed. Rep. 765, it was said that an act of a state legislature passed in the exercise of the police power of the state, inoperative on liquor in the original package, when passed, for want of congressional license, is rendered operative and effect-

ual by a subsequent act of Congress declaring that such act shall be subject to the state law. Such an act removes the impediment to the enforcement of the law against such packages and has the same effect as a precedent authority of Congress to pass it.

3. *People v. Clayton*, 4 Utah 421; *People v. Clayton*, 4 Utah 449; *Williams v. Clayton*, 6 Utah 86.

4. *In re Metropolitan Gas Light Co.*, 85 N. Y. 526; *People v. Briggs*, 50 N. Y. 553; *Slauson v. Racine*, 13 Wis. 398; *State v. Dousman*, 28 Wis. 541; *Dells v. Kennedy*, 49 Wis. 555; *Gordon v. Cornes*, 47 N. Y. 617; *People v. Bull*, 46 N. Y. 69; 7 Am. Rep. 302; *Packard v. Lewiston*, 55 Me. 456; *Cole v. Cumberland County*, 78 Me. 532; *People v. Hall*, 8 Colo. 485; *Keokuk Packet Co. v. Keokuk*, 95 U. S. 377; *Ex parte Frazer*, 54 Cal. 94; *Robinson v. Bidwell*, 22 Cal. 379; *French v. Teschemaker*, 24 Cal. 548; *Com. v. Kimball*, 24 Pick. (Mass.) 361; 35 Am. Dec. 326; *Clark v. Ellis*, 2 Blackf. (Ind.) 8; *People v. Cooper*, 83 Ill. 585. To same effect, *Ex parte Towles*, 48 Tex. 413; *State v. Clinton*, 28 La. Ann. 201; *Ex parte Wells*, 21 Fla. 280; *Lombard v. Antioch College*, 60 Wis. 459; *Christy v. Sacramento County*, 39 Cal. 3; *State v. Perry County*, 5 Ohio St. 507; *O'Brien v. Krenz*, 36 Minn. 136; *Slinger v. Henneman*, 38 Wis. 504; *Sparhawk v. Sparhawk*, 116 Mass. 315; *Central Branch U. P. R. Co. v. Atchinson, etc.*, R. Co., 28 Kan. 453; *State v. Pond*, 93 Mo. 606; *Campan v. Detroit*, 14 Mich. 276; *Willard v. People*, 5 Ill. 461; *State v. Newton*, 59 Ind. 173; *Rood v. McCargar*, 49 Cal. 117; *State v. Ramsey County*, 48 Minn. 236; *Benedict v. Columbus Constr. Co.*, 49 N. J. Eq. 23; *State v. Snow*, 3 R. I. 64; *State v. Clarke*, 54 Mo. 1; 14 Am. Rep. 471; *Muldoon v. Levi*, 25 Neb. 457; *Albany*

the same section, for the distribution into sections is purely artificial; but rather, whether they are essentially and inseparably connected;<sup>1</sup> as it would be inconsistent with all just principles of constitutional law to adjudge enactments not obnoxious to any just constitutional exceptions, void, because they are associated in the same act, but not connected with or dependent on, others which are unconstitutional.<sup>2</sup> The rule is that where the provisions are so interdependent that one may not operate without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other, the whole must fall; but if when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained.<sup>3</sup>

County v. Stanley, 105 U. S. 305; Mills v. Sargent, 36 Cal. 379; Nelson v. People, 33 Ill. 391; *In re De Vancene*, 31 How. Pr. (N. Y.) 289; Campbell v. Mississippi Union Bank, 6 How. (Miss.) 625; Exchange Bank v. Hinds, 3 Ohio St. 1; Allen v. Silvers, 22 Ind. 491; Wakely v. Mohr, 15 Wis. 609; Lyman v. Martin, 2 Utah 136; State v. Rosenstock, 11 Nev. 128; Gamble v. McCrady, 75 N. Car. 509; Bucky v. Willard, 16 Fla. 330.

1. Com. v. Hitchings, 5 Gray (Mass.) 482; Fisher v. McGin, 1 Gray (Mass.) 1; 61 Am. Dec. 381; People v. Kenney, 96 N. Y. 294; Deryee v. New York, 96 N. Y. 477; State v. Marsh, 37 Ark. 356; Powell v. State, 69 Ala. 10; People v. Nally, 49 Cal. 478; Tripp v. Overocker, 7 Colo. 72.

2. Com. v. Clapp, 5 Gray (Mass.) 97.  
3. Com. v. Hitchings, 5 Gray (Mass.) 482; Fisher v. McGin, 1 Gray (Mass.) 1; 61 Am. Dec. 381; Warren v. Charles-town, 2 Gray (Mass.) 84; Com. v. Clapp, 5 Gray (Mass.) 97; Meshmeier v. State, 11 Ind. 482; State v. Wheeler, 25 Conn. 290; Burkholz v. State, 16 Lea (Tenn.) 71; Berry v. Baltimore, etc., R. Co., 41 Md. 446; 60 Am. Rep. 69; State v. Baltimore County, 29 Md. 521; Hagerstown v. Dechert, 32 Md. 369; Darby v. Wilmington, 76 N. Car. 133; White v. Lincoln, 5 Neb. 515; Holms-berg v. Hauck, 16 Neb. 338; State v. Lancaster County, 6 Neb. 474; 17 Neb. 85; State v. Hurds, 19 Neb. 316; *Ex parte* Thompson, 16 Neb. 239; *In re* Groff, 21 Neb. 647; 59 Am. Rep. 859.

The provision of the *New York* act of 1881, ch. 415, Laws of 1881, to establish the Niagara police district, being an essential part of the act and neces-

sary to accomplish its purposes, and such provisions being invalid, the whole must fail. *People v. Porter*, 90 N. Y. 68.

The provisions of *New York* Laws of 1873, ch. 239, for the removal of causes into the supreme court and a change of the place of trial, are not affected by the unconstitutionality of that portion of the chapter which provides for the extension of the jurisdiction of the courts mentioned in it. *Darragh v. McKim*, 2 Hun (N. Y.) 337.

The *Arkansas* act of April 3, 1879, distributing portions of the territory of Clark county to other counties, is an indivisible act, and being void in part must fail as a whole. *Bittle v. Stuart*, 34 Ark. 224.

As the main purpose of the *New York* act, 1886, ch. 418, laws of 1886, which is to dispense with appeals from judgments of the general term of the city court to the court of common pleas, must fail as unconstitutional, and as all the provisions are connected, being parts of a single scheme, the incidental provisions must fail also. *Jones v. Jones*, 104 N. Y. 234; *Black v. Trower*, 79 Va. 123.

That part of *Wisconsin* Laws of 1879, ch. 235, § 8, which provides that no vote shall be received at any general election, unless the name of the person offering to vote be on the register completed by the board of registry as previously provided in said act, excepting only the case of persons who may have become qualified voters before such election but after the completion of such register, is violative of § 1, art. 3, of the state constitution, which defines the qualifications of electors; and that provision being an essential part of the act, without which it cannot be supposed

that the statute would have been enacted, the whole act is invalid. *Dells v. Kennedy*, 49 Wis. 555.

That part of the 11th section of the *California* act of 1856 (Stats. 1856), "for the protection of actual settlers and to quiet land titles," which declares that a suit on a patent shall be brought within two years from the date of the patent, is unconstitutional; the general provisions of the act being conceded to be unconstitutional, this particular clause also falls because it is not an independent provision constitutional in itself and capable of enforcement without reference to the body of the act. *Lathrop v. Mills*, 19 Cal. 514.

If in an act, unconstitutional in its main features, there is found a provision which is constitutional, that provision may be carried out, providing it is entirely disconnected from the vicious portions of the act. And the legislature is presumed to intend that, notwithstanding the invalidity of the other portions of the act, this particular provision shall stand. The saving of the particular provision, even when not upon its face unconstitutional, is matter of legislative intent. *Lathrop v. Mills*, 19 Cal. 514.

The 9th section of the *Ohio* act of April 9, 1856, which excepts from its operation certain counties therein named, and limits the operation of the entire act to the jurisdiction of the common pleas in certain counties only, to-wit, those not excepted from its operation, is so essentially connected with the subject-matter and manifest legislative intent of the entire act that it may not be separated and rejected as void, leaving the balance of the act to stand with the uniform operation in conformity with the constitution. *Kelley v. State*, 6 Ohio St. 269.

Conceding that §§ 9 and 10 of the *Michigan* Act, 398, of the local acts of 1885, amending the charter of the city of Detroit, to be invalid, they do not impair the validity of the remaining portion of the act, which is capable of enforcement even if these sections are stricken out. *Attorney Gen'l v. Amos*, 60 Mich. 372.

In *State v. Copeland*, 3 R. I. 33, it is said: "We suppose there can be no doubt that one portion of an act may be declared unconstitutional and the residue of the same act constitutional and valid. In such a case, the portion so declared to be unconstitutional is as if it had never been passed, even in

form, and the portion declared to be constitutional must remain in full force as if that had been the whole of the act originally."

Inasmuch as it is clearly unreasonable and improbable that the legislature would have passed the *Ohio* Act of 1883, commonly called the Scott Law, 80 *Ohio* Laws 164, amended in 1884, 81 *Ohio* Laws 204, with the provision giving a lien for the tax on premises occupied by tenants eliminated therefrom, the whole act, so far as it provides for an assessment or tax, is unconstitutional and void. *State v. Sinks*, 42 Ohio St. 345.

The first section of the *Arkansas* act conferring exclusive jurisdiction in misdemeanors upon justices' courts is unconstitutional, but the second section being separate and distinct from the first and not in conflict with the constitution, is valid. *State v. Devers*, 34 Ark. 188; *Morrison v. State*, 40 Ark. 448.

So much of the fifth and sixth sections of the *Florida* act of March 3, 1883, attempting to confer judicial power upon the board of county commissioners, is unconstitutional, but being separable from the remainder of the act, does not taint it with illegality. *State v. Brown*, 19 Fla. 563.

In *Lea v. Bumm*, 83 Pa. St. 237, it was held that the main and largely executed parts of an act of assembly will not be rendered void because other portions of the act, not called into life on account of their contingent relation to the main parts of the act, are unconstitutional and void.

**Statute Contemplating Two or More Objects.**—If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. *People v. Cooper*, 83 Ill. 584; *Hinze v. People*, 92 Ill. 406.

Thus, the act of incorporation of the town of Hagerstown, Maryland, of 1860, is constitutional and valid so far as it confers police powers on the mayor, while it is invalid so far as it vests in him judicial power. *Hagerstown v. Dechert*, 32 Md. 369.

And an act creating an inferior court in a city and giving jurisdiction within the city, and also in the township without the city, will be valid in conferring jurisdiction within the city, whatever may be considered as to the validity of that portion of the act purporting to extend the jurisdiction outside the ter-

**3. Statutes Ambiguous, Defective, or Inconsistent.**—Statutes so ambiguous or defective in their terms as to convey no definite or certain meaning are invalid, as, for example, a statute prohibiting the sale of liquor within a specified distance of a certain church, there being two churches answering the description.<sup>1</sup> So a statute directing the widening of streets according to a procedure therein described, but describing no procedure, is to that extent, inoperative;<sup>2</sup> as is a statute directing the payment of money, but making no appropriation.<sup>3</sup> But a penal statute that prescribes punishment in the discretion of the court by imprisonment in either the penitentiary or state prison, and by fine, is not void by reason of the fact that in many of the counties of the state there is no penitentiary.<sup>4</sup> When two statutes are irreconcilably inconsistent, the one last enacted is considered in force, as being the later expression of the legislative will.<sup>5</sup>

ritorial limits of the city. *Reid v. Morton*, 119 Ill. 118.

But where an act provides for the dissolution and reincorporation of a municipality, and it is clear that the dissolution was authorized only as a step looking to and a foundation for the reincorporation, if that portion which provides for the reincorporation is unconstitutional, the whole act must fail. *State v. Stark*, 18 Fla. 255.

**A law is entire** when each part has a general influence over the rest. *Second Municipality v. Morgan*, 1 La. Ann. 111; *Quinlon v. Rogers*, 12 Mich. 168.

**The striking out of an unconstitutional part** is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision and reading the statute as though that provision were not there. *Waite, C. J.*, in *Florida Cent. R. Co. v. Schutte*, 105 U. S. 118.

**Corporate Charter.**—If the void portion of a corporate charter was not the inducement to, nor consideration for, the enactment of the other provisions, and by striking out the void part there are still left valid provisions amply sufficient to enable the municipality fully to perform all its functions, the charter is not vitiated. So held in regard to a charter containing an unconstitutional provision relative to the exercise of the power of eminent domain. *In re Middletown* 82 N. Y. 106. And in regard to a charter containing a provision unconstitutionally restricting the right to vote for officers. *State v. Tuttle*, 53 Wis. 45.

For further examples of statutes in this connection, see cases cited above: and also the following cases: *Utsy v.*

*Hiatt*, 30 S. Car. 360; 14 Am. St. Rep. 910; *Faut v. Gibbs*, 54 Miss. 396; *Reed v. Omnibus R. Co.*, 33 Cal. 212; *Irvin v. Gregory*, 86 Ga. 605; *Gager v. Prout*, 48 Ohio St. 89; *Baker v. State*, 80 Wis. 416; *Dacres v. Oregon R., etc., Co.*, 1 Wash. 525; *Normon v. Boaz*, 85 Ky. 557; *Wooten v. State*, 24 Fla. 335; *Rogers v. Jacob*, 88 Ky. 502; *Jaehne v. New York*, 128 U. S. 189; *aff'g* 35 Fed. Rep. 357; *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813; *People v. McFadden*, 81 Cal. 489; 15 Am. St. Rep. 66; *In re Liquors of McSoley*, 15 R. I. 608; *Wilkins v. State*, 113 Ind. 514; *Treasurer v. People's, etc., Bank*, 47 Ohio St. 503; *In re Malone Water Works Co.*, 38 N. Y. St. Rep. 95; *Ex parte Christensen*, 85 Cal. 208; *Field v. Clark*, 143 U. S. 649; *St. Louis, etc., R. Co. v. State*, 55 Ark. 200; *Mathias v. Cramer*, 73 Mich. 5; *Romaguano v. Crook*, 85 Ala. 226; *Dupee v. Swigert*, 127 Ill. 494.

1. *State v. Bartlow*, 91 N. Car. 550; 49 Am. Rep. 652.

2. *Chaffee's Appeal*, 56 Mich. 244. See also *Hughes' Case*, 1 Bland (Md.) 46.

3. *Pillow v. Gaines*, 3 Lea (Tenn.) 466.

4. *People v. Borges*, 6 Abb. Pr. (N. Y.) 132.

5. *Hurst v. Hawn*, 5 Oregon 276; *Grant County v. Sels*, 5 Oregon 243; *Rex v. Middlesex*, 1 Dowl. P. C. 117. See *infra*, this title, *Repeal*. The *Maryland* acts, 1886, chapters 261 and 497, both repealing § 7 of art. 60, of the code, relating to marriage licenses, and irreconcilably inconsistent in their provisions, were passed on different days, but approved on the same day; and it was held that, in the absence of evidence to the contrary, they were to be pre-

**4. Statutes as Evidence.**—A statute reciting a former statute is evidence thereof.<sup>1</sup> Recitals in a public statute may constitute evidence, *prima facie* or conclusive, of the facts alleged:<sup>2</sup> as for example, where an information for a libel contained an introductory averment that great outrages had been committed in certain parts of the country, the preamble of an act of parliament reciting the existence of outrages of that description was held admissible for the purpose of proving the averment;<sup>3</sup> so a recital of a state of war in the preamble of a public statute may be evidence of the existence of a state of war.<sup>4</sup> In the case of private statutes, recitals are held to be evidence as between the commonwealth and the applicant or party for whose benefit the act was passed, but not as between the latter and other individuals.<sup>5</sup> An act of the legislature granting an absolute divorce to the husband obtained pending a suit for divorce *a mensa* and alimony instituted by the wife, has been held admissible as evidence in the latter proceeding.<sup>6</sup>

**VI. TITLES AND SUBJECTS UNDER CONSTITUTIONS.—1. Constitutional Provisions.**—Many state constitutions contain provisions designed to compel the title of a statute to indicate the subject-matter. The purpose of these provisions is apparent. They are designed to preclude the enactment of omnibus bills embracing irrelevant matters sometimes obscured in the body of the bill, and not infrequently obscured intentionally for the purpose of precluding opposition which might be anticipated in the case of knowledge of the contents of the bill. The substance of these constitutional provisions usually is that no law shall embrace more than one subject, and that that subject shall be expressed in the title. Sometimes the provision is that the subject shall be clearly expressed in the title; sometimes it is qualified by the addition of "and matters properly connected therewith." Sometimes the word "object" is used instead of subject, but in the same sense. Sometimes general appropriation bills are made an exception. In some constitutions it is provided that an act wherein this pro-

sumed to have been approved in their numerical order, and the one bearing the greater number considered the latest expression of the will of the legislature. *State v. Davis*, 70 Md. 237. See also *Strauss v. Heiss*, 48 Md. 292.

1. *Lord v. Bigelow*, 8 Vt. 445.

2. *Greenl. on Ev.* (14th ed.), § 491.

3. *Rex v. Sutton*, 4 M. & S. 532.

4. *Rex v. De Berenger*, 3 M. & S. 68.

The *Virginia Stat.* of 1796, expressly recognizing the proceedings of the commissioners prior to that time relative to the *Illinois* grant, is sufficient evidence of the previous surrender of title by that state to the commissioners in conformity with her laws. *Henthom v. Doe*, 1 Blackf. (Ind.) 157.

In *Bank of U. S. v. Macalester*, 9 Pa. St. 475, where a set-off was allowed of coupons payable by a bank out of funds raised by the state for canal purposes and deposited in such bank, it was held to be no ground for reversing the judgment, that the act of Congress in aid of such canal and the act of the state legislature respecting the same were admitted in evidence.

5. *State v. Beard*, 1 Ind. 460; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; 14 Am. Dec. 86; *Parmelee v. Thompson*, 7 Hill (N. Y.) 77; *Lothrop v. Stedman*, 42 Conn. 583; *Branson v. Wirth*, 17 Wall. (U. S.) 32.

6. *Roberts v. Roberts*, 54 Pa. St. 265.

vision is disregarded shall be void only as to that part not expressed in the title. Sometimes a provision is limited in its operation to private and local bills.<sup>1</sup>

Usually these constitutional requirements are deemed mandatory.<sup>2</sup> But the *Ohio* courts have construed such a provision to be

1. See the constitutions of the various states.

In *People v. Mahaney*, 13 Mich. 481, the court, by Cooley, J., said, in this connection: "The practice of bringing together into one bill, subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislature and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills, of which the title gave no intimation, and their passage secured through legislative bodies, whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiply their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass upon it."

In Bacon's Abridgment, *Statute F*, it was said: "Who would expect to find a most material alteration of the statute of distributions in a law, the title of which is 'An act for the renewal and continuance of several acts of parliament.'"

In *Savannah v. State*, 4 Ga. 38, the Yazoo act is spoken of. This act was entitled "An act for the payment of the late state troops;" but its provisions placed a large area of public lands in the hands of speculators.

It is a matter of common knowledge that congressional appropriation bills frequently embrace all sorts of incongruous matters introduced by way of riders and otherwise.

In *Walker v. Caldwell*, 4 La. Ann.

298, the court said: "The title of an act often afforded no clew to its contents. Important general principles were found placed in acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were sometimes included in the same statute with matters entirely foreign to them, the result of which was that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation to this chaotic mass was the object of the constitutional provision under consideration."

The purpose of these provisions and the evils at which they were designed to strike are adverted to in *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *State v. Davis County Judge*, 2 Iowa 280; *Davis v. State*, 7 Md. 151; *Indiana Central R. Co. v. Potts*, 7 Ind. 681; *Hingle v. State*, 24 Ind. 28; *People v. Institution of Protestant Deaconesses*, 71 Ill. 229; *State v. Ah Sam*, 15 Nev. 27; 37 Am. Rep. 454; *Harrison v. Milwaukee County*, 51 Wis. 645; *Albrecht v. State*, 8 Tex. App. 216; 34 Am. Rep. 737; *Hope v. Gainesville*, 72 Ga. 246; *State v. Ranson*, 73 Mo. 78; *State v. Govern*, 47 N. J. L. 368. And in *Cooley's Constitutional Limitations* it is said: "It may therefore be assumed as settled that the purpose of these provisions was, first, to prevent hodge-podge or 'log rolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

2. In *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504, the court referred to the language of the *Tennessee* provision, viz., "No bill shall become a law

directory only—that is, that a statute in disregard of the provision is not void.<sup>1</sup>

which embraces more than one subject,” and said: “This is a direct, positive and imperative limitation upon the power of the legislature.”

In *Central, etc., R. Co. v. People*, 5 Colo. 39; 9 Am. & Eng. R. Cas. 546, it was held that the language of the provision common to *Colorado* and some other states, viz., “But if any subject shall be embraced in any act which shall not be embraced in the title, such act shall be void only as to so much thereof as shall not be so embraced,” was decisive of the question. See *San Antonio v. Gould*, 34 Tex. 49; *Cannon v. Hemphill*, 7 Tex. 184; *State v. McCracken*, 42 Tex. 383; *Tadlock v. Eckles*, 20 Tex. 782; 73 Am. Dec. 213; *Weaver v. Lapsley*, 43 Ala. 224; *Montgomery Mut. Bldg., etc., Assoc. v. Robinson*, 69 Ala. 413; *State v. Miller*, 45 Mo. 495; *Prothro v. Orr*, 12 Ga. 36; *Phillips v. Covington, etc., Bridge Co.*, 2 Metc. (Ky.) 221; *Sedgwick County v. Bailey*, 13 Kan. 607; *People v. Fleming*, 7 Colo. 230; *Shields v. Bennett*, 8 W. Va. 74; *Ramsey County v. Heenan*, 2 Minn. 330; *Huber v. People*, 49 N. Y. 134; citing *People v. Hills*, 35 N. Y. 449; *People v. Chautauqua County*, 43 N. Y. 10; *People v. Allen*, 42 N. Y. 378; *Gaskin v. Meek*, 42 N. Y. 186; *People v. O'Brien*, 38 N. Y. 193; *Union Pass. R. Co.'s Appeal*, 81½ Pa. St. 91; *Wall v. Garrison*, 11 Colo. 515.

1. The view taken by the *Ohio* court was supported in *Pim v. Nicholson*, 6 Ohio St. 176, by the following argument: “The . . . provision . . . that no bill shall contain more than one subject, which shall be clearly expressed in its title, is also made a permanent rule in the introduction and passage of bills through the houses. The subject of the bill is required to be expressed in the title for the purpose of advising members of its subject, when voting in cases in which the reading has been dispensed with by a two-thirds' vote. The provision that a bill shall contain but one subject was to prevent combinations by which various and distinct matters of legislation should gain a support which they could not if presented separately. As a rule of proceeding in the general assembly, it is manifestly an important one. But if it was intended to effect any practical object for the bene-

fit of the people in the examination, construction, or operation of acts passed and published, we are unable to perceive it. The title of an act may indicate to the reader its subject, and under the rule each act would contain one subject. To suppose that for such a purpose the constitutional convention adopted the rule under consideration, would impute to them a most minute provision for a very imperfect heading of the chapters of laws and their subdivision. This provision being intended to operate upon bills in their progress through the general assembly, it must be held to be directory only. It relates to bills and not to acts. It would be most mischievous in practice to make the validity of every law depend upon the judgment of every judicial tribunal of the state, as to whether an act or a bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge. No practical benefit could arise from such inquiries. We are, therefore, of the opinion that in general the only safeguard against the violation of these rules of the houses is their regard for, and their oath to support, the constitution of the state. We say, in general, the only safeguard; for whether a manifestly gross and fraudulent violation of these rules might authorize the court to pronounce a law unconstitutional, it is unnecessary to determine. It is to be presumed no such case will ever occur.” See also *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383; *Lehman v. McBride*, 15 Ohio St. 604; *State v. Covington*, 29 Ohio St. 102; *Oshe v. State*, 37 Ohio St. 500.

On the other hand, in *People v. Lawrence*, 36 Barb. (N. Y.) 177, *Emmot, J.*, in speaking of this provision, said: “It will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative.” And again in *Prothro v. Orr*, 12 Ga. 36, *Lumpkin, J.*, said: “It has been suggested that the prohibition in the seventeenth section of the first article of the constitution, ‘Nor shall any law or ordinance pass containing any matter

These provisions do not invalidate existing statutes.<sup>1</sup> Under their general terms they do not apply to city ordinances.<sup>2</sup>

**2. Title Broader than Statute.**—A statute is not invalid by reason of the fact that the title expresses more than one subject, if the statute itself does not;<sup>3</sup> nor because the title refers to inconsistent matters, if there is nothing in the body of the statute to correspond with the inconsistent matters expressed in the title.<sup>4</sup> Redundant expressions in the title which do not obscure its meaning will not render the title bad.<sup>5</sup>

**3. Statute Broader than Title.**—It may be said generally that so much of a statute as is broader than the title is void under these constitutional provisions.<sup>6</sup> In such case the whole statute need

different from what is expressed in the title thereof, is directory only to the legislative and executive or law-making departments of the government. But we do not so understand it. On the contrary, we consider it as much a matter of judicial cognizance as any other provision in that instrument."

In *Cooley on Constitutional Limitations*, p. 97, the *Ohio* view is criticised and the above-quoted language from the *New York* and *Georgia* cases approved.

Under the old constitution of *California* the courts held such a provision to be directory and not mandatory. *Washington v. Page*, 4 Cal. 388; *Pierpont v. Crouch*, 10 Cal. 315; but the existing constitution closes the door on the question by providing generally that the provisions of the constitution are mandatory, unless by express words declared otherwise.

1. *Rogers v. Windoes*, 48 Mich. 628; *State v. Robinson* (Neb. 1892), 53 N. W. Rep. 213.

If, at the time of the passage of an act, the constitution of the state contains no provision that the object of an act shall be indicated in the title, the subsequent incorporation of such act in a compilation of laws will not render it subject to such a provision in a constitution thereafter adopted. *Auditor Gen'l v. Lake George, etc.*, R. Co., 82 Mich. 426.

2. *Humboldt v. McCoy*, 23 Kan. 249; *People v. Hanrahan*, 75 Mich. 611; *Green v. Indianapolis*, 25 Ind. 490; *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830.

3. *State v. Becker* (S. Dak. 1892), 51 N. W. Rep. 1018; *State v. Trolson* (Nev. 1893), 32 Pac. Rep. 930; *State v. Hyde*, 129 Ind. 296. See also *Dromberger v. Reed*, 11 Ind. 420.

*Powers v. McKenzie*, 90 Tenn. 167. In this case the objection was made that the title of the act was more comprehensive than its provisions. The court, in refuting the objection, observed: "We are aware of no adjudicated case, and it is believed that none can be found, that holds an act of the legislature obnoxious to this section of the constitution simply on the ground that the provisions of the act do not embrace or cover the full scope of appropriate legislation admissible under its title. The intent of this provision of our organic law was to secure, in a legislative sense, unity of subject expressed in its title in each legislative act; and this for the protection of the legislative body as well as its constituency. The cases, as well as sound reason, in the exposition of this and similar provisions of written constitutions, condemn acts because their terms and legal import go beyond the scope of their titles, and not because they keep well within them." *Judson v. Bessemer*, 87 Ala. 240.

4. *Strauss v. Heiss*, 48 Md. 292; *State v. Becker* (S. Dak. 1892), 51 N. W. Rep. 1018.

5. *In re Haynes* (N. J. 1891), 22 Atl. Rep. 923.

6. *Messenger v. State*, 25 Neb. 674. In this case it was held that the title "An act to provide that all citizens shall be entitled to the same civil rights" could not support a provision that "all persons within this state" should be entitled to the same right, in so far as the statutory provision applied to persons who were not citizens of the state. See also *White v. Lincoln*, 5 Neb. 505; *Tecumseh v. Phillips*, 5 Neb. 305; *McGee's Appeal*, 114 Pa. St. 470; *Ex parte Cowert*, 92 Ala. 94.

The title, "An act making appropriations for general expenses of the



not fail if the extraneous provision is so separable from that within the title that the latter can stand alone.<sup>1</sup> Sometimes the constitutional provision is that only that part of the statute not expressed in the title shall be void.<sup>2</sup> Where two subjects are expressed in the title, and two subjects embraced in the body of the act, the statute as a whole must be held inoperative generally, because of the difficulty of determining which part should stand. If, however, it can be determined from an inspection of the statute which part should be rejected, such part may be void and the rest valid.<sup>3</sup> Affirmative legislation may not be attempted

state for the year ending December 31, 1874," does not embrace a provision for expenses incurred before that year. *State v. Clinton*, 27 La. Ann. 40.

The title, "An act to provide for changing the names of minor adopted children, and of other persons" is inconsistent with a provision that the persons adopting a child shall stand in place of the parents and that the child shall be their heir at law. *People v. Congdon*, 77 Mich. 351.

In *People v. Phippin*, 70 Mich. 6, it was held that the title "An act to promote public health," would not sustain provisions regulating the practice of medicine by unqualified persons.

The title, "An act concerning bills and notes," will not sustain a provision respecting "other instruments." *Mewherter v. Price*, 11 Ind. 199.

The title of an act specifically naming five sections of another act to be amended, will not support an amendment of the sixth section of such act. *State v. Bankers, etc., Mut. Ben. Assoc.*, 23 Kan. 499.

The title, "An act providing for the acknowledgment of deeds and other conveyances of land," does not sustain a provision that conveyances not recorded within six months shall be void as against subsequent purchasers. *Carr v. Thomas*, 18 Fla. 736.

The title, "An act regulating the herding and driving of stock," will not comprehend a provision giving damages for injuries to such stock in certain cases. *Ives v. Norris*, 13 Neb. 252.

The title, "An act to release the interest of the people of the State of New York in certain real estate [certain designated persons] and for other purposes," is not sufficient to support provisions releasing to such persons an interest in personal estate acquired by the state by escheat. *Johnston v. Spicer*, 107 N. Y. 185. See also *McCabe v. Kenny*, 52 Hun (N. Y.) 518.

When the title of a statute is single, the provisions which it covers will be valid—those not covered, void. *Williams v. Payson*, 14 La. Ann. 7; *Savannah v. State*, 4 Ga. 26.

Only so much of the act as is not indicated by the title is void. *Union Pass. R. Co's Appeal*, 81½ Pa. St. 91; *Alleghany County Home's Case*, 77 Pa. St. 77; *Carothers v. Philadelphia Co.*, 118 Pa. St. 468.

1. *Ex parte Moore*, 62 Ala. 471.

In *In re Sackett, etc., Streets*, 74 N. Y. 95, the title of the act related to the improvement of three streets, but the body of the act related to five, and it was held that the act was valid as to the three streets mentioned in the title, the improvement of the other two streets not being necessarily connected with that of the other three.

2. As in *Indiana, Oregon, Iowa, Illinois, and West Virginia*. See *Indiana Cent. R. Co. v. Potts*, 7 Ind. 681; *Shields v. Bennett*, 8 W. Va. 74.

3. See *People v. Briggs*, 50 N. Y. 553; *Huber v. People*, 49 N. Y. 132; *People v. Morgan*, 65 Barb. (N. Y.) 473; *People v. Phifer*, 3 Heisk. (Tenn.) 682; *Prothro v. Orr*, 12 Ga. 36; *Chiles v. Monroe*, 4 Metc. (Ky.) 72; *Smith v. New York*, 34 How. Pr. (N. Y.) 508; *People v. O'Brien*, 38 N. Y. 193; *Walker v. State*, 49 Ala. 329; *Boyd v. State*, 53 Ala. 601; *Ex parte Moore*, 62 Ala. 471; *Phillips v. New York*, 1 Hilt. (N. Y.) 483; *Williams v. Payson*, 14 La. Ann. 7; *Savannah v. State*, 4 Ga. 26; *Fuqua v. Mullen*, 13 Bush (Ky.) 467; *Rader v. Union Tp.* 39 N. J. L. 509; *Jones v. Thompson*, 12 Bush (Ky.) 394; *Middleport Tp. v. Aetna L. Ins. Co.*, 82 Ill. 562; *Welch v. Post*, 99 Ill. 471; *Ex parte Cowert*, 92 Ala. 94. In *State v. Lancaster County*, 6 Neb. 474, it was held that the entire act was void. Also in *State v. McCann*, 4 Lea (Tenn.) 1.

In *Donnersberger v. Prendergast*,

under a title disclosing nothing except the repeal of former legislation.<sup>1</sup>

**4. General Rules.**—The provision that an act shall contain but one subject which shall be expressed in its title should be so construed as to support the validity of the act if possible.<sup>2</sup> A

128 Ill. 234, the court, by Shope, J., said in this connection: "As we have seen, the constitution provides that where a subject is embraced in an act not expressed in its title, 'the act shall be void only as to so much thereof as shall not be so expressed.' Therefore, although a portion of the statute under consideration is unconstitutional, it does not follow that the court is authorized to declare its other provisions void, if they are separable from the void provisions and capable of enforcement independently of such void provisions, unless it shall appear that all of the provisions of the act are so dependent on each other, operating together for the same purpose, or are otherwise so connected together in meaning, that it cannot be presumed that the legislature would have passed the one without the other provision. When the constitutional and unconstitutional provisions are distinct and separable, the valid provisions may stand as though the invalid provision had not been introduced. Cooley Const. Lim. 177, 178, and notes. See also *Knox County v. Davis*, 63 Ill. 405; *Myers v. People*, 67 Ill. 503; *Binz v. Weber*, 81 Ill. 288; *Middleport Tp. v. Aetna L. Ins. Co.*, 82 Ill. 562; *Hinze v. People*, 92 Ill. 406; *Cornell v. People*, 107 Ill. 372; *People v. Hazelwood*, 116 Ill. 319." See also upon this point, *State v. North Plainfield*, 43 N. J. L. 349; *Dorsey's Appeal*, 72 Pa. St. 192; *In re Metropolitan Gaslight Co.*, 85 N. Y. 526; *Tecumseh v. Phillips*, 5 Neb. 305; *Stiefel v. Maryland Blind Inst.*, 61 Md. 144; *State v. Palmes*, 23 Fla. 620.

If the first subject of an act is expressed in its title and the second subject be not so expressed, the act may be valid as to the first subject, if it appear that the second was not an inducement to the legislature to pass the first. *State v. Lancaster County*, 17 Mo. 85.

In *Skinner v. Wilhelm*, 63 Mich. 571, the title was, "An act to provide for the incorporation of merchants' mutual insurance companies, and to regulate the business of insurance by merchants' and manufacturers' mutual insurance companies," and provisions of the act followed the title. The court, by Sherman, J., said: "We think these two

objects have no necessary connection with each other. The regulation of the business of manufacturing companies having an existence when the act was passed, and some of them organized in other states, has nothing to do with, and has no necessary or natural connection with, the formation of merchants' mutual insurance companies. The two objects are distinct and separate, and should have been provided for in separate acts. The defects noticed are fatal to the validity of the whole act. The case is not one in which any part of the act can be retained, and the rest rejected for the infirmity. It is impossible to tell which object was intended by the legislature, and in such case both fall under the same condemnation. There is no room for doubt upon the subject."

1. *Stiefel v. Maryland Blind Inst.*, 61 Md. 144.

2. *Harris v. Niagara County*, 33 Hun (N. Y.) 279; *Bergman v. St. Louis, etc., R. Co.*, 88 Mo. 678; 28 Am. & Eng. R. Cas. 588; *In re Breene*, 14 Colo. 401; *In re Haynes* (N. J. 1891), 22 Atl. Rep. 923. In this case the court, by Beasley, C. J., said: "It has always been held that these statutory titles, with regard to their construction, are to be liberally treated so as to validate the law to which they appertain, if such course be reasonably practicable. In such a connection hypercriticism is utterly out of place, the only requirement being that the title of the statute shall express its object in a general way so as to be intelligible by the ordinary reader."

The title will be sufficient, if by fair construction its language can be deemed to embrace the provisions of the act. *Jacksonville v. Bassnett*, 20 Fla. 525.

In *Henderson v. Jackson County*, 2 McCrary (U. S.) 619, it is said that a provision that all bills shall be read at length before final passage, now found in most constitutions, has given additional safeguards against fraudulent legislation and made it unnecessary, except in special cases, to construe the constitutional requirement relating to title with strictness.

See generally *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *People v. Hurlbut*,

strained<sup>1</sup> or technical<sup>2</sup> construction should be avoided, and doubtful cases should be resolved in favor of the act.<sup>3</sup> It is sufficient if the title states the object of the act according to the understanding of reasonable men.<sup>4</sup> The provision should be given a reasonable interpretation,<sup>5</sup> but wherever an intent to avoid it appears, the court must give it effect.<sup>6</sup>

Long acquiescence in the constitutionality of an act in respect of its title is entitled to great weight in determining the sufficiency of the title.<sup>7</sup> The title of an act should give fair notice of its contents. It should not mislead.<sup>8</sup> But it is not necessary that the title should particularize the matter of the statute,<sup>9</sup> nor

24 Mich. 55; 9 Am. Rep. 103; *People v. Briggs*, 50 N. Y. 553; *City Sewage Utilization Co. v. Davis*, 8 Phila. (Pa.) 625; *Phillips v. Covington, etc.*, Bridge Co., 2 Metc. (Ky.) 219; *People v. Lawrence*, 36 Barb. (N. Y.) 177.

1. *Otoe County v. Baldwin*, 111 U. S. 1.

2. *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *Municipality No. Three v. Michoud*, 6 La. Ann. 665.

3. *Gillespie v. State*, 9 Ind. 380; *Robinson v. State*, 15 Tex. 311.

The act will not be declared unconstitutional unless it is in such plain conflict with the constitution as to leave no discretion to the court in the premises. Every reasonable intentment must be made in favor of the act. *Dorchester County v. Meekins*, 50 Md. 39. See also *infra*, this title, *Presumption in Favor of Constitutionality*.

4. *Municipality No. Three v. Michoud*, 6 La. Ann. 605.

The title, "An act concerning bridges in B County" is sufficient to embrace everything connected with bridges, including their manner of construction, purchase, and payment therefor. *Pierce v. Smith* (Kan. 1892), 29 Pac. Rep. 565.

The title, "An act to provide for a board of assessors in cities," sufficiently indicates provisions relating to the creation of boards to assess property and to award damages and benefits. *In re Assessment, etc.* (N. J. 1892), 23 Atl. Rep. 517.

The title of an act expressing its object to be the laying out of a public ground for the purpose of maintaining a sea wall, is sufficient to support provisions for the condemnation of such ground. *Sweet v. Buffalo, etc.*, R. Co., 79 N. Y. 293.

The title of an act in relation to "expenses" will support provisions relating to a "debt." *State v. State Auditor*, 32 La. Ann. 89.

5. *Allegheny County Home's Case*, 77 Pa. St. 79.

6. *Johnston v. Spicer*, 107 N. Y. 185; *Purdy v. People*, 4 Hill (N. Y.) 418; *People v. Hills*, 35 N. Y. 452.

7. *Continental Imp. Co. v. Phelps*, 47 Mich. 299; *Cooley Const. Lim.* (6th ed.) 81; *Stuart v. Laird*, 1 Cranch (U. S.) 299; *Detroit City R. Co. v. Mills*, 85 Mich. 646; *Martin v. Hunter*, 1 Wheat. (U. S.) 351; *Cohens v. Virginia*, 6 Wheat. (U. S.) 264; *Bank of U. S. v. Halstead*, 10 Wheat. (U. S.) 51; *Westinghausen v. People*, 44 Mich. 265; *People v. Hammond*, 13 Mich. 256; *Frey v. Michie*, 68 Mich. 323; *People v. Goodwin*, 22 Mich. 500.

8. *Allegheny County Home's Case*, 77 Pa. St. 77. Here the title of the act was "An act providing for an equitable division of property between Allegheny county and the city of Pittsburgh." Allegheny county constituted a poor district known as Allegheny County Home, and certain townships of the county were annexed to the city of Pittsburgh; two sections of the act provided that the value of the interest of the annexed townships in the Home property should be ascertained and paid to the guardians of the poor of Pittsburgh; the third section extended the provisions of the act to Allegheny city as provided for Pittsburgh. It was held that the first two sections were constitutional and did not contain more than one subject which was not expressed in the title. The court said: "If the title fairly gives notice of the subject of the act so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to the contents as has often been said." See also *State Line, etc.*, R. Co.'s Appeal, 77 Pa. St. 429.

9. *Green v. Mayor, etc.*, R. M. Charl. (Ga.) 368; *Martin v. Broach*,

set forth its substance,<sup>1</sup> nor the nature of its provisions;<sup>2</sup> nor is it necessary that it should amount to an epitome, abstract,<sup>3</sup> or index of its contents.<sup>4</sup> Nor need the title state the means<sup>5</sup> or mode<sup>6</sup> of accomplishing the purposes of the act.<sup>7</sup> Nor does the provision that the object of the act must be expressed in its title

6 Ga. 21; 50 Am. Dec. 306; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *State v. Wilson*, 12 Lea (Tenn.) 246; *Adler v. State*, 55 Ala. 16; *Watson v. State*, 55 Ala. 158; *People v. McCallum*, 1 Neb. 182.

In *Wrought-Iron Bridge Co. v. Attica*, 2 N. Y. Supp. 361, the court, by Bradley, J., said: "The purposes for which the title is required to express the subject of a private or local bill is not to furnish by it the details of the act, but to call attention to the matter to which it relates for the details of which reference must be had to the provisions of the bill. The question is not one of degree of particularity, but whatever comes within the purview of the subject expressed in the title is permissible in the act," citing *Brewster v. Syracuse*, 19 N. Y. 116; *Tift v. Buffalo*, 82 N. Y. 204; *People v. Briggs*, 50 N. Y. 553; *In re Prospect Park, etc., R. Co.*, 67 N. Y. 372; *Kerrigan v. Force*, 68 N. Y. 381; *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235; *In re Metropolitan Gaslight Co.*, 85 N. Y. 526.

The title, "An act to remove the seat of government temporarily to Wheeling," is sufficient to sustain a provision accepting the offer of certain citizens to effect such removal without cost to the state. *Slack v. Jacob*, 8 W. Va. 640.

The title, "An act concerning the dissolution of attachments," may embrace provisions relating to the disposition of an insolvent debtor's estate. *Mayer v. Cahalin*, 5 Sawy. (U. S.) 355.

The title, "An act to regulate the practice of pharmacy . . . and the sale of poisons," is sufficient to sustain a provision regulating the sale of drugs and medicines other than poisons. *State v. Donaldson*, 41 Minn. 74.

The title of a repealing act expressing its object to be the repealing of an act which provides for the levying of a tax for the purpose of erecting a drawbridge over certain waters, is sufficient to sustain a provision in the repealing act providing for the erection and repair of such a drawbridge. *Talbot County v. Queen Ann's County*, 50 Md. 245.

1. *Lockhart v. Noy*, 48 Ala. 579; *Falconer v. Robinson*, 46 Ala. 347. In this case the court, by Peck, C. J., said: "The title, 'An act to authorize the governor to fill vacancies in certain county offices' is sufficient. The subject of this law is, by whom vacancies in certain county offices shall be filled. The title clearly expresses this. They are to be filled by the governor. The title need not state what particular county offices are to be filled by him. That is a part of the matter and substance of the law, and the body of the law, not the title, is the appropriate place to express it. To require it to be expressed in the title would be to require the title to express not only the subject, but also the matter and substance of the law."

2. *People v. Lawrence*, 41 N. Y. 137; *State v. Union*, 33 N. J. L. 350; *State v. Kinsella*, 14 Minn. 524.

The title, "An act to provide for the enrollment of contributing members in each company and battery of state troops," sufficiently indicates a provision giving to such members a special exemption from jury duty. *Hall v. Burlingame*, 88 Mich. 438.

The title, "An act in relation to assignments for the benefit of creditors and to regulate the same and the proceedings thereunder," sufficiently indicates a provision invalidating all liens on stocks of goods exposed for sale in the usual course of trade. *Duncan v. Taylor*, 63 Tex. 645.

8. *People v. McCallum*, 1 Neb. 182. It is not intended that the body of an act shall be a repetition of the title, nor that the title shall be a summary or epitome of the body. *Montgomery Mut. Bldg., etc., Assoc. v. Robinson*, 69 Ala. 418.

4. *Allegheny County Home's Case*, 77 Pa. St. 77; *Carter County v. Sinton*, 120 U. S. 517; *State v. Darfel*, 28 La. Ann. 38; *Baltimore v. Reitz*, 50 Md. 574.

5. *People v. Lawrence*, 41 N. Y. 137; *Edwards v. Police Jury*, 39 La. Ann. 855.

6. *Collins v. Henderson*, 11 Bush (Ky.) 74; *Brewster v. Syracuse*, 19 N. Y. 116.

7. *Edwards v. Police Jury*, 39 La. Ann. 855.

imply that the act shall have no operation beyond what is expressed in the title.<sup>1</sup> A brief and concise statement sufficient to indicate the nature of the act is all that is necessary.<sup>2</sup> If an act relates to a definite locality so particularly that the limits within

1. *People v. Wands*, 23 Mich. 384. In this case the title of the act was "An act to amend sections 18 and 19 of an act entitled," etc. [reciting the title of the act designed to be amended fully and correctly], which re-enacted at length the two specified sections as amended, and contained no object not embraced in the title of the original act, which latter title was properly framed. The title of the amendatory act was held to sufficiently disclose the object of the act. The court, by Graves, J., said: "The title of the original act was thus fully and correctly recited, and the two specified sections as amended were re-enacted at length. They contained no object not embraced in the title of the original act, and the title of that act is framed in substantial accordance with the clause of the constitution which delineates the legislative power on the subjects to which the act relates, and indicates the purpose to be attained by legislation, and as the amending act stated its object to be the amendment of the two sections, and embraced no object not expressed in the title of the act to be amended, we think no question properly arises on the title. If we were to hold that no act can have any operation further than the title actually expresses, we should outrun the constitution, unsettle much of the legislation of the last twenty years, and throw an obstacle in the path of future legislation which no human wisdom could overcome." *Compare* *Washington County v. Franklin R. Co.*, 34 Md. 159.

See also *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447, where the right to collect tolls was held to be sufficiently included in the title, "An act to incorporate the Green and Barren River Navigation Company," the court saying that such powers as were delegated by the act were given in most instances to all corporations, and that to hold the act unconstitutional on the ground that its object was not sufficiently disclosed by the title, would be, in effect, to annul nearly all the charters theretofore granted by the legislature for internal improvement purposes.

The title, "An act to encourage the growing of hedges," sufficiently indi-

cates a provision conferring a bounty on persons growing hedges. *Marion County v. Winkley*, 29 Kan. 40.

The title, "An act to establish a water department in and for the city of Syracuse," is sufficient to sustain a provision for obtaining water from a certain lake, and for condemnation proceedings necessary for that purpose. *Sweet v. Syracuse* (N. Y. 1891), 27 N. E. Rep. 1081.

The title, "An act to regulate the descent of real estate and the distribution of personal property," comprehends a provision that the existing law as to inheritance of the husband and wife from each other shall apply only to the separate property of the decedents and take the place of tenancy in dower and tenancy by the curtesy, which are thereby abolished. *Richards v. Bellingham Bay Land Co.*, 54 Fed. Rep. 209.

The title, "An act to encourage and provide for a general vaccination in the State of California," sufficiently sustains a provision that children shall be vaccinated before they are admitted to any of the public schools. *Abeel v. Clark*, 84 Cal. 226.

2. *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522. In this case it was held that the fact that an act makes the "giving" away intoxicating liquors an offense, while the title of the act refers to the sale only, does not render the act unconstitutional.

In a statute creating a public office, whatever is regarded by the legislature as requisite to describe or establish the nature of the office, the character, limit and effect of the powers communicated, the extent of the duties intended to be imposed on its incumbent, and the official and personal rights intended to be claimed and exercised by him, as well as all provisions intended to afford means of carrying out the objects contemplated by the establishment of such office, may be regarded as part of the subject-matter and entering into the proper subject of the statute. *Morton v. Comptroller Gen'l.*, 4 S. Car. 430. Provisions regulating the manner of conducting an election to determine a change of location of a county seat may be embraced under the title, "An

which it is to apply become an essential feature, it has been held necessary to express the locality in the statute.<sup>1</sup>

On the other hand, the title will not be invalidated by the fact that it contains redundant expressions<sup>2</sup> or is needlessly particular in stating details embraced in the act.<sup>3</sup> If subjects embraced by the statute but not specified in the title have congruity<sup>4</sup> or natural connection<sup>5</sup> with the subject stated in the title, or are cognate<sup>6</sup>

act to change the location of the county seat of—"specifying the county. The submission of the question of the change of location to the voters, the selection of the new site, and the removal of the county buildings, are all matters properly connected with the "change of the location," which is the subject expressed in the title of the act. *Simpson v. Bailey*, 3 Oregon 515. See also *Division of Howard County*, 15 Kan. 197; *Woodruff v. Baldwin*, 23 Kan. 494.

1. *Durkee v. Janesville*, 26 Wis. 697, where the title, "An act to legalize and authorize street improvements and assessments," was held insufficient because it did not specify the localities to be improved, as shown by the body of the statute. See also *Anderton v. Milwaukee*, 82 Wis. 279, where the title, "An act to authorize the city of Milwaukee to change the grades of streets," was held insufficient for the same reason. See also *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214. In *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235, it was held that the title of an act to preserve the public peace within the city of New York on Sunday, need not express the locality mentioned in the body of the act; *distinguishing* *Durkee v. Janesville*, 26 Wis. 697.

2. Thus in the title, "An act concerning cities of the first class in this state, and constituting municipal boards of street and water commissioners, and defining the powers and duties of such boards and relating to the municipal affairs and departments of such cities, placed under the control and management of such boards, and providing for the maintenance of the same," that part commencing with the words "and defining the powers," etc., and continuing to the end, was held to consist of harmless redundancies. *In re Haynes* (N. J. 1891), 22 Atl. Rep. 923.

3. *Allen v. Hall*, 14 Bush (Ky.) 85; *Greaton v. Griffin*, 4 Abb. Pr. N. S. (N. Y.) 313.

Where but one general subject is expressed, the fact that the legislature sees fit to incur the title with two

specifications under that subject, will not render the act obnoxious to the constitutional provision against dual subjects. *Dallas v. Redman*, 10 Colo. 297; *State v. Kolsem*, 103 Ind. 434; *Bitters v. Fulton County*, 81 Ind. 125; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97; *Barnett v. Harshbarger*, 105 Ind. 410; *Indianapolis v. Huegele*, 115 Ind. 581.

4. *De Witt v. San Francisco*, 2 Cal. 289.

The title of an act relating to bonds issued in aid of improvements "in this state," will sustain provisions relating to certain improvements, though such improvements are not restricted by the act to the state in question. *Otoe County v. Baldwin*, 111 U. S. 1.

5. *State v. Miller*, 45 Mo. 495.

The title, "An ordinance to regulate and prohibit the running at large of animals," comprehends a provision prohibiting the unlawful taking of animals from the city pound. *Smith v. Emporia*, 27 Kan. 528.

The title, "An act to prevent stock from running at large in P. county," sufficiently indicates a provision making the owner liable for all injuries done by the stock while running at large, and that a judgment therefor shall be a lien on the stock committing the injury. *Barnhill v. Teague* (Ala. 1892), 11 So. Rep. 444.

6. *McCaslin v. State*, 44 Ind. 151; *Bonorden v. Kriz*, 13 Neb. 121.

The title, "An act to prevent animals from running at large in a designated county," will sustain a provision prohibiting the running at large of animals in a precinct of that county. *Erlinger v. Boneau*, 51 Ill. 94.

The title, "An act to provide for the appointment of a land commissioner," sufficiently indicates a provision authorizing a public debt to be contracted for the purposes of the act. *Morton v. Comptroller Gen'l*, 4 S. Car. 430. *Compare* *State v. Gurney*, 4 S. Car. 520.

The title, "An act to provide a home-stead for the widows and children of deceased persons," is sufficient to indicate

or germane<sup>1</sup> thereto, the requirement of the constitution as to title is satisfied. The fact that the act authorizes many things of a diverse nature to be done will not affect the sufficiency of the title, provided the doing of such things may be fairly regarded as in furtherance of the general subject of the enactment.<sup>2</sup>

If the subject of the act is embraced in the title, all legal consequences necessarily flowing from it will, for the purposes of the constitutional requirement, be regarded as embraced in the title

a provision that in certain cases such persons shall be entitled to receive a specified sum from the estate of the decedent before his debts shall have been paid. *Lanzetti's Succession*, 9 La. Ann. 329; *Aaron's Succession*, 11 La. Ann. 671.

The title, "An act to establish state depositaries . . . and prescribe their duties and liabilities," comprehends a provision for the giving of bonds by the depositaries and the enforcement thereof. *Seay v. Bank of Rome*, 66 Ga. 609.

1. The general rules are stated in *Johnson v. Harrison*, 47 Minn. 578, where the court, by Mitchell, J., said: "Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire body of statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is that the act should not include legislation so incongruous that it could not, by any fair intendment, be considered germane to one general subject. The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several. The connection or relationship of several matters, such as will render them germane to one subject and to each other, can be of various kinds, as, for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical; it is enough that the matters are connected with and related to a single subject in popular signification. The generality of the title of an act is no objection, provided only it is sufficient to give notice of the general subject of the proposed legislation and of the in-

terests likely to be affected. The title was never intended to be an index of the law."

In *Shields v. Bennett*, 8 W. Va. 74, the title of the act was "An act making appropriations of the public money to pay general charges on the treasury," and it was held that this was a sufficient expression of the object of the act to sustain a provision indicating the officer on whose requisition the money should be paid. And see the following cases: *State v. Silver*, 9 Nev. 227; *DeWitt v. San Francisco*, 2 Cal. 289; *People v. Mahaney*, 13 Mich. 481; *State v. State Bank*, 45 Mo. 528; *Gifford v. New Jersey R., etc., Co.*, 10 N. J. Eq. 171. As to what is germane to title, see *Smith v. State*, 19 Fla. 408; *People v. Nelson*, 133 Ill. 565; *Benson v. Christian*, 129 Ind. 535; *State v. Bush*, 45 Kan. 138; *In re Pinkney*, 47 Kan. 89; *Tice v. Bay City*, 78 Mich. 209; *Campbell v. Kalamazoo*, 80 Mich. 655; *Fort Street Union Depot Co. v. Morton*, 83 Mich. 265; *Ripley v. Evans*, 87 Mich. 217; *Frary v. Allen Tp.* (Mich. 1892), 52 N. W. Rep. 78; *McPherson v. Blacker*, 92 Mich. 377; *State v. Starkey*, 49 Minn. 503; *State v. Macklin*, 41 Mo. App. 335; *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; *Clark Thread Co. v. Hudson County* (N. J. 1892), 23 Atl. Rep. 820; *State v. Shaw*, 22 Oregon 287; *Com. v. Deputy* (Pa. 1892), 23 Atl. Rep. 896; *Washington v. McGeorge* (Pa. 1892), 23 Atl. Rep. 222; 29 W. N. C. (Pa.) 251; *Ex parte Bacot* (S. Car. 1892), 15 S. E. Rep. 204; *Magee v. Merriman* (Tex. 1892), 19 S. W. Rep. 1002; *Van Houten v. Route*, 1 Wash. 306; *State v. New Whatcom*, 3 Wash. 7; *Marston v. Humes*, 3 Wash. 267; *overruling Harland v. Territory*, 34 Wash. Ter. 131.

2. Good illustrations of this will be found in the following cases: *Magurn v. Board of Education*, 133 Ill. 122; *Blake v. People*, 109 Ill. 504; *Larned v. Tiernan*, 110 Ill. 173; *Mix v. Illinois Cent. R. Co.*, 116 Ill. 502; *People v. Hazelwood*, 116 Ill. 319.

also.<sup>1</sup> Provisions fairly within the title are not objectionable because improperly classified,<sup>2</sup> nor because they might have been more explicit<sup>3</sup> or more apt,<sup>4</sup> nor because the court may consider them unjust.<sup>5</sup>

The words "and for other purposes" frequently suffixed to the title of a statute imply purposes not named in the title, and therefore are generally rejected as being without force or effect, and insufficient to indicate matters not otherwise indicated by the title.<sup>6</sup> "Etc." has also been held to have no meaning as a part of the title of an act.<sup>7</sup> Clerical errors will not vitiate the title if the object of the statute is apparent.<sup>8</sup>

The constitutional provision may not be construed as to operate an unnecessary restriction on legislative action.<sup>9</sup>

1. *Timm v. Harrison*, 109 Ill. 193; *Mix v. Illinois Cent. R. Co.*, 116 Ill. 102; *Magurn v. Board of Education*, 133 Ill. 122.

2. *Robinson v. State*, 15 Tex. 311.

3. *Coffman v. Keightley*, 24 Ind. 509.

4. *Miami County v. Bears*, 25 Ind. 110.

5. *Mayer v. Cahalin*, 5 Sawy. (U. S.) 355.

6. *Sutherland on Stat. Const.*, § 89; *Mix v. Tiefert*, 42 Mo. 578; *State v. Garrett*, 29 La. Ann. 637; *Com. v. Green*, 58 Pa. St. 233; *Fishkill Tp. v. Fishkill, etc., Plank Road Co.*, 22 Barb. (N. Y.) 634; *Johnston v. Spicer*, 107 N. Y. 185; *Ryerson v. Utley*, 16 Mich. 269; *Shepherd v. Helmers*, 23 Kan. 504; *Pitkin County v. Aspen Min., etc., Co. (Colo. 1893)*, 32 Pac. Rep. 717.

In *Georgia*, where the requirement was that the act should contain no matter "different" from what was expressed in the title, it was held that the words "and for other purposes" were sufficient to sustain provisions not otherwise indicated by the title. *Martin v. Broach*, 6 Ga. 21; 50 Am. Dec. 306.

7. *State v. Hackett*, 5 La. Ann. 93. But in *Garvin v. State*, 13 Lea (Tenn.) 162, it was held that in the title, "An act to punish as felons all parties who may engage in keeping or conducting halls or houses for conduct of games of keno, faro, three-card monte, and mustang, etc.," the phrase "etc." had force as showing that the title applied to other games mentioned in the act, and that it was not equivalent to "and for other purposes."

8. *State v. Elvins*, 32 N. J. L. 362. In this case, the act set apart the township of Hammonton in Atlantic County from the township of Mullica and Hamilton. The title of the act was "An act to incorporate the town of

Hammonton in the township of Mullica in the county of Atlantic." The inaccuracy consisted in a failure of the title to show that a part of Hamilton as well as a part of Mullica was embraced in the bounds of Hammonton. This was held immaterial and that the object of the act was sufficiently expressed in the title.

In *State v. McCracken*, 42 Tex. 383, the title of an amendatory act merely misrecited the date of the act amended. The error was held immaterial, for the reason that the amended act being the only legislation upon the subject which it embraced, no one could be misled by the error.

In *People v. Onondaga*, 16 Mich. 257, the title authorized the levy of a "bounty" tax. But in the engrossment of the act, the word "county" was substituted for "bounty." The court held, Cooley, J., delivering the opinion, that the act was not vitiated by this clerical error.

9. *Smith v. Com.*, 8 Bush (Ky.) 108. In this case the title of the act was "An act to separate the offices of commissioner and receiver of the Louisville chancery court and to provide for the appointment of said officers and to define their duties." It was held that a section of the act providing that the receiver and commissioner should be removed at the pleasure of the court and that all laws in conflict therewith should be repealed, was sufficiently indicated by the title and was not unconstitutional; the court saying that while the rule as to expression of the subject of an act in its title should be observed and legislation in violation thereof discountenanced, "no unnecessary restriction should be placed on legislative action, except so far as may be required



A repealing clause in an act may be so germane to the principal subject-matter as to be embraced within a title not making particular reference to the repeal.<sup>1</sup> A repeal by implication need not appear in the title.<sup>2</sup> It has been held that the title should indicate the retrospective operation of an act.<sup>3</sup>

**5. Illustrations—*a*. MISCELLANEOUS INSTANCES.**—The foregoing principles have been applied in many instances to statutes dealing with subjects as various as is the field of legislation. The application of these principles varies with the language of the various titles and the language of the subject-matter of the statutes introduced by the titles. The classification of these illustrations here must of necessity be somewhat arbitrary, but it is deemed of importance to set out the cases here. It has been held that the constitutional requirement as to the expression of the object of an act in its title does not apply to headings of chapters in the compiled laws.<sup>4</sup> Additional illustrations relating to codes and compilations of laws are given in the note.<sup>5</sup>

to sustain this provision of the constitution."

In *People v. Banks*, 67 N. Y. 568, Allen J., said: "It is not allowable for the purpose of invalidating a law, to sit in judgment upon its title, to determine with critical acumen whether it might not have been more explicit and so drawn as more clearly and definitely to indicate the nature of the legislation covered by it. The legislature is not subject to judicial control in respect to the form or mode in which the subject of a bill shall be expressed. If it is expressed the constitution is satisfied."

1. In *Burke v. Monroe County*, 77 Ill. 610, the title of the act was, "An act to restore uniformity in the taxation of real and personal property for all purposes in the several counties and cities in this state." It was held that the act in so far as it provided for the repeal of certain other acts was not open to the objection that the constitutional requirement was not observed. See also *Timm v. Harrison*, 109 Ill. 593.

2. *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Com. v. Godshaw* (Ky. 1891), 17 S. W. Rep. 737; *State v. Gallagher*, 42 Minn. 449.

3. *Thomas v. Collins*, 58 Mich. 64. Here the title, "An act to provide for the assessment of property and levy and collection of taxes thereon," was held insufficient to support provisions of the act relating to taxes already assessed. In *Smith v. Auditor Gen'l*, 20 Mich. 406, in which the prospective operation of a statute with precisely the same title, was in dispute, it was decided,

*Cooley, J.*, delivering the opinion, that the title of the act might be looked to in order to determine a question as to its retrospective operation.

**4. Compilations and Codes.**—*Stewart v. Riopelle*, 48 Mich. 177; *State v. McDaniel*, 19 S. Car. 114; *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 63.

5. The title, "An act to amend the Code of Civil Procedure," sufficiently indicates a provision fixing the time within which an action for the recovery of real estate may be brought. *Gatling v. Lane*, 17 Neb. 80. See also *People v. Parvin*, 74 Cal. 549.

The title, "An act to amend title 3, articles 9 and 10 and to add 10a," omitting the words, "Revised Statutes," where those provisions were found, is sufficient, though there is no other compilation of laws in the state having a title 3. *Gunter v. Texas Land, etc., Co.*, 82 Tex. 496.

The title, "An act to amend title 1, ch. 66, of Hill's Annotated Laws of Oregon relating to pilotage at the Columbia river bar," sufficiently expresses the subject of the act. *The Borrowdale*, 39 Fed. Rep. 376.

The title, "An act to amend sections 10 and 11 of the Code of Civil Procedure, and to repeal said original section, which section relates to the time of docketing appeals," sufficiently indicates a section providing a substitute for a provision of the Code of Civil Procedure regulating the practice on appeal from the county justice's court. *Muldoon v. Levi*, 25 Neb. 457.

The title, an act to amend a specified

The title, "An act concerning drainage," has been held to comprehend a provision establishing a board of drainage commissioners;<sup>1</sup> but a title, "An act to provide for the drainage of" a certain district, has been held not to indicate a provision for the creation of a new drainage district, and the institution of unusual and summary proceedings to enforce the collection of a drainage tax;<sup>2</sup> so the title, "An act to promote drainage," has been held not to indicate provisions relating to the control of debris from mining and other corporations.<sup>3</sup> A general title relating to elections should be given a wide scope.<sup>4</sup> There are cases in relation to statutes designed to protect laborers,<sup>5</sup> and to statutes

"section" of a compilation of statutes, sufficiently expresses the object of the act, though the amended law be classified as a "subdivision" of a chapter of such compilation, and not a "section." *State v. Babcock* 23 Neb. 128.

In *Second German, etc., Bldg. Assoc. v. Newman*, 50 Md. 62, the title, "An act to amend article 95 of the Code of Public General Laws, by adding an additional clause thereto," was held sufficient to sustain an amendment containing the whole legislation regulating rate of interest.

The title, "An act to establish a probate code," is sufficient to sustain a provision relating to titles of real property by descent. *Johnson v. Harrison*, 47 Minn. 576. Here the court said: "The large number of related or enacted matters found treated of under some comprehensive title, such as, 'Criminal Code,' 'Penal Code,' 'Code of Civil Procedure,' 'Private Corporations,' 'Railroad Corporations,' and the like, are familiar illustrations of what may legitimately be included in one act."

1. **Drainage.**—*Ross v. Davis*, 97 Ind. 79; *Wishmier v. State*, 97 Ind. 160.

2. *Irwin's Succession*, 33 La. Ann. 63.

3. *People v. Parks*, 58 Cal. 624; *Doane v. Weil*, 58 Cal. 334.

In *Hall v. Slaybaugh*, 69 Mich. 484, the title, "An act to provide for the construction and maintenance of drains and the assessment and collection of taxes therefor, and to repeal all other laws relating thereto," was held sufficiently to express its object, the court saying: "It would be difficult to conjecture anything pertaining to a drain in any way that would not come properly under this title if made a subject of legislation." See also *Gillett v. McLaughlin*, 69 Mich. 547; *State v. Orange* (N.J. 1893), 26 Atl. Rep. 799.

4. **Elections.**—A title, "An act concerning public elections," has been held sufficient to sustain provisions authorizing the governor to fill certain vacancies in elective offices, *State v. Mead*, 71 Mo. 266; but insufficient to embrace a provision conferring upon women the right to vote. *Harland v. Territory*, 3 Wash. Ter. 131; *Rumsey v. Territory*, 3 Wash. Ter. 332.

The title, "An act regulating elections," is sufficient to support a provision that every qualified elector shall be eligible to hold any office for which he is an elector. *People v. Goddard*, 8 Colo. 432.

The title, "An act to regulate municipal elections in the city of Louisville," sufficiently indicates a provision that the votes at the election therein specified shall be by ballot. *Rogers v. Jacobs*, 88 Ky. 502.

The title, "An act to legalize a certain election named therein," though very general and failing to locate the election by designating time and place, nevertheless sufficiently expresses the object of the act. *Dows v. Elmwood*, 34 Fed. Rep. 114, following *Montclair v. Ramsdell*, 107 U. S. 147.

5. **Employees; Laborers; Mechanics' Liens.**—The title, "An act to fix the amount of wages of laborers exempt from process," comprehends a provision that wages of others than laborers working with their hands alone should be exempt. *Boyle v. Vanderhoof*, 45 Minn. 31.

The title, "An act giving labor the right of first lien, and material furnished a second lien on all property," comprehends a provision making it an offense for a contractor to receive full payment under his contract and neglect to pay laboring and material men. *State v. Brachvogel*, 38 Minn. 265.

The title, "An act to insure payment

for the protection of game,<sup>1</sup> and to prevent gambling.<sup>2</sup> So cases have arisen concerning statutes relating to insurance com-

of wages earned and materials used in constructing . . . public buildings and public works," sufficiently indicates a provision that officers contracting for public buildings shall require a bond for the payment by the contractor for labor performed or materials furnished. *Plummer v. Kennedy*, 72 Mich. 295.

A section of an act creating a mechanic's lien is sufficiently indicated by the title, "An act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the courts of this state; to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity." *Hall v. Bunte*, 20 Ind. 304.

The title, "An act to secure the payment of wages or salaries to certain employés of railway corporations," will not sustain a provision giving a lien on the company's property for materials furnished. *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 86 Va. 1.

A provision that whenever any person or corporation shall make an assignment for the benefit of creditors, or shall be adjudged insolvent, or shall have his or its property taken possession of by a receiver, all wages or salaries due employés shall first be paid in full, if construed to subject corporations to the insolvency laws, is not indicated by the title, "An act to provide for the payment of the wages and salaries due the employés of insolvent employers." *Search v. Ellicott* (Md. 1890), 18 Atl. Rep. 863.

The title, "An act to secure the payment of the wages or salaries of certain employés of railway, canal, steamboat and other transportation companies," does not embrace provisions creating liens in favor of the employés of mining and manufacturing companies to secure their wages. *Fidelity Ins., etc., Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372.

The title, "An act relating to the liens of mechanics, material men and laborers upon leasehold estates," does not indicate a section relating to liens on freeholds. *Dorsey's Appeal*, 72 Pa. St. 192.

1. **Acts for Protection of Game.**—The title, "An act to protect game," comprehends provisions making it a misdemeanor to sell or expose for sale, or have in possession for that purpose,

any of the game protected by the act. *People v. O'Neil*, 71 Mich. 325.

The title, "An act to prevent the destruction of fish," sufficiently indicates a provision prohibiting the catching of fish by any other device than of hook and line. *People v. Miller*, 88 Mich. 383.

The title, "An act to amend an act entitled, an act to establish a penal code . . . by amending § 634, relating to fish and game," sufficiently indicates a provision for the protection of fish and game. *People v. Dobbins*, 73 Cal. 257.

In *State v. Stunkle*, 41 Kan. 459, it was held that the title, "An act authorizing the appointment of a commissioner of fisheries, and for the protection of fish in the waters of the State of Kansas," was sufficiently broad in that it specifically applied to the protection of the fish in the waters of the state while providing for a commissioner of fisheries. The case does not show what particular provision of the act was objected to as being not within the constitutional provision.

The title, "An act to regulate the planting and taking of oysters in the waters of the state" sufficiently indicates provisions prohibiting non-residents from taking or transporting domestic oysters and forbidding all persons to ship oysters in the shell within the limits of the state. *State v. Harrib* (Ala. 1892), 10 So. Rep. 752.

The title, "An act to repeal ch. 193 of the acts of 1872, and re-enacting the same with amendments, so that oysters sold in the shell at Baltimore, and at all packing establishments, shall be measured in an iron measure," is sufficient to sustain a provision that such oysters shall be measured by licensed measurers, in an iron circular tub, of a certain description, and that the measure "shall be even, or struck." *McGrath v. State*, 46 Md. 631.

2. **Acts to Prevent Gambling.**—Enactments giving the loser of money at any game a right of action against the winner have been held to be indicated by the title "An act to prevent and punish gaming." *O'Keefe v. Weber*, 14 Oregon 55; *Maling v. Crumney* (Wash. 1892), 31 Pac. Rep. 600.

The title "An act to revise the law in relation to criminal jurisprudence," sufficiently indicates a provision for

panies, foreign and domestic.<sup>1</sup> And in statutes relating to public

the recovery of money lost at gaming. *Larned v. Tiernan*, 110 Ill. 173.

Under the title, "An act to amend § 214 of the criminal code of the Gen. Sts. of 1873," which section provides the punishment of the offense of gambling, provisions may be contained authorizing a civil action by the loser for the recovery of money lost. *Perry v. Gross*, 25 Neb. 826.

The title "An act to amend § 1547 of art. 8, of the Revised Statutes relating to offenses against public morals and decency, or the public police, and miscellaneous offenses," is sufficient to sustain a provision raising the offense of gambling from a misdemeanor to that of felony. *State v. Laughlin*, 75 Mo. 358.

The title, "An act to punish as felons all parties who may engage in the keeping or conducting of halls or houses for conduct of games of keno, faro, three-card monte, mustang, etc.," is sufficient to support provisions relating to other games than those mentioned in the title. *Garvin v. State*, 13 Lea (Tenn.) 162.

The title, "An act to prohibit book-making and pool selling," sufficiently indicates provisions that persons keeping a place for book making upon the result of any trial, or decision of speed, skill, or power of man or beast, which is to take place beyond the limits of this city; or who makes books or sells pools on such event; or who makes books or sells pools on the result of any political nomination, appointment or election, wherever made or held; or who makes books with, or sells pools to minors on such events, shall be guilty of a misdemeanor. *State v. Burgdoerfer*, 107 Mo. 1.

The title, "An act to prevent and punish gambling and the making, writing, or selling of books or pools or mutuals on the result of any trotting race of horses, or race of any kind, or any election or any contest of any kind, or game of base ball," is sufficient to sustain a provision making it an offense to keep a house for the purpose of such betting therein. *Lescallett v. Com.* (Va. 1893), 17 S. E. Rep. 546.

**1. Insurance Companies.**—The title, "An act for the incorporation of insurance companies, defining their powers and prescribing their duties," does not embrace a provision that an agent of a

foreign insurance company shall not transact business in the state without a certificate of authority from the auditor of the state. *Igoe v. State*, 14 Ind. 239.

The title, "An act for the incorporation of insurance companies, defining their powers and prescribing their duties," cannot include provisions regulating agencies for foreign insurance companies. *Grubbs v. State*, 24 Ind. 295.

The title, "An act relative to the organization and powers of insurance companies transacting business within this state," sufficiently indicates a provision for the examination of the affairs of an insurance company already organized. *People v. State Ins. Co.*, 19 Mich. 392.

The title, "An act to regulate the manner in which insurance companies not organized under the laws of this state but doing business within it, should transact their business" is sufficient to support a provision for a penalty for violation of the act. *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485.

The title "An act regulating insurance and fire insurance companies," is sufficient to sustain provisions that any person soliciting or procuring applications for insurance, shall be soliciting agent of the company; that such company shall attach to their policies the application of the assured, providing consequences for a failure so to do; that the policy shall be *prima facie* evidence of the insurable value of the property; that the assured must give notice in writing of a loss, accompanied by affidavit stating the fact; and that no action shall be begun within ninety days after notice of such loss has been given. *Christie v. Life Indemnity, etc., Co.*, 82 Iowa 360.

The title "An act to provide for the incorporation of mutual fire insurance companies, and defining their powers and duties," sufficiently indicates provisions for settling the affairs of such companies upon their insolvency. *Wardle v. Townsend*, 75 Mich. 385.

In *Com. v. Morningston*, 144 Pa. St. 103, the title of act *Pennsylvania* May 7, 188 P. L. 116, imposing a penalty on life-insurance agents, offering a rebate of premium as an inducement to insurance, was held to sufficiently indicate the contents of the act. The case does not show the title of the act.

The title "An act to declare unlawful

officers numerous constitutional questions have arisen,<sup>1</sup> and a

trusts and combinations in restraint of trade and productions, and to provide penalties therefor," covers a section prohibiting any combination to control the cost of insurance. *In re Pinkney*, 47 Kan. 89.

1. **Public Officers.**—Provisions for a county treasurer's tenure of office, duties, compensation and powers, including the right to appoint a deputy, and that such deputy shall act as clerk of the county commissioners, are embraced in the title, "An act to create a treasurer," for a named county. *Calvert v. Heelen*, 72 Md. 603.

The title, "An act to reorganize the local government of the city of New York," will sustain provisions creating city offices, defining their functions and compensation, imposing restrictions upon the holders of such offices, and providing that certain duties might be required of them without further compensation than their annual salary. *Billings v. New York*, 68 N. Y. 415.

The title, "An act amendatory to an act entitled 'An act creating a board of police commissioners, and authorizing the appointment of a police force for the city of St. Louis,'" is sufficient to sustain a section providing for the appointment and regulation of private detectives. *State v. Bennett*, 102 Mo. 356.

The title, "An act in relation to the fees and compensation of certain officers in the city and county of New York" includes a provision that fees of certain officers of the city should be paid into the treasury and the officer receive a salary instead. *Conner v. New York*, 5 N. Y. 285.

The title, "An act to make uniform the selection and duties of directors of the boards of chosen freeholders of the state," is sufficient to sustain provisions regulating the selection and duties of such a director in a particular county, so as to conform the law relating to such county to a general law on that subject. *Govern v. State*, 48 N. J. L. 612.

The title "An act to provide for a state board of equalization," sufficiently indicates provisions relating to the duties of the board of supervisors, as a county board of equalization. *Boyce v. Sebring*, 66 Mich. 210.

The title of an act to "vacate" certain offices, will support a provision "abolishing" such offices. *State v. Hermann*, 11 Mo. App. 43.

The title, "An act to amend an act creating the office of public weigher, and regulating the appointment and defining the duties and liabilities thereof," is sufficient to sustain a provision declaring it to be unlawful to employ any one except the public weigher to perform his duties, and that any person violating such provision should be liable to damages at the suit of such weigher. *Johnson v. Martin*, 75 Tex. 33.

The title, "Concerning townships and township officers," is consistent with provisions limiting the powers of townships and township officers. *State v. East Orange Tp.*, 49 N. J. L. 401.

The title, "An act to determine the mode of filling vacancies in all offices for which no provision is made in the constitution," is sufficient to support a provision that such vacancies in the state, parish, or municipality, shall be filled by the governor. *State v. Leovy*, 12 La. Ann. 538.

The title, "An act providing for the election and qualification of justices of the peace, defining their jurisdiction, powers and duties," does not indicate a provision that no constable shall purchase a judgment on the docket of any justice in the township of the constable. *Spaugh v. Huffer*, 14 Ind. 305.

The title, "An act reducing and regulating the salaries and compensation of certain state officers, justices of the supreme court, and attachés of the state government" has been held not to indicate a provision reducing the salaries of members of the legislature. *State v. Hallock*, 19 Nev. 384.

The title, "An act in relation to the fees of the sheriff of the city and county of New York, and to fees of referees in sales in partition cases," does not embrace provisions requiring a judicial sale to be made by the sheriff. *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259; *Gaskin v. Meek*, 8 Abb. Pr., N. S. (N. Y.) 312.

The title, "An act to provide for the appointment of deputy coroners in the several counties of this commonwealth," is insufficient to cover a provision for the compensation of such deputies by fees instead of salaries, in counties of over 150,000 inhabitants each. *Com. v. Grier*, 9 Pa. Co. Ct. Rep. 444.

The title, "An act defining the duties

few decisions upon statutes relating to the public lands, both state and federal, are collected in the note.<sup>1</sup>

As a general rule the title of an act incorporating a private body need not indicate the objects the corporate body is designed to accomplish, nor the powers with which it is to be invested, nor the agencies to be employed or mode to be pursued in exercising its powers; all of these matters being necessary incidents to corporate existence.<sup>2</sup> But matters not incidental to the

of state comptroller," is insufficient to sustain a provision imposing a penalty upon other officers for failing to make settlements with the comptroller. *State v. Hoadley*, 20 Nev. 317.

**1. Public Lands.**—A title referring to state lands in a particular county will not sustain a provision in the act relating to state lands in another county. *Wilcox v. Paddock*, 65 Mich. 23.

The title, "An act in relation to a portion of the submerged lands and Lake Park of the grounds lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago," is sufficient to sustain provisions granting certain of those lands to a city, and certain other of the lands to a railroad company with the right to maintain docks and wharves. *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730.

The title, "An act to regulate the sale of swamp lands donated by the United States to the State of *Indiana*" embraces a provision requiring patents for such lands to be recorded. *Nitche v. Earle*, 117 Ind. 270.

**2. Private Corporations — Sufficient Titles.**—A title relating to the incorporation of a certain gas-light company is sufficient without detailing the powers and privileges granted to the company, including a monopoly of the manufacture and supply of gas. *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138. See also *Arnoult v. New Orleans*, 11 La. Ann. 54, *Bridgeford v. Hall*, 18 La. Ann. 218; *Inkster v. Carver*, 16 Mich. 484.

The title, "An act creating a city sewage utilization company," embraces a provision conferring powers on the company in regard to cleaning of streets. *City Sewage Utilization Co. v. Davis*, 8 Phila. (Pa.) 625.

The title, "An act to reorganize the medical society of *New Jersey*," will support provisions repealing the former powers of the company and conferring new powers. *Hill v. Morrison*, 46 N. J. L. 488.

The title, "An act to authorize the organization of annuity, safe deposit and trust companies," is sufficient to sustain provisions allowing such companies to act as guardians of the estates of insane persons. *Minnesota L. & T. Co. v. Beebe*, 40 Minn. 7.

The title, "An act in relation to the formation of co-operative associations," comprehends provisions for the formation of corporations for the purpose of trade or of the carrying on of any lawful mechanical, manufacturing, or agricultural business, limiting the amount of capital stock and also the amount which any one member may hold. *Finnegan v. Knights of Labor Building Assoc.* (Minn. 1893), 53 N.W. Rep. 1150.

The title, "An act to provide for the organization and government of state banks," is sufficient to embrace a section prohibiting their transacting banking business unless incorporated under the provisions of the act. *State v. Woodmanse*, 1 N. Dakota 246.

The title, "An act for the better protection of stockholders and corporations formed . . . for the purpose of carrying on and conducting the business of mining," sufficiently indicates a provision imposing a penalty on directors of such companies for failure to cause to be made or posted an itemized account or balance sheet of the affairs of the company. *Francais v. Soms*, 92 Cal. 503.

The title, "An act to amend a charter of the bank of D.," will embrace provisions for the establishment of a branch bank. *Robinson v. Bank of Darien*, 18 Ga. 89.

The title, "An act to provide for the formation of corporations," will sustain a provision for the payment of a fee to the secretary of state, by a corporation, upon filing a certificate of incorporation. *Edwards v. Denver, etc., R. Co.*, 13 Colo. 59.

The title, "An act to incorporate the M. Waterworks Company" sufficiently indicates a provision requiring that a map of the property to be ac-

creation and existence of corporations must be indicated by the title.<sup>1</sup>

**b. MUNICIPAL CORPORATIONS.**—Under titles relating to, or appearing to provide for, the incorporation of cities or villages, various powers may be conferred and many matters embraced, so long as they are germane to the general subject.<sup>2</sup> Titles

quired by the company shall be filed, and other provisions facilitating the establishment of the company's works. *In re Malone Water Works Co.*, 15 N. Y. Supp. 654.

The title, "An act authorizing and regulating the business of commercial agencies, credit companies, and guarantee associations," sufficiently embraces a provision that any such company shall procure a certificate from the city auditor, and appoint a resident attorney upon whom process might be served; and other provisions respecting the capital, financial statements and taxation of the company. *State v. Morgan* (S. Dak. 1891), 48 N. W. Rep. 314.

The title, "An act to incorporate the L. Navigation Company," embraces a provision that counties benefited by the company may subscribe to its stock. *State v. Wirt County Ct.* (W. Va. 1893), 17 S. E. Rep. 379.

The title, "An act to incorporate the bank of F.," is sufficient to support a provision that the bank may join in one action all parties to a note or bill given to be negotiated or actually negotiated in that bank. *Davis v. Bank of Fulton*, 31 Ga. 69. See also *Hill v. Decatur Tp.*, 22 Ga. 203. For other illustrations, see *Montgomery Mut. Bldg., etc., Assoc. v. Robinson*, 69 Ala. 413; *Yellow River Imp. Co. v. Arnold*, 46 Wis. 225.

**1. Insufficient Titles.**—A provision authorizing a loan of public money with which to build an astronomical observatory, has been held not sufficiently indicated by a title reciting as its only object the incorporation of the observatory. *People v. Allen*, 42 N. Y. 404. In this case it was said that the act of incorporation, when confined to its legitimate action, conferred all the power necessary to enable the corporation to carry out its proper operation, but this has nothing to do with providing the means. The title of an enactment to "incorporate" the trustees of an observatory will no more lead one to suppose that it contained an enactment that the state was to supply the

means to build it, by gift or loan, than that it required some individual to do so out of his own private means. The whole object of an act of incorporation is to give the artificial person an existence, and to enable it to control and to protect its rights. An enactment compelling the state to give, or to loan it money, after the incorporation is complete, is no proper or appropriate portion of such act of incorporation.

The title, "An act to regulate and tax certain named foreign corporations," is not sufficient to support provisions relating to other corporations than those named. *Oregon, etc., Trust, etc., Co. v. Rathbun*, 5 Sawy. (U. S.) 32.

The title, "An act to incorporate the board of education of the Kentucky National Conference of the Methodist Episcopal Church, South," is insufficient to sustain a provision repealing an act incorporating a female seminary under the control of that denomination. *Bryan v. Board of Education* (Ky. 1890), 13 S. W. Rep. 276.

The title, "An act to extend the area of gas lighting in the city of New Orleans, and to reduce the price now paid by consumers," does not sufficiently indicate a provision extending the charter of an existing gas-light company for twenty years. *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138.

The title of an amended act "To authorize the formation of corporations for literary and scientific purposes," will not support an amendment by which the act is made to include missionary and other benevolent purposes. *People v. Young Men's, etc., Ben. Soc.*, 41 Mich. 67.

**2. Municipal Corporations — Incorporation Acts.**—*Lockhart v. Troy*, 48 Ala. 579; *Harris v. People*, 59 N. Y. 599; *State v. Union*, 33 N. J. L. 354.

The title, "An act to incorporate the city of E.," sufficiently indicates provisions that a fixed portion of the fees for licenses for the sale of liquor shall be paid over to the public school fund. *State v. Madson*, 43 Minn. 438.

The title, "An act to provide for the incorporation of cities and villages," will sustain provisions relating to cities and towns already incorporated. *Guild v. Chicago*, 82 Ill. 472.

The title, "An act to incorporate the city of X.," sufficiently sustains a provision authorizing the establishment of water-works for that city. *David v. Portland*, 14 Oregon 98, comprehends a provision for the establishment of a recorder's court in such city. *People v. Gobles*, 67 Mich. 475; and is sufficient to support a provision that a certain part of J. shall constitute the city of X., and that the rest shall remain the town of J. *People v. Wilber*, 15 N. Y. Supp. 435.

A provision relating to the government of a village is sufficiently indicated by the title, "An act to amend the general laws as to the incorporation of villages, as to the village of Mount Vernon, and to enlarge the powers of its officers and to extend and enlarge the powers of the corporation." *People v. Duffy*, 1 N. Y. Supp. 896. See also *In re Dept. of Public Parks*, 86 N. Y. 440; *In re Knaust*, 101 N. Y. 190.

The title, "An act to provide for the incorporation of cities and towns, and establish uniform systems of municipal government in the state," will sustain an amendment relating to the assessment and collection of taxes for municipal purposes, and legalizing assessments for such purposes theretofore made. *Jacksonville v. Basnett*, 20 Fla. 525.

The title, "An act to establish excise departments in cities of this state," is sufficient to sustain a provision delegating to the common council the power to establish such excise, and investing them with certain powers when established. *State v. Cherry*, 53 N. J. L. 173.

The title, "An act in relation to cities of the second class, providing for the levy, collection, and disbursement of taxes, and water-rents," sufficiently indicates provisions as to the cost of collecting such taxes and water-rents. *Bradley v. Pittsburgh*, 130 Pa. St. 475.

The title, "An act to create the M. fire and police district in C. county, and to provide for the government thereof," is not inconsistent with a provision authorizing the levy of a tax for the maintenance of such fire district. *Ader v. Newport* (Ky. 1888), 6 S. W. Rep. 577.

The organization of townships is not inconsistent with the title "An act for the more uniform mode of doing

township business." *Clinton Tp. v. Draper*, 14 Ind. 295.

The title, "An act to authorize the town to raise money to construct a town dock," sufficiently indicates a provision giving the power to charge and collect wharfage. *Pelham v. Woolsey*, 16 Fed. Rep. 418.

The title, "An act relative to contracts by the mayor, aldermen and commonalty of the city of New York," is sufficient to sustain a provision in the act creating a board of revision, whose duty it was to confirm assessments for local improvements. *In re Tappen*, 36 How. Pr. (N. Y.) 390.

The title, "An act in relation to local improvements in the town of F.," indicates a provision for the construction of a sewer in such a town. *Van Brunt v. Flatbush Tp.*, 59 Hun (N. Y.) 195.

The title, "An act in relation to the government of the city of B.," will sustain provisions relating to the reconstruction of the fire department of that city. *People v. Partridge*, 13 Abb. N. Cas. (N. Y.) 410.

The title, "An act providing for the organization, classification, incorporation and government of municipal corporations," comprehends a provision relating to the enlargement and consolidation of municipal corporations. *King County v. Davies*, 1 Wash. 290.

The title, "An act authorizing cities and towns to construct internal improvements," is sufficient to sustain a provision authorizing the construction of water-works, sewers and light plants. *Yesler v. Seattle*, 1 Wash. 308. See also *Seymour v. Tacoma* (Wash. 1893), 32 Pac. Rep. 1077.

The title, "An act for the relief of the village of C.," is sufficient though it states neither the mode in which the subject is treated nor the means by which the end is to be reached. *Water Works Com'rs v. Dwight*, 101 N. Y. 9.

The title, "An act relating to cities and towns," may support provisions relating to the opening, improvement and repair of streets. *Potwin v. Johnson*, 108 Ill. 77.

An act entitled "An act to incorporate the village of H.," in addition to incorporating the village provided for dividing the town and organizing a new town. It was held that so much of it as provided for dividing the town and organizing the new town was in conflict with that section of the constitution which provides that "no law shall embrace more than one subject which



providing for amendments are equally comprehensive.<sup>1</sup> Mis-

shall be expressed in its title." *State v. Kinsella*, 14 Minn. 524.

1. **Acts Amending Charters.**—The title, "An act to amend the charter" of a city, may comprehend provisions altering the boundaries or extending the limits. *Prescott v. Chicago*, 60 Ill. 121; *Hargrave v. Webber*, 66 Mich. 59; *Attorney Gen'l v. Amos*, 60 Mich. 372; *Winona v. School Dist. No. 82*, 40 Minn. 13; 12 Am. St. Rep. 687; *Morford v. Unger*, 8 Iowa 83; *Whiting v. Mt. Pleasant*, 11 Iowa 482.

The title, "An act to amend the charter of the town of B., and to establish a charter therefor," is sufficient to sustain a provision authorizing the town of B. to issue negotiable bonds for certain specified purposes. *Judson v. Bessemer*, 87 Ala. 240.

The title, "An act to amend the charter of the city of A.," is not inconsistent with a provision requiring a street railway company to pave the street between its tracks and for three feet on either side. *Atlanta v. Gate City St. R. Co.*, 80 Ga. 276.

The title, "An act to amend the charter of the city of C.," will sustain a provision for the limitation of suits against the city. *Covington v. Voskottter*, 80 Ky. 219.

The title, "An act to amend and alter the charter of the city of A.," sufficiently indicates a provision ratifying acts and ordinances already done and passed by the corporation, in regard to the closing or discontinuance of a street. *Annapolis v. State*, 30 Md. 119. See also *Deegan v. Morrow*, 31 N. J. L. 136; *State v. Union*, 33 N. J. L. 350; *State v. Newark*, 34 N. J. L. 236.

The title, "An act to amend the charter of the city of J.," comprehends a provision making the office of city attorney elective instead of appointive. *Powell v. Jackson*, 51 Mich. 129.

The title, "An act to amend an act to establish the corporation of J., provide for its government, and prescribe its jurisdiction and powers," sufficiently indicates a provision repealing the existing charter of the town. *State v. Duval County*, 23 Fla. 483.

The title, "An act to reorganize the local government of Jersey City," embraces provisions for the collection and adjustment of taxes. *Snipe v. Shriner*, 44 N. J. L. 206.

The title, "An act to revise an act to

incorporate the city of Bay City, . . . and to add twenty-three new sections thereto," sufficiently indicates a provision for the establishment of a police court with original and exclusive jurisdiction in criminal cases. *People v. Pond*, 67 Mich. 98.

The title of an amended act, "An act to reincorporate the village of Ridge city," is sufficient to sustain a provision of the amendatory act making the president of the village *ex officio* a member of the board of supervisors. *Holden v. Osceola County*, 77 Mich. 202.

The title, "An act to consolidate into one the various acts in relation to the city of H.," comprehends a provision creating the office of recorder, and vesting him with certain powers. *Frost v. Wilson*, 70 Mo. 664.

**Insufficient Titles.**—The title, "Cities, town and villages," does not sufficiently indicate a provision empowering cities to establish park districts. *State v. Jackson County Ct.*, 102 Mo. 531.

The title, "An act to amend the city charter," will not sustain provisions ratifying acts of the city council. *Williamson v. Keokuk*, 44 Iowa 88.

The title, "An act to amend the charter of the town of P. in J. county," will not sustain a provision authorizing the issuing of municipal bonds for improvements extending into the county. *Parkland v. Gaines*, 88 Ky. 562.

The title, "An act to consolidate and amend the several acts incorporating the city of B. and for other purposes therein mentioned," is sufficient to sustain a provision confirming all the ordinances of the mayor and city council of the city of B. theretofore passed. *Brieswick v. Brunswick*, 51 Ga. 639; 21 Am. Rep. 240.

The title, "An act to amend the charter of the city of C.," does not comprehend a provision relating to the registry of deeds by the clerk of the county court. *Wulfstange v. McCollom*, 83 Ky. 361.

The title, "An act to amend the first section of the act to incorporate the town of M. and to provide for the government of the same," does not indicate a provision amending other sections. *Wisner v. Monroe*, 25 La. Ann. 598.

The title, "An act to amend an act to incorporate cities of the second

cellaneous applications of the general principle are set forth in the note.<sup>1</sup>

*c. COUNTIES AND COUNTY OFFICERS.*—As in titles relating to municipal corporations so in titles relating to counties and county officers, general provisions may embrace subsidiary and germane matters; *e. g.*, the title, "An act to increase the boundaries" of a

class, and to define their powers, and to equalize certain taxes therein mentioned," is insufficient to sustain a provision confirming certain expenditures by the city from the funds arising from illegal taxes, and in no wise amending the laws in question. *Tecumseh v. Phillips*, 5 Neb. 305; *White v. Lincoln*, 5 Neb. 506.

The title, "An act to create a new charter for the city of C. and to consolidate and declare the rights and powers of said corporation and for other purposes," is not sufficient to sustain a provision extending the municipal police jurisdiction of the city over territory adjacent thereto. *Blair v. State* (Ga. 1893), 17 S. E. Rep. 96.

The title, "An act to consolidate, amend and modify the various acts incorporating the city of D., . . . and to define the duties of the mayor and common council and other officers of said city, does not sufficiently indicate a provision," that the mayor or three members of council, in the absence or disqualification of the mayor, shall be a court for the trial of offenders in the following cases." *Brown v. State*, 79 Ga. 324.

An act, the effect of which is to create a road district, is not sustained by the title "An act to amend the charter of the town of P." *Parkland Tp. v. Gaines*, 88 Ky. 562.

**1. Miscellaneous Acts Relating to Municipal Corporations.**—The title, "An act providing that any city having a population of more than 100,000, may frame a charter of its own government and regulate the same," is sufficient to sustain a provision that the courts shall take judicial notice of the population of all cities in the state. *State v. Dolan*, 93 Mo. 467.

The title, "An act concerning the construction, care and improvement of the public ways, parks and sewers in certain of the cities of this state," embraces a provision abolishing offices, boards and commissions connected with those departments. *State v. Hoagland*, 51 N. J. L. 62.

The title, "An act to establish a

board of public works in and for the city of D.," sufficiently indicates provisions transferring to that board the powers, duties and papers of the old "board of commissioners," the "board of sewer commissioners" and of the "commissioners of grades and plans." *People v. Hurlbut*, 24 Mich. 55; 9 Am. Rep. 105.

The title, "An act to provide for police courts in cities having thirty thousand and under one hundred thousand inhabitants, and to provide for officers thereof," embraces provisions for the election of a police judge with jurisdiction of petty offenses, violation of ordinances, etc., and providing for fees, seal, appeals, records, etc. *People v. Henshaw*, 76 Cal. 436.

The title, "An act providing for placing electrical conductors underground in the cities of this state and for commissioners of electrical subways," is sufficient to sustain the provision that electrical wires in cities of the state having a population exceeding five hundred thousand and less than one million, shall be laid under ground. *People v. Squire*, 14 Daly (N. Y.) 154, affirmed 107 N. Y. 593; 1 Am. St. Rep. 893.

The title, "An act dividing the cities of this state into three classes, with respect to their population, and designating the mode of ascertaining and changing the classification thereof," sufficiently embraces a provision for new offices and elections for filling them. *Com. v. Wyman*, 137 Pa. St. 508.

The title, "An act to define the boundaries of the city of E.," sufficiently indicates provisions enlarging the city limits. *People v. Bradley*, 36 Mich. 447.

The title, "An act in relation to the erection of public buildings for the use of the city of R.," sufficiently indicates provisions for the purchase of sites for such buildings. *People v. Rochester*, 50 N. Y. 525.

The inadvertent use of the word "village" in the title, instead of the word "town," will not invalidate provisions as to the "town" in the body of the act. *State v. Lake City*, 25 Minn. 404.

certain county, may embrace provisions for extending the borders of the county, locating the seat of justice, and accepting donations for the public buildings.<sup>1</sup> The title, "An act to authorize the formation of new counties," comprehends provisions relating

The title, "An act to set off in the township of B., in the county of E., a new township to be called the township of M.," is sufficient to sustain provisions conferring upon the new municipality all the powers of a township. *Montclair v. Ramsdell*, 107 U.S. 147.

The title, "An act to provide for the organization, government, and powers of cities of the second class," does not comprehend a provision giving police judges concurrent jurisdiction with the county courts in civil actions. *Holmberg v. Hauck*, 16 Neb. 337. Nor a provision exempting a city from liability for injuries resulting from the negligence of street railway companies in failing to keep in order streets which they occupy. *Weigel v. Hastings*, 29 Neb. 379.

An act providing for the relief of certain towns is void as to a town not mentioned in the title, but valid as to the others. *Harris v. Niagara County*, 33 Hun (N. Y.) 279.

The title, "An act to enable the board of supervisors of the county of New York to raise money by taxes, . . . and in relation to the expenditure thereof," does not sustain a provision that the municipality shall not be liable upon any contract, made by any department, beyond the amount appropriated, and that no judgment shall be entered against the corporation unless it appear that the amount thereof remains unexpended from the appropriation. *Smith v. New York*, 34 How. Pr. (N. Y.) 508.

The title of a local act, "An act to authorize the city of M. to change the grade of its streets," does not sufficiently indicate a provision authorizing the change of grade of certain streets in certain wards. *Anderton v. Milwaukee*, 82 Wis. 279.

The title, "An act to alter the commissioner's map of the city of Brooklyn," does not indicate provisions authorizing the closing of one street and opening of another in a different mode than that prescribed by the charter. *People v. Brooklyn*, 13 Abb. Pr., N.S. (N. Y.) 121.

The title, "An act for the collection of damages sustained by reason of defective public highways, streets, bridges, crosswalks and culverts," is insufficient

to sustain an amendment extending the provisions of the act to sidewalks. *Church v. Detroit*, 64 Mich. 571; *Losch v. St. Charles*, 65 Mich. 555.

The title, "An act to amend § 78 of chapter C, of the General Laws of the State of Colorado, entitled towns and cities," is insufficient to sustain provisions changing the tenure of certain municipal offices and making certain officers elective instead of appointive. *People v. Fleming*, 7 Colo. 230.

The title, "An act to reorganize the local government of a designated city," will not support a provision validating claims for work done for the city in an unlawful mode. *Jersey City v. Elmhurst*, 47 N. J. L. 283.

The title, "An act to legalize the acts and proceedings of the town board of auditors for the town of A., in relation to the erection of a certain iron bridge in said town," is insufficient to sustain a provision that the town shall not be required to pay the contract price of said bridge nor the amount audited by the said town board therefor, and authorizing the contractor to sue the town for "a reasonable compensation" for the bridge. *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204.

The provision of the Laws of N. Y., 1863, p. 409, declaring that the head of the law department of the city of New York shall have the right to appear for the mayor, etc., was unconstitutional and void, because it was a subject entirely distinct from the subject of the act, and was not expressed in the title, which related only to appropriations to defray the expenses of the city government. *Baldwin v. New York*, 42 Barb. (N. Y.) 549.

The title, "An act to revise the law in relation to township organizations," will not sustain a provision extending the limits of towns of a certain class. *Dolese v. Pierce*, 124 Ill. 140.

A title of an act relating to "city" taxation only, will not support provisions relating to "municipal" taxation. *Bugher v. Prescott*, 23 Fed. Rep. 20.

1. *County Boundaries, etc.*—*Blood v. Merceiliott*, 53 Pa. St. 391. See also *Ledger v. Rice*, 8 Phila. (Pa.) 167.

The attaching of certain townships

to the boundaries of old counties from which the new are to be formed,<sup>1</sup> also provisions for the organization and sitting of courts in the new counties.<sup>2</sup> Miscellaneous cases relating to county matters are set forth in the note below.<sup>3</sup>

to W. county, has been held a necessary means to the attainment of the object expressed in the title, "An act to extend the boundaries of K. county." *Duncombe v. Prindle*, 12 Iowa 1.

The title, "An act to annex the city of Carrollton (in the parish of Jefferson) to the city of New Orleans, providing for the transfer of certain transcripts, . . . and repealing the act incorporating the city of Carrollton," sufficiently embraces a provision changing the limits of the parish, and removing the parish seat of the parish of Jefferson. *State v. Daniel*, 28 La. Ann. 38.

The title, "An act to extend the limits of the parish of Orleans," is sufficient to indicate provisions extending the limits of the city of New Orleans so as to embrace therein the entire area of the parish of Orleans. *New Orleans v. Cazelar*, 27 La. Ann. 156.

The title, "An act to change the bounds of the parish of St. B.," sufficiently indicates provisions as to the means by which the change is to be made. *Hammond v. Lesseps*, 31 La. Ann. 337. See also *Jefferson, etc., R. Co. v. New Orleans*, 31 La. Ann. 478.

The title, "An act to define the county line of E. county," comprehends a provision abandoning the existing line and taking a large territory from E. county and transferring it to an adjoining county. *Walters v. Richardson* (Ky. 1892), 20 S. W. Rep. 279.

The title, "An act to create counties and to establish the boundaries thereof," sufficiently indicates a provision that one county shall annually pay a certain sum of money to the other. *Humboldt County v. Churchill County*, 6 Nev. 30.

1. *Jasper County v. Spitler*, 13 Ind. 235; *Haggard v. Hawkins*, 14 Ind. 299.

2. *Brandon v. State*, 16 Ind. 197.

3. **Miscellaneous County Matters.**—The title, "An act authorizing certain counties to fund their outstanding indebtedness," will sustain provisions validating bonds previously issued for the purpose of funding such indebtedness. *Worthen v. Badgett*, 32 Ark. 496.

The title, "An act authorizing the board of county commissioners of O.

county, and other counties therein named, to provide a fund and appropriate the same for the purpose of building county buildings in said counties," is sufficient to sustain a provision relating to the creation and use of a fund for the erection of county buildings in the counties of O., W. and R. *Weyand v. Stover*, 35 Kan. 545.

The title, "An act concerning counties, county officers, and county government," sufficiently indicates a provision that county officers shall keep their offices at the county seat open during business hours, and that all books and papers required to be in their offices shall be open to examination, and that any person making abstracts shall have the right to examine such books and papers and make memoranda of their contents. *Stockman v. Brooks*, 17 Colo. 248.

The title, "An act authorizing the county commissioners of W. county to appropriate money for the repair of bridges," will not support a section containing the language, "it is hereby made their duty" to appropriate such money, the language in question being broader than the title. *State v. Wabaunsee County*, 45 Kan. 731.

The title, "An act to legalize and make valid certain county bonds and to provide for payment of the same," does not indicate a provision requiring counties to pay a bounty to soldiers. *Madison County v. Baker*, 80 Ind. 374.

The title, "An act to provide for township organization," will not sustain provisions for "county" organization. *State v. Lancaster County*, 6 Neb. 474.

An act "providing for the removal of a parish seat," may contain a provision that the consent of the majority of the taxpayers to the increase of taxes beyond the legal limit shall be first obtained. *Edwards v. Police Jury*, 39 La. Ann. 855.

An act destroying the existence of a particular county, and dividing its territory between two named counties, but which fails to name the destroyed county in its title, is not for that reason invalid. *State v. Hordey*, 41 Kan. 630.

The title, "An act to add an addi-

**d. RAILROAD COMPANIES.**—The title of a railroad incorporation act need not particularize the powers, rights, and privileges conferred by the act.<sup>1</sup> It has been held that a title reciting in-

tional article to the code of public laws, entitled 'Garrett county,' will sustain a provision prohibiting the cutting down of trees in such county. *State v. Fox*, 51 Md. 412.

**County Officers — Titles Sufficient.**—*People v. Brinkerhoff*, 68 N. Y. 259. Other examples of the sufficiency of titles of laws relating to county officers, will be seen below.

The title, "An act relating to counties and county officers," will support an amendment relating to the duties of county surveyors and the determination of boundaries by them and an appeal from their decision. *John v. Reaser*, 31 Kan. 406.

The title, "An act to establish criminal courts for A, B, C, and D counties," sufficiently indicates a provision for the appointment and selection of a clerk by the judge, and how and by whom the grand jury should be chosen. *Com. v. Green*, 58 Pa. St. 226.

The title, "An act fixing the salaries of the various county officers in the several counties of this state and other matters relating thereto," comprehends a provision that the surplus in the salary fund shall be transferred to the general fund, and that a deficiency in the salary fund shall be supplied by a transfer to such fund to be made by the board of county commissioners. *Esser v. Spaulding*, 17 Nev. 289.

The title, "An act to perfect the records of deeds, mortgages and other instruments in certain cases," is sufficient to embrace a provision that counties shall pay recorders of deeds certain fees for certifying on the deeds that they have been recorded in their offices. *Pierie v. Philadelphia*, 27 W. N. C. (Pa.) 285.

The title, "An act to reorganize a board of chosen freeholders and counties of the first class in this state," sufficiently embraces a provision for certain changes in the number, mode of election and organization of the boards of such freeholders in certain counties. *Mortland v. State*, 52 N. J. Eq. 521.

The title, "An act to regulate the fees of county judges, county clerks, sheriffs and county treasurers," embraces a provision that such officers shall report the fees received and pay the excess from a sum named into the

county treasury. *State v. Rean*, 16 Neb. 681; *Com. v. Bailey*, 81 Ky. 397.

The title, "An act to establish a uniform system of county and township government," embraces provisions for the compensation of officers according to the classification of counties by population. *Longan v. Solano County*, 65 Cal. 122.

The title, "An act to extend the powers of the board of supervisors," sufficiently indicates provisions empowering such board to borrow money on the credit of the town for the improvement of roads. *People v. Brinkerhoff*, 68 N. Y. 259.

**Titles Insufficient.**—The title, "An act to change the time of electing certain officers in the county therein named," does not indicate a provision that the board of supervisors should be chosen from and by districts, instead of towns, and changing the number of the board. *Leach v. People*, 122 Ill. 420.

The title, "An act to provide additional compensation to the auditor and assessor of R. county for clerk hire, . . . in transcribing books, . . . and for other purposes," will not sustain provisions for a change in time for the elections of a city attorney, and provisions for the salaries of city jailer and market master. *State v. Murray*, 41 Minn. 123.

The title, "An act to make further division of a county in *New York*," does not indicate provisions relating to the appointment and dismissal of attendants upon the courts of the city of New York. *Murray v. New York*, 43 N. Y. Super. Ct. 164.

The title, "An act regulating the fees and salaries of a county clerk and treasurer of D. county," and to repeal an act under which the fees and salaries of the same officer in N. county had been fixed, will not sustain a provision fixing the salaries of such officers in N. county. *Norton County v. Snow*, 45 Kan. 332.

**1. Railroad Incorporation Acts.**—*Goldsmith v. Rome R. Co.*, 62 Ga. 473; *Carothers v. Philadelphia Co.*, 118 Pa. St. 468; *Mississippi, etc., R. Co. v. Wooten*, 36 La. Ann. 441; *Stockland v. Central R. Co. (N. J.)*, 1892, 24 Atl. Rep. 964; *Paterson R. Co. v. Grundy (N. J.)*, 1893, 26 Atl. Rep. 788.

corporation is broad enough to embrace provisions authorizing municipal subscriptions in aid of the road.<sup>1</sup>

A provision that a railroad company shall be liable for all damages which its employes shall sustain in consequence of the neglect of their fellow-servants, has been held to be sufficiently indicated by the title "An act in relation to the duties of railroad companies."<sup>2</sup> Miscellaneous cases relating to torts of railroad companies are given in the note,<sup>3</sup> followed by a large num-

The title, "A supplement to the charter of the E. & A. R. Company," sufficiently indicates a provision limiting the time within which suits must be brought against the company. *Vail v. Easton, etc., R. Co.*, 44 N. J. L. 237.

The title, "An act to incorporate the L. & E. Passenger Railway Company," embraces a provision authorizing the company to build a railroad extending beyond the limits of a city, and the right to use steam as a motive power, and to carry freight as well as passengers. *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1.

1. *San Antonio v. Mehaffy*, 96 U. S. 312. This case involved the application of the provision of the *Texas* constitution of 1845, viz., "Every law enacted by the legislature shall contain but one object and that shall be expressed in the title." The court followed *San Antonio v. Lane*, 32 Tex. 405, rather than *San Antonio v. Gould*, 34 Tex. 49, and *Giddings v. San Antonio*, 47 Tex. 548, in which two latter cases the *Texas* court, consisting of judges other than those who sat in the first case, came to a different conclusion, so that the Supreme Court of the *United States* deemed the question unsettled in the jurisprudence of *Texas*, and felt at liberty to follow the guidance of its own judgment, deeming that the ruling in the first *Texas* case had the greater weight of reason and authority. In *Peck v. San Antonio*, 51 Tex. 491, the court followed the two latter *Texas* cases rather than the earlier *Texas* case, notwithstanding the opinion of the *United States* Supreme Court. In line with *San Antonio v. Mehaffy*, 96 U. S. 312, are *Jonesboro v. Cairo, etc., R. Co.*, 110 U. S. 192. and *Mahomet v. Quackenbush*, 117 U. S. 508. These cases were *Illinois* cases. In harmony therewith is *Abington v. Cabeen*, 106 Ill. 200. But in *People v. Hamill* (Ill. 1888), 17 N. E. Rep. 799, decided in 1888, the same provision of the *Illinois* constitution of 1848 was

before the court, and it was decided that an act entitled merely, "An act to incorporate" a certain railroad company, and which provided in its body, not only for the incorporation but also for the subscription to the capital stock by certain counties, provided for too much; and that the bonds issued were void. In harmony with the *United States* Supreme Court decisions are *Conner v. Green Pond, etc., R. Co.*, 23 S. Car. 427; *Floyd v. Perrin*, 30 S. Car. 1; *Whitesides v. Neely*, 30 S. Car. 31; *Hope v. Gainesville*, 72 Ga. 246; *Shipley v. Terre Haute*, 74 Ind. 297; *Marion County v. Harvey County*, 26 Kan. 181.

2. *McAunich v. Mississippi, etc., R. Co.*, 20 Iowa 341.

3. **Torts by Railroad Companies.**—The title, "An act requiring railroad corporations, and other persons operating and controlling railroads, to fence their right of way and railroad track," is consistent with a provision that the owners of farm-crossings shall construct, maintain and keep closed gates at such crossings. *Hunt v. Lake Shore, etc., R. Co.*, 112 Ind. 69.

But in *Missouri, etc., R. Co. v. Long*, 27 Kan. 684, the title, "An act to require railroad companies to make cattle guards and to pay damages that individuals may sustain," has been held not to indicate a provision that a railroad company crossing public highways shall construct crossings. *Missouri, etc., R. Co. v. Long*, 27 Kan. 684.

The title, "An act to secure to the owners of livestock payment of the full value of all animals killed or maimed by railroad trains," is sufficient to sustain a provision exonerating the railroad company from liability in case it maintains a proper fence. *Dacres v. Oregon R., etc., Co.*, 1 Wash. 525.

The title, "An act to compel railroad companies to fence their road," sufficiently indicates a provision for the recovery of an attorney's fee in an action against the company founded on the

ber of other miscellaneous cases in regard to the titles of acts relating to railways.<sup>1</sup>

*c. STREETS AND HIGHWAYS.*—A title providing for surveying, laying out, and monumenting certain parts of a city has been held broad enough to embrace provisions in the act for opening a

act. *Missouri Pac. R. Co. v. Harrelson*, 44 Kan. 253.

The title, "An act to amend the charter of the L. R. Co.," embraces a provision by which actions for injuries to stock and other property, by such company, or its agents, shall be brought within six months after such injury. *O'Bannon v. Louisville, etc., R. Co.*, 8 Bush (Ky.) 350.

The title, "An act relating to the liability of railroads for damages by fire," sufficiently sustains provisions that the fire and damages caused by the road shall be *prima facie* evidence of negligence, but that the contributory negligence of the plaintiff shall be considered in determining his right to recover. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 407.

The title, "An act to revise the law providing for the incorporation of railroad companies," is sufficient to indicate provisions retaining the substantial provisions of a former law rendering railroad companies liable for injuries resulting from a failure to fence their track. *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

*1. Miscellaneous Railroad Cases.*—The title, "An act fixing the manner of voting in B. county on questions of taxes for subscription to railroad companies," sufficiently indicates a provision that no such tax shall be imposed upon those residing outside of a certain city in that county, unless a majority of persons shall vote in favor of the tax. *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98.

The title, "An act relating to a railroad, to run into and through the town of T.," comprehends a provision that under certain conditions the railroad shall run within one mile of the courthouse in T. *Macon B. R. Co. v. Stamps*, 85 Ga. 1.

The title, "An act for the relief of the creditors of the L. R. Co.," sufficiently indicates a provision for the sale of the real and personal property of the company and its franchises, to provide means for paying its debts. *Mosier v. Hilton*, 15 Barb. (N. Y.) 657.

The title, "An act for the sale of the

Pacific Railroad Company, and to foreclose the state's lien thereon," sufficiently indicates a provision that upon payment of a certain sum of money the state shall execute a release of its lien. *Woodson v. Murdock*, 22 Wall. (U. S.) 351.

*Titles Insufficient.*—The title, "An act amendatory of an act providing for the construction of the W. B. & C. Railway," as amended by another act, will not embrace a provision in the amendatory act granting certain tide land to a certain town; such grant not having been referred to in either of the former acts. *Case v. Loftus*, 43 Fed. Rep. 839.

The title, "An act to facilitate the carriage and transfer of passengers and property by railroad companies," is not sufficient to embrace a provision that no right shall exist under the act to condemn any real estate for river landings for the use of the railroad company, and that the act which authorized such companies to own watercraft necessary for the transportation of passengers across rivers, should apply only to such companies as owned the landing for the watercraft. *Thomas v. Wabash, etc., R. Co.*, 40 Fed. Rep. 126.

The title, "An act for the relief of the H. & T. C. R. Co.," is not inconsistent with a provision authorizing the extension of such road to a designated point. *Houston, etc., R. Co. v. Odum*, 53 Tex. 343.

The title, "An act to provide for the relief of the city of R. and the New York Cent. & H. R. R. Co., in said city," sufficiently indicates a provision relating to the elevation of the company's tracks, and changing the grade of the streets for that purpose, and to the payment of costs and expenses thence arising. *Wilson v. New York Cent., etc., R. Co.*, 2 N. Y. Supp. 65.

The title, "An act to amend the law in relation to the consolidation of railroads," sufficiently embraces a provision that no company should have power to execute a mortgage, or other lien which should have preference over judgments for timbers furnished and work and labor done, or for dam-

street;<sup>1</sup> but a title expressing for its object the regulating of a road has been held not to embrace provisions considerably reducing its width.<sup>2</sup> The numerous cases relating to the titles of acts concerning streets and highways deal with titles and acts so miscellaneous in their provisions as to make classification difficult.<sup>3</sup>

ages done, to persons and property, in the operation of its railroad. *Frazier v. East Tennessee, etc., R. Co.*, 88 Tenn. 138.

1. **Streets and Highways.**—*In re* One Hundred and Thirty-eighth Street, 60 How. Pr. (N. Y.) 290; *In re* Dept. of Public Parks, 86 N. Y. 437. See also *In re* Upson, 89 N. Y. 67.

2. *People v. Com'r of Highways*, 53 Barb. (N. Y.) 70.

3. **Sufficient Titles.**—The title, "An act relative to the powers and duties of commissioners of Central Park," sufficiently indicates provisions relating to laying out, grading, sewerage, paving and improving, under the direction of said commissioners, certain streets adjacent to such park. *In re* Knaust, 101 N. Y. 188.

It seems that a title expressing the object of the act to be the condemnation of property for public uses and benefits and for opening highways, streets and alleys by municipalities, embraces provisions relating to the opening of highways. *Schehr v. Detroit*, 45 Mich. 626.

The title, "An act amending the charter of a certain turnpike company," is not inconsistent with provisions repealing a prior act so far as they applied to such company. *Cassell v. Lexington, etc., Turnpike Road Co.* (Ky. 1888), 9 S. W. Rep. 502.

The title, "An act to provide for laying out . . . any street . . . within municipalities, and to condemn and acquire any and all land and property necessary and convenient for that purpose," sufficiently covers provisions in the act for the condemnation of land and for assessments upon other lands to pay therefor. *Davies v. Los Angeles*, 86 Cal. 37.

The title, "An act providing the mode of declaring charters of turnpike roads forfeited in certain cases," includes a section authorizing the forfeiture of a charter as to a part of a road therein embraced. *Central Plank Road Co. v. Hannaman*, 22 Ind. 485.

The title, "An act authorizing the construction of plank roads," sustains a provision for penalties for nonpay-

ment of toll and actions for collection thereof. *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 217.

The title, "An act for the benefit of L. turnpike company," sufficiently indicates a provision authorizing the company to borrow money on mortgage and to sell the road. *Louisville, etc., Turnpike R. Co. v. Ballard*, 2 Metc. (Ky.) 165.

The title, "An act authorizing supervisors of roads to remove fences standing near public highways on streams and watercourses, and to turn public roads and highways on watercourses to the rear of buildings, where such buildings stand too near the stream to give room for said roads or highways," will sustain provisions for changing the location of roads bounded by such fences and buildings. *Hines v. Aydelotte*, 29 Ind. 518. See also *Madison, etc., R. Co. v. Whitneck*, 8 Ind. 217; *State v. Bowers*, 14 Ind. 195; *Wheeler v. Calvert*, 25 Ind. 365; *State v. Montgomery County*, 26 Ind. 522; *Bright v. McCullough*, 27 Ind. 223.

The title, "An act in relation to a portion of the G. Turnpike Road Company," sufficiently indicates provisions authorizing a conveyance by the turnpike company and an acceptance of the same by grantees of a portion of the road, empowering the latter to improve the same as an approach to a park, and containing other provisions for the improvement and ornamentation of that part of the road conveyed. *People v. Banks*, 67 N. Y. 571.

The title, "An act to authorize the B. Street Railway Company to extend their railroad tracks to certain streets and avenues," sufficiently indicates numerous provisions and requirements affecting the use, operation and disposition of the road. *Central Crosstown R. Co. v. Twenty-third Street R. Co.*, 54 How. Pr. (N. Y.) 168.

The title, "An act to authorize the city of M. to re-assess and collect certain taxes and assessments," sufficiently indicates a provision authorizing the city after such re-assessment of taxes to order the streets of the city to be paved with the Nicholson, or any other



*f. SCHOOLS.*—The regulation of public instruction by the state includes the power to raise money by taxation for the support of schools; therefore the title, "An act to regulate public instruction" may embrace provisions authorizing a tax for school purposes.<sup>1</sup> But the title, "To raise funds for the common-school system" does not indicate provisions authorizing lotteries for that purpose.<sup>2</sup> Other miscellaneous cases relating to school acts are stated in the notes.<sup>3</sup>

kind of pavement. *Mills v. Charleston*, 29 Wis. 400; 9 Am. Rep. 575; *Evans v. Sharp*, 29 Wis. 564.

**Insufficient Titles.**—The title, "An act authorizing the acquisition of turnpikes, roads, or highways, heretofore or hereafter constructed near or through any borough or township in this commonwealth," is insufficient to embrace provisions relating to turnpikes in cities, and the rights of counties through which the turnpikes pass. *In re Carbondale, etc., Plank Road* (Pa. 1888), 13 Atl. Rep. 913.

The title, "An act to construct a plank road from Oswego to the Indiana line by way of Joliet," will not sustain a provision for the organization of a company to construct a plank road from Chicago to the northern line of Cook County. *Snell v. Chicago*, 133 Ill. 413.

The title, "An act to incorporate the Northwestern Plank Road Company," is insufficient to embrace provisions validating acts in pursuance of void legislation in regard to such road. *Snell v. Chicago*, 133 Ill. 413.

The title, "A supplement . . . authorizing the laying of an additional . . . track," will not support a provision authorizing an extension of a street railway track into streets not designated in the act incorporating the street railway company. *Union Pass. R. Co.'s Appeal*, 81½ Pa. St. 91.

The title, "An act relative to R. Street Railway Company," does not sufficiently indicate a repeal of a provision of the charter of such company, requiring it to keep the streets which it traverses in repair. *Ridge Ave. Pass. R. Co. v. Philadelphia*, 125 Pa. St. 219.

The title, "An act in relation to streets in Union township in Union county," does not sufficiently indicate provisions for a park. *Rader v. Union Tp.*, 39 N. J. L. 509.

1. *Smith v. Bohler*, 72 Ga. 546.

2. *Boyd v. State*, 53 Ala. 601.

3. *Schools*—Titles Sufficient.—The

general title, "Cities and towns," in the compilation of laws is sufficient to sustain an amendment enabling certain cities and towns to acquire the right to levy and collect a special tax for school purposes. *Austin v. Austin Gas Light, etc., Co.*, 69 Tex. 180.

The title, "An act to amend ch. 5 and 11 of title 17 of Rev. Sts. relating to the charters of cities and towns, so as to authorize the levy of a tax for the support of a public free school," is sufficient to sustain a provision authorizing the imposition of such a tax in a city containing more than ten thousand inhabitants. *Werner v. Galveston* (Tex. 1888), 7 S. W. Rep. 726.

The title, "An act regulating the collection of taxes in boroughs and townships," sufficiently indicates provisions for the collection of school and county taxes. *Com. v. Frutchey*, 11 Pa. Co. Ct. Rep. 112.

The title, "An act to authorize the county commissioners of S. county to transfer certain sums," sufficiently indicates a provision that certain surplus moneys be transferred from the railroad interest and sinking fund to the school fund of a county. *State v. Storey County*, 17 Nev. 96.

The title, "An act to legalize the organization of the independent school district of E.," sufficiently indicates a provision legalizing the acts of *de facto* officers of the district. *State v. Squires*, 26 Iowa 345.

The title, "An act constituting each city, of the third class, a single school district, providing for the election of school controllers," is sufficient to embrace a provision consolidating school districts composed of parts of a city and township. *Com. v. Reynolds*, 8 Pa. Co. Ct. Rep. 568.

The title, "An act fixing the number of school directors in public school boards in certain cities," is sufficient to sustain a section describing the qualifications of such directors. *State v. Macklin*, 41 Mo. App. 335.

*g.* **TAXATION.**—Titles relating generally to the levy, assessment, and collection of taxes have been held sufficient to support provisions relating to the subjects of taxation.<sup>1</sup> Such general titles have been held to embrace provisions abolishing taxes on municipal corporations,<sup>2</sup> and provisions limiting the time within which an action may be brought for recovery of land held under a tax title.<sup>3</sup> The title, "An act concerning taxes" has received an equally liberal construction.<sup>4</sup>

In the appended note are various cases wherein the sufficiency of the titles of acts relating to taxation and cognate matters has been asserted, in view of the subject-matter.<sup>5</sup>

On the other hand, it has been held that provisions authorizing

The title, "An act to establish and maintain a uniform course of text-books to be used in all the public schools in this state," sufficiently indicates a provision excluding from the operation of the act cities and districts having more than one hundred thousand inhabitants. *State v. Bronson* (Mo. 1893), 21 S. W. Rep. 1125.

The title, "An act to establish the M. Charitable Association for the benefit of the common-school fund, without distinction of color," does not sufficiently indicate provisions conferring upon a firm the power to receive subscriptions, and to sell and distribute certificates of subscription entitling the holder to prizes to be awarded by lot, the whole object of such provision being the establishment of a lottery for the benefit of the firm in question, under the pretense of promoting the interests of the school fund, to which was to be paid a portion of the receipts from the lottery. *Moses v. Mobile*, 52 Ala. 198.

The title, "An act allowing school directors to borrow money and issue bonds for the building and furnishing of a schoolhouse, to permit funding of school-district bonds heretofore, or hereafter to be issued, legalizing the same, and declaring an emergency," is insufficient to sustain a provision extending the issuing of bonds by certain school districts to five per cent. of their taxable property. *Van Houten v. Route*, 1 Wash. 306.

The title, "An act to constitute the town of B. and vicinity in B. county a separate school district," will not sustain a provision that intoxicating liquors shall not be sold in such district. *Montgomery v. State*, 88 Ala. 141.

1. *Gibson County v. Pullman Southern Car Co.*, 42 Fed. Rep. 572.

2. *Hawes Mfg. Co.'s Appeal* (Pa. 1889), 17 Atl. Rep. 219.

3. *Bowman v. Cockrill*, 6 Kan. 311.

4. *Warren v. Britton*, 84 Ind. 14; *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46.

5. **Sufficient Titles Relating to Taxation.**—The words, "to levy an assessment," in the title of an act, will support a provision for levying a "tax" in the body of the act. *Washburn v. Shawnee County*, 37 Kan. 217.

The title, "An act . . . relating to notice of redemption from tax sales," will support an amendment providing that the extension of the time to redeem shall apply also to cases in which the property was purchased by the state. *State v. Bigelow* (Minn. 1893), 54 N. W. Rep. 95.

The title of an act "relating to the taxation of money lent on land" will support a provision that mortgages covering lands in more than one county shall be void. *Farmers' L. & T. Co. v. Oregon, etc.*, R. Co., 24 Fed. Rep. 407.

The title, "An act to authorize and empower the board to make an appropriation of state swamp lands to aid in the construction of a railroad," will sustain a provision authorizing the board to exempt from taxation for a limited time all swamp-land property so appropriated. *Chippewa County v. Auditor Gen'l*, 65 Mich. 408.

The title, "An act . . . defining certain duties and liabilities of officers and persons therein named," is sufficient to cover a provision for the publication of delinquent tax lists and fixing the compensation to be paid to the publisher. *Bitters v. Fulton County*, 81 Ind. 126.

The title, "An act relative to the finances of the state," sufficiently indicates a provision under which property

may be seized and held for the payment of taxes. *City Nat. Bank v. Mahan*, 21 La. Ann. 752.

The title, "An act relating to the assessment and revision of taxes," is sufficient to sustain a provision relating to the mode of appointing members of boards of assessment and revision. *State v. Hammer*, 42 N. J. L. 435.

An act, the title of which recites that it is a law for regulating the mode of assessing and collecting taxes throughout the state, is not invalid as to a particular city, in that it fails to mention that city in the title. *Stewart's Succession*, 41 La. Ann. 128.

The title, "An act in relation to assessments in townships," sufficiently indicates provisions relating to a stay of collection of money paid on void assessments and to the mode of levying assessments in townships. *State v. North Plainfield*, 43 N. J. L. 349.

The title, "An act to levy and collect a tax for the support of the state government . . . to prescribe what persons, profession and property are liable to taxation, prescribe the method of receiving and collecting said taxes and to provide penalties and forfeitures for non-payment of taxes," is sufficient to embrace the imposition of a tax on "futures" and a provision that such tax shall be paid in full at the time of commencing the business of operating in "futures" and requiring registration with the ordinary at the time of payment of the tax and making the failure to pay the tax, or to register, an offense. *McGhee v. State* (Ga. 1893), 17 S. E. Rep. 276.

The title, "An act to enforce the collection of taxes levied in the county of L.," is sufficient to sustain a provision making it unlawful for the owners of land in that county, on which taxes were unpaid, to peel bark or cut timber on such land. *Prentice v. Weston*, 47 Hun (N. Y.) 121.

The title, "An act for the more rigid collection of the revenue," will sustain a provision relating to assessment and to the collection of three separate and distinct revenues and increasing the jurisdiction of justices of the peace in respect to the collection of taxes. *State v. Whitworth*, 8 Lea (Tenn.) 594.

The title, "An act in reference to the collection of taxes" in a certain county, comprehends a provision that tax deeds shall be conclusive evidence of title. *Ensign v. Barse*, 107 N. Y. 329.

In *Com. v. Martin*, 107 Pa. St. 189,

the title, "An act to provide revenue by taxation of corporations, associations and limited partnerships," was held to refer to taxation without restriction to corporate associations and limited partnerships, and it was held that a tax on loans held by individuals was within the title.

The title, "The payment of a county's bonded indebtedness," embraces provisions authorizing the appointment of commissioners of a sinking fund, the levy of taxes, and the collection of and penalties for failing to pay the same. *Owenboro, etc., R. Co. v. Logan County* (Ky. 1889), 11 S. W. Rep. 76.

The title, "An act to establish taxing districts, and to provide the means for local government for the same," is sufficient to sustain provisions giving municipal franchises to communities within such district, together with the necessary legislative, judicial and police powers, and providing for offenses against such municipalities by officers and others. *Luehrman v. Shelby County Taxing Dist.*, 2 Lea (Tenn.) 425.

The title, "An act to authorize the construction and maintenance of a courthouse in C. county," is sufficient to support provisions relating to the levying and collection of taxes for that purpose, and conferring the power to appoint commissioners to receive such tax and apply it to the purposes of the act. *McArthur v. Nelson*, 81 Ky. 67.

The title, "An act to provide for a board of equalization," sufficiently indicates provisions for such a board in every county of the state. *Stewart v. Collier* (Ga. 1893), 17 S. E. Rep. 278.

The title, "An act, a supplement to an act, entitled 'an act to provide revenue by taxation,'" sustains a provision that the exemption of certain banks from taxation should be confined to "so much of the capital and profits of such bank as shall not be invested in real estate." *National Bank v. Cheater County*, 14 Fed. Rep. 239.

The title, "An act to provide for the closing of the entrance of the tunnel of the L. R. Co. . . . in A. street," sufficiently indicates a provision for an assessment to raise a fund with which to compensate the railroad company for its losses and expenses in that behalf. *People v. Lawrence*, 36 Barb. (N. Y.) 177; *People v. Lawrence*, 41 N. Y. 137.

The title, "An act attaching certain territory to the county of W. to enable said town to take stock in a railroad,"

local taxation to pay part of the expense of building a bridge were not indicated by the title, "An act making appropriations for the expenses of government;"<sup>1</sup> and that the title, "An act to provide more just and equitable laws for the assessment and collection of revenue for state and county purposes," was not sufficient to sustain provisions relating to the collection of municipal taxes.<sup>2</sup> For other miscellaneous cases of insufficient titles, see appended note.<sup>3</sup>

**h. INTOXICATING LIQUORS.**—Provisions prohibiting or regulating the sale of intoxicating liquors are frequently inserted in the

comprehends provisions erecting the annexed territory into a taxing district. *Henderson v. Jackson County*, 2 McCrary (U.S.) 619.

The title, "An act to enable the supervisors . . . to raise money by tax," sufficiently indicates provisions for raising a fund with which to pay existing or future judgments, and directions for ascertaining that such judgments were really due. *Sharp v. New York*, 31 Barb. (N. Y.) 574.

The title, "An act to make provision for the government of the county of New York," embraces a provision that the real estate of a certain hospital, except such buildings actually used for hospital purposes, shall be liable to taxation. *People v. Com'rs of Taxes*, 47 N. Y. 502.

**License Cases.**—The title, "A further supplement to an act regulating boroughs and authorizing the corporate authorities to levy and collect a license tax on hacks," is sufficient to sustain provisions authorizing the enactment of ordinances fixing reasonable rates of license taxes on all hacks and other vehicles used in carrying persons or property for pay, and limiting the compensation within a borough. *Washington v. McGeorge* (Pa. 1892), 23 Atl. Rep. 222.

A provision requiring vendors of lager beer, manufactured by themselves, to take out licenses, is embraced by the title "An act to raise additional revenue to pay the debts of the state by increasing the rates of licenses of ordinary keepers and traders." *Keller v. State*, 11 Md. 525; 69 Am. Dec. 226.

The object of a provision that peddlers of drugs and nostrums shall obtain a license, under penalty of a fine to be recovered by action of debt in the name of the people, is sufficiently indicated by the title, "An act to regulate the sale of medicine in the state of Illinois." *People v. Blue Mountain Joe*, 129 Ill. 370.

A title expressing the subject-matter of an ordinance to be the licensing of vehicles, and the fixing of rates for the same, is not inconsistent with provisions for the imposition of the license, or regulation of vehicles driven in the night, and for fixing rates of charges for use of vehicles, and the licensing of drivers. *St. Louis v. Green*, 7 Mo. App. 472.

The title, "An act to define the duties, powers, qualifications and liabilities of assessors," comprehends a provision referring disputes as to values to the board of equalization for decision. *International, etc., R. Co. v. Smith County*, 54 Tex. 10.

The title, "An act to ratify and confirm certain proceedings of the board of trustees of the village of A.," sufficiently indicates a provision ratifying an invalid assessment. *People v. Wilson*, 3 N. Y. Supp. 326.

The title, "An act providing for the improvement of the F. road at the cost of the property benefited thereby," sufficiently indicates a provision for assessment of the adjoining property within eight hundred feet of either side of the road. *Graham v. Conger*, 85 Ky. 582.

See generally *State v. Lasater*, 9 Baxt. (Tenn.) 584; *Com. v. Dickinson*, 13 Phila. (Pa.) 585; *Slymer v. State*, 62 Md. 237; *In re Broom's Estate* (Pa. 1893), 25 Atl. Rep. 630; *State v. Wright* (45 La. Ann.), 12 So. Rep. 129; *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707.

**1. Insufficient Titles Relative to Taxation.**—*People v. Chautauqua County*, 43 N. Y. 10.

**2. Knoxville v. Lewis, 12 Lea (Tenn.) 180.**

**3. The title, "An act to exempt from taxation public property used for public purposes and places of religious worship," does not embrace the proviso that "all property, real or personal, other than that which is in actual use**

legislative charters of municipal, eleemosynary, and private corporations, and have been held to be sufficiently indicated by titles expressing no other purpose than that of incorporation.<sup>1</sup> Under a title expressing the purpose of the act to be to regulate the sale of liquor, provisions prohibiting the sale and imposing penalties may be embraced;<sup>2</sup> or provisions declaring the holder of a liquor license and his bondsmen liable for damages sustained from a sale;<sup>3</sup> or a provision imposing a license tax;<sup>4</sup> or a provision declaring disorderly houses where liquor is sold to be nuisances.<sup>5</sup> See note for miscellaneous instances of sufficient titles.<sup>6</sup> On

and occupation for the purposes aforesaid, and from which any income or revenue is derived, shall be subject to taxation." *Sewickley v. Sholes*, 118 Pa. St. 165.

The title, "An act to allow further time for the treasurer of H. county to make returns of delinquent taxes," is inconsistent with a provision allowing a former treasurer additional time in which to make supplementary returns of delinquent taxes. *Henrico County v. Magruder*, 84 Va. 828.

The title, "An act making appropriations for the expenses of state offices and state governments for the years 1885-6, and to provide a tax for paying the same," is not sufficient to embrace a section authorizing a tax to raise money with which to pay interest to counties on proceeds of sales of swamp lands theretofore accruing. *Sanilac County v. Aplin*, 68 Mich. 659.

The title, "An act to amend an act providing for the registration of precinct bonds," will not support a provision for levying taxes to pay such bonds. *Burlington, etc., R. Co. v. Saunders County*, 9 Neb. 507.

The title, "An act to fix the license tax of stevedores," is not consistent with a provision for the examination of persons as to their qualification for performing the duties of stevedore. *State v. Palmes*, 23 Fla. 620.

The title, "An act to provide for assessment of unclaimed military lots and tracts of land in A. and G. counties, and for the collection of state and county taxes thereon, by selling the delinquent lands and turning the net proceeds into the treasury," does not embrace a provision that fees charged those counties for previous searches in land offices shall be remitted, or that their agent shall have free access to the records. *Scharf v. Tasker*, 73 Md. 378.

The title, "An act to require assessors . . . to assess all seated lands

in the county in which the mansion house is situated where the county lines divide a tract of land," does not indicate a provision relating merely to assessment of lands divided by township and borough lines. *La Plume v. Gardner* (Pa. 1892), 23 Atl. Rep. 899.

See generally *Com. v. Bender*, 7 Pa. Co. Ct. Rep. 620; *State v. McCann*, 4 Lea (Tenn.) 1.

1. *Ex parte Moore*, 62 Ala. 471; *Gloversville v. Howell*, 7 Hun (N. Y.) 345; *Neifing v. Pontiac Tp.*, 56 Ill. 172; *O'Leary v. Cook County*, 28 Ill. 534.

2. *Williams v. State*, 48 Ind. 306. See also *State v. Adamson*, 14 Ind. 296; *Thomasson v. State*, 15 Ind. 449.

3. *Poffenbarger v. Smith*, 27 Neb. 788; *Durein v. Pontious*, 34 Kan. 353.

The title "An act to regulate and license the sale of . . . liquors," comprehends a provision that the applicant shall give bond to pay all fines and costs imposed for violation of the act as a condition precedent to the issuing of the license. *Kane v. State*, 78 Ind. 103.

4. *State v. Dogherty* (Idaho 1892), 29 Pac. Rep. 855.

5. *O'Kane v. State*, 60 Ind. 183; *State v. Campbell* (Kan. 1893), 32 Pac. Rep. 35.

#### 6. Sufficient Titles of Liquor Acts.—

The title, "To provide for the collection of special taxes on dealers in spirituous or malt and intoxicating bitters, and for other purposes," sufficiently indicates a provision that a failure to pay such taxes shall be a misdemeanor. *Brown v. State*, 73 Ga. 38.

An act, entitled "An act to regulate, restrain, license or prohibit the sale of intoxicating liquors," sufficiently indicates a provision that ten per cent. of the license fees shall be paid into the state treasury. *State v. Spokane Falls*, 2 Wash. 40.

The title, "An act to amend ch. 92 Gen. Sts., entitled 'revenue and taxes,'"

the other hand, a title "to regulate the sale of intoxicating liquors, and provide against evils resulting therefrom" has been held not to include provisions prohibiting and punishing intoxication;<sup>1</sup> and a title referring to a prohibition against the sale of spirituous liquors has been held not to support a provision prohibiting the sale of intoxicating liquors, the two words not being, in the opinion of the court, synonymous.<sup>2</sup> Miscellaneous instances of titles not broad enough to support provisions of statutes are set forth in the note.<sup>3</sup>

*i. CRIMES AND CRIMINAL PROCEDURE.*—Illustrations of what may be embraced under a general and comprehensive title are afforded by those decisions which hold that the title, "An act relative to crimes and offenses," is sufficient without specifying the particu-

embraces a provision to impose a fine on persons for selling liquor without license. *Rosenham v. Com.* (Ky. 1886), 2 S. W. Rep. 230.

The title of an original act, "Liquors," is sufficient to sustain provisions of an amendatory act regulating the sale. *In re White*, 33 Neb. 812.

The title, "An act to prohibit the sale of intoxicating liquors within certain limits," will sustain a provision prohibiting the sale of "Plantation Bitters" or other intoxicating bitters under the name of patent medicine. *Howell v. State*, 70 Ga. 224; 51 Am. Rep. 259.

The title, "An act to provide a local option law for the incorporated cities, towns and villages of this state," sufficiently indicates a proviso that the act shall not apply to a city, town or village in which the sale of ardent spirits shall thereafter be prohibited by legislative enactment. *State v. Chester*, 18 S. Car. 464.

The title, "An act to amend acts . . . relating to the practice of pharmacy," may contain provisions amending the laws authorizing the sale of liquors for different purposes. *State v. Aulman*, 76 Iowa 624.

1. *State v. Young*, 47 Ind. 150.

2. *McDuffie v. State*, 87 Ga. 687.

**3. Insufficient Titles of Liquor Acts.**—

A provision prohibiting the sale of intoxicating liquors within a specified limit, is not included within the title, "An act to regulate the sale of spirituous liquors." *People v. Gadway*, 61 Mich. 285; 1 Am. St. Rep. 578.

The title, "An act to authorize police juries to make such regulations as they may deem proper to prohibit or regulate the sale, barter or exchange of intoxicating liquors or merchandise on Sunday," does not indicate a pro-

vision that violations of such ordinances shall be considered misdemeanors, and that the penalties therein prescribed shall be enforced by indictment or information. *State v. Baum*, 33 La. Ann. 981; *overruling State v. Bott*, 31 La. Ann. 663; 33 Am. St. Rep. 224.

The title, "An act to regulate the sale of spirituous, malt, and vinous liquors," is insufficient to support an amendment increasing the license tax for the sale of such liquors, the effect of such amendment being to alter the charters of all the cities of the state. *State v. Wright*, 14 Oregon 365.

The title, "An act to establish a separate school district, . . . and for the appointment of a board of trustees for such school district, with certain powers and privileges," is not sufficient to embrace a provision that no license for the sale of spirituous liquors in the district shall be granted to any person without the recommendation of the board of trustees as to his moral fitness. *Glenn v. Lynn*, 89 Ala. 608.

The title, "An act to amend an act incorporating a town," which latter act merely authorizes the collection of a tax for selling liquors, is not sufficient to sustain a provision in the amendatory act prohibiting the sale of intoxicating liquors. *Ex parte Cowert*, 92 Ala. 94.

The title, "An act to prohibit the issuing of licenses in certain boroughs," does not sufficiently indicate provisions imposing a penalty for selling liquor in said boroughs. *Com. v. Frantz*, 135 Pa. St. 389.

The title, "To provide for licensing boats, hacks, and other vehicles by incorporated camp-meeting associations and seaside resorts and for the better government of the same," will not sus-

lar crimes and offenses provided for in the act;<sup>1</sup> and that the titles, "Crimes and Criminal Procedure,"<sup>2</sup> and "An act to establish a code of criminal procedure,"<sup>3</sup> may comprehend all matters relating to the definition and punishment of crimes and to criminal prosecutions. Miscellaneous instances where statutes have been sustained are given in the note.<sup>4</sup>

tain provisions regulating the manufacture and sale of liquor at such resorts. *Grover v. Ocean Grove Camp-meeting Assoc.*, 45 N. J. L. 399.

It was held in *Lauer v. State*, 22 Ind. 461, that the title, "An act to regulate and license the sale of intoxicating liquors, and providing penalties for the violation thereof," could not embrace a section relating to the jurisdiction of courts, and to the practice in prosecutions for offenses against the statute. *Overruled*, however, in *Hingle v. State*, 24 Ind. 28, and *Reams v. State*, 23 Ind. 111.

1. **Crimes and Criminal Procedure—Titles Sufficient.**—*State v. Dubois*, 39 La. Ann. 676; *State v. Taylor*, 34 La. Ann. 978.

2. *State v. Brassfield*, 81 Mo. 151; 51 Am. Rep. 234.

3. *Woodruff v. Baldwin*, 23 Kan. 491, in which case the title was held sufficient to embrace provisions relating to the care and custody of estates of convicts. It was contended here that the expression "criminal procedure" was broad enough to include not merely every proceeding in the prosecution of crime, but any proceeding connected with or directly caused by the crime, and aiming at the adjustment of rights disarranged by it, and that the expression was broader than the phrase "proceedings in criminal cases." This contention was sustained by the court.

Under the title, "An act to amend the code," provisions may be embraced extending the definition of the crime of embezzlement so as to embrace persons and transactions not mentioned therein. *Heller v. People* (Colo. 1892), 31 Pac. Rep. 773.

The title, "An act to amend chapter 24 . . . entitled 'criminal code,'" is sufficient, though the title of the act intended to be amended be "an act concerning criminal jurisprudence." *Heller v. People* (Colo. 1892), 31 Pac. Rep. 773.

The title, "An act to add a new section to art. 7 of the Code of Gen. Public Laws, entitled 'crimes and punish-

ment,' sub-title 'Rivers,'" sufficiently embraces a provision prohibiting the deportation of sand from the bed of a certain river, and prescribing a punishment therefor. *State v. Norris*, 70 Md. 91.

4. **Miscellaneous Instances of Valid Criminal Statutes.**—The object of a statute providing punishment for offenses committed by slaves has been held sufficiently indicated by the title "An act relative to slaves." *State v. Henry*, 15 La. Ann. 297.

The title, "to provide for the detection and conviction of all forgers of land titles," will support provisions prescribing the offense, its punishment, and the procedure. *Johnson v. State*, 9 Tex. App. 249, *citing* *English v. State*, 7 Tex. App. 171; *Albrecht v. State*, 8 Tex. App. 216; 34 Am. Rep. 737.

A provision, that "Whoever shall willfully violate a contract upon the faith of which money or goods have been advanced" shall be punished, etc., is not indicated by the title, "To enforce labor contracts, and to provide a penalty for the willful violation thereof." *State v. Pierson* (La. 1892), 10 So. Rep. 400.

The title, "An act to protect females of immature age and judgment from licentiousness," sufficiently indicates a provision making carnal intercourse with a female under the age of seventeen years a felony. *Holton v. State*, 28 Fla. 308.

A statute "To regulate the sale or disposal of opium" and to prohibit the keeping of places of resort for smoking or otherwise using that drug," is not unconstitutional as embracing more than one subject. *State v. Ah Sam*, 15 Nev. 27; 37 Am. Rep. 454.

The title, "An act to prohibit the fraudulent transfer of property and to declare the same a crime and to prescribe the punishment thereof," comprehends a provision making the sale and transfer, sequestration, incumbrance, or disposal of property with intent to defraud creditors, an offense. *Herold v. State*, 21 Neb. 50.

The title, "Dram shop—Gambling

devices in. An act to prevent any dram-shop keeper from keeping or permitting to be kept in or about his dram shop certain musical instruments, any billiard, pool or other gaming table, bowling or ten-pin alley, cards, dice, or other device for gaming or amusement," comprehends a provision forbidding sparring, boxing, wrestling, and cock fighting in dram shops. *State v. Blackstone* (Mo. 1893), 22 S. W. Rep. 370.

The title, "An act to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of this state," which article required that the legislature should pass laws to prevent the sale of fraudulent warehouse receipts, sufficiently indicated provisions prescribing a penalty for issuing false receipts, and for not canceling receipts under certain circumstances. *Sykes v. People*, 127 Ill. 117.

The title, "An act to protect innkeepers," sufficiently indicates a provision for the punishment of parties who avoid paying board by means of a trick. *State v. Kingsley*, 108 Mo. 135.

The title, "An act to prohibit the sale and manufacture of unhealthy or adulterated dairy products," sufficiently embraces a provision that no person shall manufacture out of any oleaginous substance or compound of the same or any compound other than that produced from unadulterated milk or cream or any article designed to take the place of butter or cheese made from pure unadulterated milk or cream. *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638.

The title, "An act providing for metropolitan police in all cities of 29,000 or more inhabitants," is sufficient to sustain a provision for the punishment of persons interfering with the police in the discharge of their duties. *Indianapolis v. Huegele*, 115 Ind. 581.

The title, "An act to regulate the sale of opium and to suppress opium dens," is sufficient to support a provision forbidding the sale or giving of opium to any one but a druggist or practicing physician, except on the prescription of a practicing physician. *Ex parte Yung Jon*, 28 Fed. Rep. 308.

The title, "An act to prevent fraud in the sale of lard, and to provide punishment for the violation thereof," is sufficient to embrace a provision that no person shall sell any substitute for lard under the words "refined," "pure,"

"family," unless each package is marked "compound lard." *State v. Snow*, 81 Iowa 642.

The title, "An act to prevent the sale of cotton between sunset and sunrise," is sufficient to sustain provisions making it unlawful to buy and sell, barter or exchange," or "receive on deposit," any cotton within that time. *Truss v. State*, 13 Lea (Tenn.) 311.

The title, "An act designating the name by which the house of refuge for correction and reformation of juvenile offenders shall hereafter be known, . . . and regulating the committing thereto," sufficiently indicates a provision for the commitment of boys to the "Indiana Reform School for Boys." *Jarrard v. State*, 116 Ind. 98.

The title, "An act to secure more competent and well qualified juries in the several counties of this state," comprehends provisions reducing the number of peremptory challenges in criminal cases. *Tatum v. State*, 82 Ala. 5.

Though the title of an act relates only to proceedings by information, it will support a provision dispensing with grand juries in such case, unless ordered by the judge. *In re Rafferty*, 1 Wash. 382.

The title, "An act relative to the payment of expenses incident to the prosecution of criminals," sufficiently indicates a section providing that the fines and forfeitures collected for the violation of criminal laws shall be paid into the treasury of the state. *Bossier v. Steele*, 13 La. Ann. 433.

The title, "Cheats, frauds, bogus checks, etc.," is sufficient to support a provision as to what shall be a sufficient charge in an indictment founded on the act. *State v. Morgan* (Mo. 1892), 20 S. W. Rep. 456.

The title, "An act concerning proceedings in criminal cases," is sufficient to sustain a provision forbidding municipalities from punishing by ordinance a statutory offense. *Jett v. Richmond*, 78 Ind. 316.

The title, "An act to provide for the trial of offenses where the penalty is not necessarily imprisonment at hard labor or death," is sufficient to support provisions that the accused may waive trial by jury. *State v. White*, 33 La. Ann. 1221; *State v. Carter*, 33 La. Ann. 1214.

The title, "An act to provide for the more efficient government and maintenance of the house of correction and reformatory at G.," embraces a provision that the jury shall say in their verdict



On the other hand, in a case where a statute imposed a penalty upon county treasurers for lending out the public funds for private uses, the title was, "An act to provide for the assessment and collection of the revenue," and the statute was held unconstitutional, it being declared that the matter of the act must be "clearly" and not "dubiously" indicated by the title, and that the relation of the title to the subject must not rest upon a merely possible or doubtful reference.<sup>1</sup> For other instances of statutes held bad, see note.<sup>2</sup>

j. CIVIL PROCEDURE AND COURTS.—The titles and statutes relating to matters of civil procedure are various and difficult of

whether the convict shall be sent to the reformatory or the penitentiary. *Washington v. State*, 28 Tex. App. 411.

1. *In re Breene*, 14 Colo. 401. See also *Brooks v. People*, 14 Colo. 413.

2. **Insufficient Titles—Criminal Statutes.**—The title, "An act for the suppression of lottery gifts by storekeepers and others to secure patronage," is not sufficient to sustain provisions prohibiting tradesmen from giving tickets to purchasers, entitling them to money or articles of value. *Com. v. Moorhead*, 7 Pa. Co. Ct. Rep. 513.

The title, "An act to amend § 1 of Act No. 43 of the Laws of 1873 . . . and to repeal § 2 of said act" is insufficient to support a provision for the punishment of persons embezzling mortgaged goods and chattels, there being in the title of the act amended no reference to chattel mortgages. *Ellis v. Hutchinson*, 70 Mich. 154.

The title, "An act to change the penalty for disturbance of the peace," will not support a provision making it an offense to disturb any person." *State v. Persinger*, 76 Mo. 346.

The title, "An act to provide for the maintenance, government, and police of the penitentiary; also the mode of appointing officers," is insufficient to sustain a provision that persons convicted of offenses punishable by imprisonment for a period of time exceeding six months shall be imprisoned in the penitentiary. *Brooks v. People*, 14 Colo. 413.

The title, "An act to prevent deception in the sale of dairy products, and to preserve the public health," will not sustain a provision making the manufacture of imitations of butter an offense. *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381; 55 Am. Rep. 693.

The title, "To prevent the adulteration and to regulate the sale of milk," is insufficient to sustain the prohibition

of production of impure milk by other means than adulteration without regard to the existence of an intent to sell the same. *State v. Newton*, 45 N. J. L. 469.

The title, "An act to prevent the fraudulent transfer of personal property," does not sufficiently indicate a provision making it an offense to remove mortgaged property out of the county. *Ex parte Thomason*, 16 Neb. 238.

The title, "An act making it a misdemeanor to carry on barbering on Sunday," will not sustain a provision prohibiting a barber from keeping open a bath room on Sunday. *Ragio v. State*, 86 Tenn. 272.

The title, "An act . . . prohibiting the manufacture of cigars and preparation of tobacco in any form in the tenement houses of said city," does not indicate a provision prohibiting such labor in any rooms or apartments in such city used as dwellings for the purpose of living, sleeping, or doing any household work therein. *Ex parte Paul*, 94 N. Y. 497.

A provision that a defendant indicted for assault and battery with intent to commit felony, may be convicted of a lesser offense, is not indicated by the title, "An act to limit the number of grand jurors, and to point out the mode of their selection." *Foley v. State*, 9 Ind. 365; *Gillespie v. State*, 9 Ind. 380.

The title, "An act to amend and reenact § 997 in regard to challenges of jurors in trials of criminal cases" (such section having reference to regular jury terms), will not support a provision increasing the number of peremptory challenges to which the state is entitled and disclaiming any application to the trial of cases at other terms than regular jury terms, but nevertheless containing a provision on the subject

classification, but it is believed that a full collection of the cases will be found in the appended note.<sup>1</sup>

Provisions in titles relating to courts, though general in their terms, are deemed sufficient usually to embrace various matters of detail relating to the general subject.<sup>2</sup>

of peremptory challenges in that very class of cases. *State v. Everage*, 33 La. Ann. 123.

1. **Civil Procedure.**—The title, "An act providing the place of bringing suit in certain cases," may support a provision designating those upon whom service may be made. *Farmer's Ins. Co. v. Highsmith*, 44 Iowa 330.

The title, "The Code of Civil Practice," sufficiently indicates provisions relating to the issuing of executions, their levy, stay, sales thereunder and the appraisal of property taken by virtue thereof. *Porter v. Thomson*, 22 Iowa 391.

The title, "An act to regulate the foreclosure of real estate," is sufficient to indicate a provision that a mortgagor's right of redemption may be waived. *Atkinson v. Duffy*, 16 Minn. 45.

The title, "An act concerning the unlawful detention of land and the recovery thereof," is sufficiently comprehensive to embrace proceedings against tenants unlawfully holding over, and proceedings in forcible entry and detainer. *Sturgeon v. Hitchens*, 22 Ind. 109.

The title, "An act to provide interpleas in certain cases," sufficiently indicates a provision that any person claiming attached property may interplead in a case. *Bennett v. Wolverton*, 24 Kan. 284.

The title, "An act in relation to the removal of causes to the supreme court," is sufficient to indicate a provision for giving notice of appeal in open court or at chambers. *Baker v. Prewett*, 3 Wash. Ter. 474.

A title relating to the transfer of causes is consistent with provisions for the mode of trying such causes after removal. *State v. Judges*, 32 La. Ann. 778.

The object of an act allowing judgment to be rendered on a mortgage note, waiving appraisal laws in accordance with the note, is sufficiently expressed by the title, "An act to revise, simplify and abridge rules, practice, pleadings, etc., of the courts." *Reilly v. Ellsworth*, 11 Ind. 222.

A provision that an act creating

privileges in favor of non-resident plaintiffs, in suits against lunatics and infants, shall not extend beyond those enjoyed by resident plaintiffs, is sufficiently indicated by the title, "An act amendatory and explanatory of the Statute of Limitations in this state, so far as regards idiots, lunatics and infants." *Denham v. Holeman*, 26 Ga. 193; 71 Am. Dec. 198.

But a title, "An act to provide for appeals from interlocutory orders granting injunctions or appointing receivers," has been held not to sustain a provision for an appeal from an order refusing to dissolve an injunction or an order enlarging the scope of the injunction. *Taylor v. Kirby*, 31 Ill. App. 658.

The title of an act professing to amend a prior act in relation to the publication of summons, by adding certain words in relation to the powers of the court in vacation, will not sustain a provision adding those words, and other words also, materially changing the length of time for which the publication was required. *Johnson v. Jones*, 87 Ga. 85.

2. **Courts.**—The title, "An act constituting district courts in certain cities," comprehends provisions taking away part of the jurisdiction of certain other courts. *Payne v. Mahan*, 44 N. J. L. 213.

The title, "An act to amend § 23 of an act to establish a criminal court for the county of P. with criminal jurisdiction in misdemeanor cases," is sufficient to support a provision conferring on such court the power to grant writs of *mandamus*. *Mobile, etc., R. Co. v. Pike County* (Ala. 1892), 11 So. Rep. 732.

The title, "An act to create a criminal court," will sustain a provision conferring equitable jurisdiction on such court. *Howland Coal, etc., Works v. Brown*, 13 Bush (Ky.) 681. See also *Chiles v. Drake*, 2 Metc. (Ky.) 146; 74 Am. Dec. 406.

The title, "An act to enlarge the jurisdiction of the courts of general and special sessions of the peace, in and for the city and county of New York," sufficiently indicates provisions relat-

ing to the courts of *oyer and terminer* of the state at large. *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642.

The title, "An act to enlarge the jurisdiction of the husting court," sufficiently indicates a provision that in certain cases the judge of that court may act as a judge of the chancery court. *Morris v. Virginia Ins. Co.*, 85 Va. 588.

The title, "An act to regulate proceedings in county courts pertaining to the estates of deceased persons," sufficiently indicates a provision for the revision of the accounts of executors and administrators in the district court. *Murphey v. Menard*, 11 Tex. 673.

The title, "An act to enlarge the jurisdiction of the probate courts," is sufficient to sustain provisions prescribing the manner in which their exercise of that jurisdiction shall be reviewed by the circuit courts. *Perkins v. DuVal*, 31 Ark. 238.

The title of an act creating a new judicial district need not indicate the fact that one of the counties composing the district was taken from an adjoining district. *Brown v. State* (Tex. 1893), 22 S. W. Rep. 596.

The title, "An act to regulate proceedings in contestation between persons claiming judicial office," indicates that its provisions were intended to apply to the office of justice of the peace. *McGregor v. Allen*, 33 La. Ann. 870.

The title, "Of justices of the Peace and their courts," comprehends a provision in an amendatory act for the election of justices of the peace and fixing their tenure of office. *State v. Ranson*, 73 Mo. 78.

The title, "An act regulating the jurisdiction and procedure before justices of the peace in certain cases," is sufficient to sustain provisions making a justice of the peace and his bondsmen liable for the misfeasances of a special constable appointed by the justice. *Martin v. Borgman*, 21 Kan. 672.

The title, "A further supplement to an act entitled 'An act constituting courts for the trial of simple cases,'" may contain provisions regulating the fees of justices of the peace, and constables, in criminal cases. *Lane v. State*, 49 N. J. L. 673.

The title, "An act to increase the jurisdiction of justices of the peace," sufficiently indicates a provision giving courts for the trial of small causes, jurisdiction to the amount of \$200. *Colwell v. Chamberlin*, 43 N. J. L. 387.

The title, "An act to define the judicial districts of the state and prescribing the time for holding the terms of the district courts in the several counties of each judicial district," sufficiently indicates provisions so dividing the state as to make an additional district and providing for the appointment of a judge thereof until the next election, and for the determination of matters pending in the organized counties of the new district by the district courts of such counties. *In re Johnson County* (Wyoming 1893), 32 Pac. Rep. 850.

The title, "An act concerning justices of the peace, their general jurisdiction and mode of proceeding before them," is sufficient to sustain provisions regulating the practice on appeals from decisions of a justice's court. *Robinson v. Skipworth*, 23 Ind. 316; *overruling Kuhns v. Krammis*, 20 Ind. 490, and followed in *Hingle v. State*, 24 Ind. 35; *Grubbs v. State*, 24 Ind. 295; *Crist v. Glidewell*, 24 Ind. 396; *Murray v. Kelly*, 27 Ind. 42; *Bergman v. Ashdill*, 48 Ind. 489.

**Insufficient Titles in Acts Relating to Courts.**—But a title general in its terms relating to courts has been held insufficient to sustain provisions giving exclusive jurisdiction of certain matters. *Payne v. Mahon*, 41 N. J. L. 292.

The title, "An act to provide a revenue, to levy and collect taxes, to grant and collect licenses, to provide for the creation, appointment and removal of revenue officers, and to define their duties," does not sufficiently indicate a provision extending the jurisdiction of a district court to offenses relating to the revenue. *State v. Wardens of St. Louis Cathedral*, 23 La. Ann. 720.

The title, "A supplement to an act regulating writs of error," will not include provisions for removal of "decisions" by motion for a new trial. *Folkner v. Dorland* (N. J. 1892), 24 Atl. Rep. 403.

The title, "An act to give jurisdiction to district courts . . . over causes . . . respecting landlord and tenant," will not sustain provisions regulating the procedure in such causes. *Duverge v. Salter*, 5 La. Ann. 94.

The title, "An act to regulate the terms of court in the sixteenth circuit district," will not sustain a provision attaching an unorganized county for certain judicial purposes. *Ex parte Wood*, 34 Kan. 645. See *State v. Porter* (Minn. 1893), 55 N. W. Rep. 134 for a

**6. Amendatory and Repealing Acts.**—The general rule is that the title of an amendatory act, reciting the title of the amended act, will be sufficient if the new matter contained in the amendatory act is fairly indicated by the title of the original act.<sup>1</sup> If the title of the original act is sufficient, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient.<sup>2</sup> Trivial errors in describing the title of the original act, which cannot mislead, will not invalidate the amendatory act.<sup>3</sup> It is not necessary that the title of the amendatory act should specify the particular sections of the act amended.<sup>4</sup>

The title of the amendatory act need not necessarily refer in terms to the fact of repeal.<sup>5</sup> An act which in its title is called a repealing act may not in its body embrace new enactments outside the scope of those repealed.<sup>6</sup>

**7. One or More Subjects.**—The requirement that no statute shall embrace more than one subject, though so interwoven with the

case involving the sufficiency of the title of an act relating to terms of office of judges of the municipal court.

1. *Yellow River Imp. Co. v. Arnold*, 46 Wis. 225; *Willis v. St. Paul Sanitation Co.*, 48 Minn. 140; *Montclair Tp. v. New York, etc., R. Co.*, 45 N. J. Eq. 436, where the supplementary act was held to contain matter not indicated by the title of the original act. *Wardle v. Cummings*, 86 Mich. 395. In *People v. Young Men's, etc., Ben. Soc.*, 41 Mich. 67, and *Eaton v. Walker*, 76 Mich. 579, the amendment introduced purposes not coming within the title of the original act. *Norman v. Curry*, 27 Ark. 440; *People v. Parvin*, 74 Cal. 549; *Saunders v. Pensacola*, 24 Fla. 226; *Jones v. Columbus*, 25 Ga. 610; *Alberston v. Hamilton*, 82 Ga. 30; *Reed v. State*, 12 Ind. 641; *Brandon v. State*, 16 Ind. 197; *Morford v. Unger*, 8 Iowa 82; *Lafon v. Dufrocq*, 9 La. Ann. 350; *Second German, etc., Bldg. Assoc. v. Newman*, 50 Md. 62; *Holden v. Osceola County*, 77 Mich. 202; *People v. Gadoway*, 61 Mich. 285; 1 Am. St. Rep. 578; *Hoffman v. Parsons*, 27 Minn. 236; *State v. Smith*, 35 Minn. 257; *St. Louis v. Tiefel*, 42 Mo. 578; *People v. Willsea*, 60 N. Y. 507; *People v. Whitlock*, 92 N. Y. 191; *David v. Portland Water Committee*, 14 Oregon 98; *State Line, etc., R. Co.'s Appeal*, 77 Pa. St. 429; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; 32 Am. Rep. 417; *In re East Grant Street*, 121 Pa. St. 596; *Gibson v. State*, 16 Fla. 291; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1; *Mills v. Charleton*, 29 Wis. 400; 9 Am. Rep. 575; *National Bank v. Chester County*, 14 Fed. Rep. 239.

A title of an amendatory act which expresses its object by mere reference to the act intended to be amended substantially complies with the provision that the object of every act must be expressed in its title. *Arnould v. New Orleans*, 11 La. Ann. 56; *State v. Garrett*, 29 La. Ann. 637; *State v. Brown*, 41 La. Ann. 771.

The amendment of a statute is a "subject" within the constitutional requirement that the subject of a statute shall be embraced in its title. *People v. Parvin* (Cal. 1887), 14 Pac. Rep. 783.

The title, "An act to amend an act entitled 'An act to establish the municipality of J.,'" is sufficient to sustain a provision purporting to amend not the entire act, but only a particular section thereof. *State v. Duval County*, 23 Fla. 483.

A supplement to an act repealing a clause in the supplemented act requiring the assent of voters to the issuing of certain municipal improvement bonds, sufficiently expressed its object in the title "a supplement to" the act repealed. *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48.

2. *Brandon v. State*, 16 Ind. 197.

3. *People v. Howard*, 73 Mich. 10.

4. *State v. Duval County*, 23 Fla. 483.

5. *Gabbert v. Jeffersonville R. Co.*, 11 Ind. 365; 71 Am. Dec. 358; *New Orleans v. Dunbar*, 28 La. Ann. 722; *Washington County v. Franklin R. Co.*, 34 Md. 159; *Burke v. Monroe County*, 77 Ill. 610; *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214.

6. *People v. Mellen*, 32 Ill. 181; *Ex parte Upshaw*, 45 Ala. 234.

requirement that the subject shall be expressed in the title as frequently to raise a single question, when the validity of a particular statute is under consideration, is, notwithstanding, a separate question. The cases cited above on the question of the sufficiency of the title to indicate the subject-matter throw much light upon the collateral question whether such a plurality of subjects is dealt with in a single statute as to make it obnoxious to the constitutional provision. In addition to those cases are many which deal more especially with the question here under discussion, and which, therefore, may be classified here. One subject only, within the meaning of this constitutional requirement, has been held to be embraced in an act separating the offices of receiver and commissioner, providing for their appointment, and defining their duties;<sup>1</sup> in an act relating to lands and levees;<sup>2</sup> an act relating to the compensation of executors, administrators, guardians, and county commissioners;<sup>3</sup> an act defining the duties and fixing the compensation of a state officer and providing for vacancies;<sup>4</sup> and an act to revise the general statutes.<sup>5</sup> Provisions relating to the mode of accomplishing the object of an act constitute a part of the subject-matter and not a separate subject.<sup>6</sup> So various pertinent details come within the general subject.<sup>7</sup> The requirement should not be so construed as to restrict legislation to an extent that will render different

1. *Smith v. Com.*, 8 Bush (Ky.) 108.  
2. *Police Jury v. Colomb*, 20 La. Ann. 196.

3. *Key v. Jones*, 52 Ala. 238.  
4. *Walker v. Dunham*, 17 Ind. 483.  
5. *Osbe v. State*, 37 Ohio St. 494.  
6. *People v. Lawrence*, 36 Barb. (N. Y.) 177; *State v. Miller*, 100 Mo. 439; *Bergman v. St. Louis, etc.*, R. Co., 88 Mo. 678; 28 Am. & Eng. R. Cas. 588; *Ewing v. Hoblitzell*, 85 Mo. 64; *Hope v. Gainesville*, 72 Ga. 246; *Brown v. State*, 73 Ga. 38; *Crawfordville, etc.*, Turnpike Co. v. *Fletcher*, 104 Ind. 97; *Golden Canal Co. v. Bright*, 8 Colo. 144; *People v. Goddard*, 8 Colo. 432; *Willis v. Standard Oil Co.* (Minn. 1892), 52 N. W. Rep. 652.

An act having for its object the preservation of the public health, may include provisions for the payment and control of policemen and police commissioners. *State v. Covington*, 29 Ohio St. 102.

An act for the appointment of two coal and coke boat gaugers, to fix their compensation and to define their duties, embraces but one subject. *State v. Pittsburg, etc.*, Coal Co., 41 La. Ann. 465. So also an act creating a commission of arbitration and award, and defining the powers and duties thereof,

and making appropriations to pay the salaries of judges thereof. *Stone v. Brown*, 54 Tex. 330.

The same statute may regulate the sale, alienation, removal, etc., of animals. *State v. Deitz*, 30 Tex. 511.

7. *Hare v. Kennerly*, 83 Ala. 608; *Block v. State*, 66 Ala. 493; *Tatum v. State*, 82 Ala. 5; *Gunter v. Dale County*, 44 Ala. 639; *Ex parte Upshaw*, 45 Ala. 234; *Martin v. Hewitt*, 44 Ala. 433. See also *Tuttle v. Strout*, 7 Minn. 465; 82 Am. Dec. 108; *Clay v. Central R. & B. Co.*, 84 Ga. 345; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656.

An act providing for the organization and government of a state hospital embraces but one subject. *Overseers of Poor v. Clearfield County* (Va. 1890), 19 Atl. Rep. 952; as does an act regulating the use of water for irrigation and providing for settling priorities of water rights, *Golden Canal Co. v. Bright*, 8 Colo. 144; and an act providing for the sale of public lands for specified purposes, and the investment of the proceeds, *Looney v. Bagly* (Tex. 1887), 7 S. W. Rep. 360; and an act requiring that all mortgages filed with the registrar of deeds for record shall be by him reported to the tax assessor of the county, and that no mortgage

acts necessary, when the whole subject-matter is connected and may be properly embraced in the same act.<sup>1</sup> It has been said that the question must be determined by the act itself and not by its title.<sup>2</sup> An amendment in two particulars may be good.<sup>3</sup> If the two subjects are separable, that which is indicated by the title may stand;<sup>4</sup> but if the title indicates both subjects, the act must fail.<sup>5</sup>

Municipal incorporation acts may embrace many matters without violating the constitutional provision.<sup>6</sup>

Provisions authorizing the removal of a county seat and com-

shall be recorded which does not give the name and residence of the mortgagee. *People v. Board of Supervisors* (Mich. 1888), 38 N. W. Rep. 639.

An act to establish evidence of title to real property, and to restore the record of the same, and to provide for the recording of deeds, embraces more than one subject. *In re Goode*, 3 Mo. App. 226. See also *State v. Shadle*, 41 Tex. 404; *Smails v. White*, 4 Neb. 353; *Davies v. Saginaw County*, 89 Mich. 295; *Webb v. New York*, 64 How. Pr. (N. Y.) 10; *Klein v. State Treasurer*, 42 La. Ann. 174; *State v. Harrison*, 11 La. Ann. 722; *Maranthe v. Hunter*, 11 La. Ann. 734; *State v. Adeline*, 11 La. Ann. 736; *State v. Kolsem*, 130 Ind. 434.

A local act entitled, "An act to provide for transmission of letters, packages, and merchandise in the cities of New York and Brooklyn, and across the North and East rivers, by means of pneumatic tubes to be constructed beneath the surface of the streets and public places in said cities and under the waters of said rivers," embraces but one subject. *Astor v. Arcade R. Co.*, 113 N. Y. 93; 1 N. Y. Supp. 174; *Bailey v. New York A. R. Co.*, 1 N. Y. Supp. 304.

1. *Phillips v. Covington, etc.*, *Bridge Co.*, 2 Metc. (Ky.) 219; *Hoke v. Com.*, 79 Ky. 573.

2. *Greaton v. Griffin*, 4 Abb. Pr. N. S. (N. Y.) 313; *People v. Lawrence*, 36 Barb. (N. Y.) 176.

3. *State v. Brown*, 41 La. Ann. 771.

4. *People v. Briggs*, 50 N. Y. 566; *People v. Parks*, 58 Cal. 624; *Webb v. New York*, 64 How. Pr. (N. Y.) 12.

5. *Skinner v. Wilhelm*, 63 Mich. 568.

6. **Municipal Incorporation Acts.** — *Harris v. People*, 59 N. Y. 601, the court saying, among other things: "The whole thing, the creation of the municipality, is the subject of the act; and the parts of it are not separate sub-

jects, but separate parts of one general subject."

An act incorporating a city may provide for establishment of a court therein. *Davis v. Woolnough*, 9 Iowa 104; or may provide for future annexation to another city, embraces but one subject. *State v. LaVaque*, 47 Minn. 106.

A local act incorporating a town situated in two counties does not embrace more than one subject in providing that notices, required to be published in either county, shall be published in a newspaper in the town. *More v. Deyoe*, 22 Hun (N. Y.) 208.

An act consolidating various acts in relation to the charter of a city embraces but one subject. *Hannibal v. Marion County*, 69 Mo. 571. So, also, an act repealing the charter of certain municipal corporations, and providing that their property shall be transferred to the custody and control of the state, to remain public property for the uses to which it had been formerly applied. *Luehrman v. Shelby County Taxing Dist.*, 2 Lea (Tenn.) 425.

But an act which, professing to amend a particular section of a city charter, amends such section and expressly repeals other sections, and adds numerous powers necessary to municipal government, embraces more than one subject and is void. *Ex parte Reynolds*, 87 Ala. 138; as is an act consolidating several acts incorporating a city and confirming certain ordinances of such city theretofore passed. *Brieswick v. Brunswick*, 51 Ga. 639; 21 Am. Rep. 240; and an act prescribing a mode by which municipal corporations may surrender or abolish their charters, and also how they may amend their charters. *Murphy v. State*, 9 Lea (Tenn.) 373; and an act incorporating two towns in different parts of the state. *King v. Banks*, 61 Ga. 20.

An act enabling municipalities to

pensating the owners of real estate taken as a site for county buildings, have been held to be in furtherance of a single object; <sup>1</sup> also provisions authorizing the removal of a county seat and an issue of bonds to raise funds with which to build a courthouse at the new county seat.<sup>2</sup> But acts prescribing the manner of chang-

borrow money on their bonds, or to issue bonds in aid of works of internal improvements, and to validate bonds already issued for such purposes, embraces but one subject. *Otoe County v. Baldwin*, 111 U. S. 1; *Dawson County v. McNamar*, 10 Neb. 276; as does an act authorizing a city to extend its indebtedness and validating indebtedness already contracted. *Baker v. Seattle*, 2 Wash. 576; and an act to enable two towns to issue bonds for a park, *People v. Brislin*, 80 Ill. 423; and an act consolidating a city and providing for the payment of its debts and for other municipal matters, *Louisiana v. Pilsbury*, 105 U. S. 278; *State v. Pilsbury*, 31 La. Ann. 1; and an act in relation to lighting cities and towns, furnishing light, providing for the right of way and assessment of damages, and declaring an emergency. *Rushville Gas Co. v. Rushville*, 121 Ind. 213; an act granting submerged lands to a city, requiring it to build docks and wharves, authorizing charges by the city for dockage and wharfage, establishing a tide-water basin, providing that the balance of the tract be dedicated to public use, and authorizing abutting owners to erect walls, etc., contains but one subject. *Easton, etc., R. Co. v. Central R. Co.*, 52 N. J. L. 267; as does an act providing for a water supply for a city by a certain water company, and for the municipal taxation of the company, *Conéry v. New Orleans Water Works Co.*, 41 La. Ann. 910; an act providing for the election of police commissioners in a city, and the establishment of a police force therein. *People v. Whitlock*, 92 N. Y. 196; and an act amending a consolidation act, *People v. Coleman*, 4 N. Y. Supp. 417. See also *In re McAdam*, 7 N. Y. Supp. 454. An act limiting the time of making claims and bringing suits against municipal corporations, including cities organized under special charters, embraces but one subject. *Morgan v. Des Moines*, 54 Fed. Rep. 456; as does an act fixing the number of directors in certain cities, and providing for their election and for districting the cities therefor, *State v. Miller*, 100 Mo. 439;

*State v. Macklin* (Mo. 1890), 13 S. W. Rep. 680.

1. **County Matters.**—*Allen v. Tison*, 50 Ga. 374.

2. *Allen v. Tison*, 50 Ga. 374.

An act forming a new county out of old counties is not objectionable because it changes the boundaries of the old counties. *Haggard v. Hawkins*, 14 Ind. 299.

An act changing the boundary lines between the counties of D, W, and J, and authorizing the removal of the county seat of B county, embraces but one subject. *Walker v. Griffith*, 60 Ala. 361. So also an act defining the boundaries of counties and providing for the preservation of the peace in such counties. *Philpin v. McCarty*, 24 Kan. 393. An act "relating to counties and county officers," *State v. Page*, 12 Neb. 386; relating to township organization of several towns, *Ramsey County v. Heenan*, 2 Minn. 330; authorizing the rebuilding of county bridges and empowering commissioners to borrow money for that purpose, *Myers v. Com.*, 110 Pa. St. 217; authorizing the erection of a courthouse and bridge, *Cherokee County v. State*, 36 Kan. 337; changing the line between counties and providing for citizenship and apportionment of taxes, *Ex parte Upshaw*, 45 Ala. 234. See also *Tallassee Mfg. Co. v. Glenn*, 50 Ala. 489; fixing the salaries and compensation of the officers of a certain county, consolidating certain offices in the county, fixing the salary of the sheriff and other officers, and providing that the district attorney shall act as supervisor of schools, *State v. Humboldt County* (Nev. 1892), 29 Pac. Rep. 974; to legalize the proceedings of a board of supervisors locating and constructing a levee, and to provide for an assessment for benefits, *Richman v. Muscatine County*, 77 Iowa 513; 14 Am. St. Rep. 308; ratifying an election to certain offices of a city and of two counties, and providing for vacancies in such offices, *State v. Price*, 50 Ala. 568; treating of both sheriff and commissioners, they having certain duties in common, *Com. v. Drewry*, 15 Gratt. (Va.) 1; ratifying and

ing parish lines, and removing a parish seat ;<sup>1</sup> locating a county seat, and authorizing supervisors to sell county property ;<sup>2</sup> providing for transferring the charge of jails from sheriffs to county boards, and for the employment of prisoners, and to regulate their terms of service, have been held to embrace more than one subject.<sup>3</sup>

It is not always easy to determine whether particular provisions of a statute are incidental and subordinate to the principal subject, or whether they constitute independent subjects. Thus, an act regulating the civil jurisdiction of justices of the peace, police justices, and quarterly courts, and the appellate jurisdiction of circuit courts, and authorizing the quarterly courts to appoint clerks, has been held to embrace but one subject,<sup>4</sup> while the contrary has been affirmed of an act establishing an inferior court of criminal jurisdiction in a county, and defining the jurisdiction of such court, and the criminal jurisdiction of justices of the peace in the county.<sup>5</sup>

A statute prescribing the punishment for several different crimes embraces but one object, namely, the prevention of the crimes mentioned.<sup>6</sup>

confirming certain orders of a county judge, appointing commissioners to issue bonds and legalizing all proceedings under such orders, *Rogers v. Stevens*, 86 N. Y. 623; an act legalizing and validating certain irregular proceedings of the town authorities in relation to the building of a bridge does not, in making the value rather than the contract price, the measure of compensation and liability for the work, embrace more than one subject. *Wrought Iron Bridge Co. v. Attica*, 2 N. Y. Supp. 359.

An act to enable the county commissioners of W. county to settle and prevent controversies arising out of the organization thereof, by retaining a town designated by the governor as the temporary seat of said county for five years, and by paying certain claims which accrued before its organization embraces but one subject. *State v. Sanders*, 42 Kan. 228.

1. *Moore v. Police Jury*, 32 La. Ann. 1013.

2. *Cutlip v. Cahoon County*, 3 W. Va. 88.

3. *State v. Smith*, 47 N. J. L. 200.

4. **Courts and Juries.**—*Allen v. Hall*, 14 Bush (Ky.) 85.

• An act restricting a state, prescribing the number and salaries of district judges, and fixing the place of holding courts, embraces but one subject. *State v. Atherton*, 19 Nev. 332.

So also an act relating to proceedings by the surrogate court in the city of New York, and to the powers and jurisdiction of the surrogate. *In re Bernstein*, 3 Redf. (N. Y.) 20.

An act carrying into effect "article 116," and providing the qualifications for the selection of competent and intelligent jurors throughout the state, embraces but one subject. *State v. Henderson*, 32 La. Ann. 779.

5. *Ballentine v. Wickersham*. An act regulating appeals from justices' and police courts, and officers of the quarterly court, embraces more than one subject. *Hind v. Rice*, 10 Bush (Ky.) 528. So also an act declaring certain judgments void, granting new trials, and assuming to repeal independent enactments. *Weaver v. Lapsley*, 43 Ala. 224.

6. **Crimes and Offenses.**—*Miles v. State*, 40 Ala. 39. An act regulating the manufacture, transportation, use and sale of explosives, and providing the punishment for the improper use of the same, embraces but one subject, *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652. So also an act fixing the time for the opening and closing of saloons and gaming-houses, *Ex parte Livingstone*, 20 Nev. 282; an act providing that "any person who shall be drunk in any highway, or in any public place or in his own house, or in any private building, disturbing his family or others,



An act providing for the registration of voters in certain cities, governing elections in such cities, and creating the office of recorder of voters, has been held to embrace but one subject.<sup>1</sup> On the other hand, an act providing for the incorporation of merchants' mutual insurance companies, and regulation of the business of insurance by merchants' and manufacturers' insurance companies, has been held bad.<sup>2</sup> An act prescribing penalties for the unlawful manufacture, sale, and keeping for sale, of intoxicating liquors, and regulating the sale, barter, and giving away of such liquors for medicinal, scientific, and mechanical purposes, embraces but one subject.<sup>3</sup>

In statutes for the relief of laborers, employes, and mechanics, these rules have been applied.<sup>4</sup>

The requirement that the act shall contain but one "object" does not intend that an act contemplating the accomplishment of

shall be guilty of a misdemeanor;" State v. Brown, 38 Kan. 390; an act for the protection of public health, and regulating the practice of medicine, Harding v. People, 10 Colo. 387; an act regulating the sale or disposal of opium and prohibiting the keeping of places of resort for smoking or otherwise using opium, State v. Ah Sam, 15 Nev. 27; 37 Am. Rep. 454; an act to regulate conditional sales of personal property, providing for filing, and making a violation of the act a misdemeanor. Well v. State, 46 Ohio St. 450.

1. **Elections.**—Ewing v. Hoblitzelle, 85 Mo. 64, citing Sedgw. Stat. and Const. L. 521, n.

An act providing for the registration of voters, and prescribing the use to be made of the registration list, embraces but one subject. Eureka v. Davis, 21 Kan. 578.

2. **Insurance.**—Skinner v. Wilhelm, 63 Mich. 568. An act providing for the incorporation of mutual fire insurance companies, defining their powers and duties, and repealing prior acts upon the same subject, contains but one subject. Telford v. Church, 66 Mich. 431.

3. **Intoxicating Liquors.**—State v. Haas (N. Dak. 1891), 50 N. W. Rep. 254, citing Hronek v. People, 134 Ill. 139; 23 Am. St. Rep. 652; Evansville v. Bayard, 39 Ind. 450; Ramagnano v. Crook, 85 Ala. 226; Fahey v. State, 27 Tex. App. 146; 11 Am. St. Rep. 182; Hart v. Judge, 50 N. J. L. 585; Easton, etc., R. Co. v. Central R. Co., 52 N. J. L. 267; State v. Madson, 43 Minn. 438; People v. Haug (Mich. 1888), 37 N. W. Rep. 21.

An act prohibiting the sale and

manufacture of intoxicating liquors and providing for the punishment of an intoxicated person, embraces but one subject. State v. Barrett, 27 Kan. 213. So also an act prohibiting all sophistication and adulteration of wines and intoxicating liquors, and to prevent fraud in the manufacture and sale thereof. *Ex parte Kohler*, 74 Cal. 38.

In *Fahey v. State*, 27 Tex. App. 158; 11 Am. St. Rep. 182, it was held that an act levying an occupation tax, and providing for issuance of a license for the sale of intoxicating liquors, did not contain more than one subject, and was therefore valid; and the court observed, that if there were but one subject in the act, the fact that the act had more than one object would not render it obnoxious to the constitution.

An act prohibiting the sale of liquors within a specified distance from two churches, situated in different counties, embraces but one subject. Block v. State, 66 Ala. 493.

4. **Employes; Laborers; Mechanic's Liens.**—An act for the relief of laborers and employes containing a clause exempting wages from garnishee process, embraces but one subject. Farley v. Dowe, 5 Ala. 326. So also an act giving laborers and material-men a lien upon a railway for materials furnished and labor performed on such railway. Kansas City, etc., R. Co. v. Frey, 30 Neb. 790.

Creating a mechanic's lien, and providing that a person furnishing materials for a building on the land of a married woman, who has not signed a building contract, may remove the materials furnished if she refuses to recog-

more than one ultimate end shall be invalid.<sup>1</sup> But an act incorporating three distinct corporations is bad.<sup>2</sup>

According to the weight of authority one act may incorporate a railroad company and authorize municipal aid in its behalf.<sup>3</sup> The same statute may authorize the construction of a railroad, the purchase of land, and the leasing of a ferry franchise;<sup>4</sup> but an act empowering a railroad company to construct a road and lease it, and at the same time authorizing another road to take the

nize the lien, and providing that the proper owner may demand indemnity bonds. *Cole Mfg. Co. v. Fall*, 90 Tenn. 466.

1. Provisions consolidating a monument committee and a military institute with a female college, the whole to stand as a monument for a particular purpose, embrace but one subject. *Tadlock v. Eccles*, 20 Tex. 782; 73 Am. Dec. 213.

An act changing the name of a trust company and amending and defining its powers embraces but one subject. *Gans v. Carter* (Md. 1893), 25 Atl. Rep. 663; so also an act to authorize a water company to increase its capital stock, and to contract with the city for a supply of water. *Utica Waterworks v. Utica*, 31 Hun (N. Y.) 426; and revising the laws providing for the incorporation of manufacturing companies (except for the manufacture of salt) and of mercantile companies. *Jenking v. Osmun*, 79 Mich. 305.

2. *Ex parte Connor*, 51 Ga. 571. In this case the act provided for the establishment of three separate military organizations. After referring to the "single-subject" clause of the constitution, the court, by McCay, J., said: "This act has for its avowed purpose the creation of separate corporate bodies, and, as we think, comes exactly within the intent and scope of this prohibition. The evident intent was to prevent what is commonly known as 'log rolling,' passing through a measure not on its own merits, by combining it with other measures, each of which has a certain strength, and thus pulling them through by virtue of their combined strength."

3. **Railroad Companies.**—*Baltimore, etc., R. Co. v. Jefferson County*, 29 Fed. Rep. 306. In that case Jackson, J., delivering the opinion of the court, after affirming the validity of the statute, said: "The decisions of the highest tribunals in the states of *Indiana*, *Michigan*, and *Wisconsin*, are to the

same effect upon a similar provision in their respective constitutions. In some other states—*California* and possibly *Missouri*—the courts hold differently; but not only is the weight of authority in the highest tribunals in the states against them, but the law is, we think, well settled otherwise." An act authorizing several towns to issue bonds in aid of a railroad company embraces but one subject. *Binz v. Weber*, 81 Ill. 291. See also *San Antonio v. Mehaffy*, 96 U. S. 312; *Unity v. Burrage*, 103 U. S. 458; *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589; *Ross v. Chicago, etc., R. Co.*, 77 Ill. 127; *Mahomet v. Quackenbush*, 117 U. S. 508; *Montclair v. Ramsdell*, 107 U. S. 147; *Jonesboro v. Cairo, etc., R. Co.*, 110 U. S. 192; *Otoe County v. Baldwin*, 111 U. S. 1; *Ackley School Dist. v. Hall*, 113 U. S. 135. See also *Hardenbergh v. Van Keuren*, 4 Abb. N. Cas. (N. Y.) 43; *Powell v. Brunswick County*, 88 Va. 707.

4. *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589; an act revising the law providing for the incorporation of railroad companies, regulating their management, and fixing their duties and liabilities, embraces but one subject. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456; so also an act requiring section-masters of a railroad to give notice of injuries to livestock, providing for the appointment of appraisers and the collection of appraisements, and making railroads liable for all injuries to stock upon or near their unfenced track, *Illinois Cent. R. Co. v. Crider* (Tenn. 1892), 19 S. W. Rep. 618; so also an act requiring section-masters of railroads to give notice of injuries to livestock; to provide for appraisements and collections, and to make railroads liable for such injuries, *Illinois Cent. R. Co. v. Crider* (Tenn. 1892), 19 S. W. Rep. 618; and an act relating to mortgages against preferred stock in, and the delivery of goods by, railroad companies, *Attorney Gen'l*

lease, embraces more than one subject, and is void so far as it authorizes the acceptance of the lease.<sup>1</sup>

An act authorizing school districts to borrow money and issue bonds, legalizing bonds already issued, and providing that school orders shall carry interest, in certain cases, embraces but one subject.<sup>2</sup> So an act setting aside lands for educational purposes and payment of the public debt, embraces but one subject;<sup>3</sup> as does an act providing for the reorganization of a normal school, authorizing a sale of its lands, and providing that no further appropriation shall be made.<sup>4</sup>

Cases relating to street and highway acts are set forth in the note.<sup>5</sup>

*v. Joy*, 55 Mich. 94; and an act authorizing a street railway company to extend its railroad track to certain streets, and providing that such company might take a lease of all, or any portion, of a certain other street railroad and extension. *Central Crosstown R. Co. v. Twenty-third Street R. Co.*, 54 How. Pr. (N. Y.) 168.

1. *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530.

An act authorizing a railroad to declare a dividend, and to lay an additional track, embraces more than one subject. *Philadelphia Pass. R. Co. v. Union Pass. R. Co.*, 9 Phila. (Pa.) 495; so also an act to facilitate the construction of a railroad, providing for its consolidation with another road, taxation of its property, and bridging the Mississippi river. *Winona, etc., R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100.

2. **Schools.**—*Ackley School Dist. v. Hall*, 113 U. S. 135.

3. *Day Land, etc., Co. v. State*, 68 Tex. 526.

4. *State v. Cross*, 38 Kan. 696.

5. **Streets and Highways—Single Subjects.**—It has been held proper to include all or any number of roads in a township in a scheme of improvement, and unite them in one act. *State v. Union Tp.*, 44 N. J. L. 599; *In re Sackett, etc., Streets*, 74 N. Y. 95.

An act providing for the taking of private property for public use, and for opening, extending, widening and straightening streets and alleys in a certain city, embraces but one subject. *Detroit v. Wabash, etc., R. Co.*, 63 Mich. 712; so also an act regulating roads and highways and containing a provision for bridges, *Fletcher v. Oliver*, 25 Ark. 289.

Where the subject of an act is vacation of streets and alleys, the fact that

the streets and alleys to be vacated are not contiguous, nor all in the same town or city, will not make the subject of the act dual, nor render it void. *Wichita v. Burleigh*, 36 Kan. 34.

The *New York Laws* of 1884, 1885, and 1886 relating to underground construction of electric wires and conductors, in cities exceeding 500,000 inhabitants, and the manner in which the provisions of the several acts in relation to location and removal of wires and conductors shall be applied and enforced, embrace but one subject. *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893. See also *Paterson R. Co. v. Grundy* (N. J. 1893), 26 Atl. Rep. 788.

An act prohibiting the collection of tolls on turnpike roads and declaring the charters of such roads forfeited in such cases, embraces but one subject. *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97. So also an act authorizing a city to open streets through a cemetery, repealing prior prohibitory acts, authorizing the removal of bodies interred therein; and providing for the disposition of the land after removal of the bodies. *Catholic Cathedral Church v. Manning*, 72 Md. 116; and an act authorizing the construction of tram-railways for the carriage of freight, and an amendment thereof authorizing the construction of such a road for the carriage of passengers. *Detroit City R. Co. v. Mills*, 85 Mich. 646.

It has been held the improvement of separate highways should be provided for by separate acts. *People v. Denahy*, 20 Mich. 349.

An act to authorize the opening and paving of Fifteenth, Sixteenth, and Norris streets embraces more than one subject. *Com. v. Dickinson*, 9 Phila. (Pa.) 561; so also an act authorizing the grading of an avenue and changing

So in the notes will be found collected the cases upon acts relating to taxation.<sup>1</sup>

**VII. AMENDMENT—1. General Rules.**—The legislature has general power to amend statutes,<sup>2</sup> but an amendatory act, to be valid

the grade of intersecting streets so as to conform to that of the avenue. *In re Blodgett*, 89 N. Y. 392; *reversing* 27 Hun (N. Y.) 12; and an act authorizing cities and towns to acquire by purchase or condemnation the rights of turnpike companies in their streets, and also authorizes the sale of any portion of the turnpike or its franchises to any city, township, person, or corporation. *Grand Rapids v. Burlingame* (Mich. 1892), 53 N. W. Rep. 620.

The *New York* act of 1868 authorized the transmission of letter packages and merchandise between New York and Brooklyn, by pneumatic tubes. An amendatory act authorized the enlargement of the tubes so as to admit of the transportation of passengers. It was held that the amendatory act embraced more than one subject, and that its object was not sufficiently expressed by a mere reference in the title to the act amended. *Astor v. Arcade R. Co.*, 113 N. Y. 93.

**1. Taxation.**—Provisions for the assessment of property and the levying of taxes thereon, and for the collection of taxes theretofore or thereafter levied, constitute but one general subject. *Auditor Gen'l v. Stiles*, 83 Mich. 462; *Distinguishing People v. Denahy*, 20 Mich. 349; *Auditor Gen'l v. Monroe County*, 36 Mich. 70, 76; *Nester v. Busch*, 64 Mich. 657; *Thomas v. Collins*, 58 Mich. 64. See also *Columbus S. R. Co. v. Wright*, 89 Ga. 574; *Georgia Midland, etc., R. Co. v. State*, 89 Ga. 597; *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504; *In re Com'rs*, 49 N. J. L. 488; *Miller v. Hurford*, 13 Neb. 19.

An act creating a board of commissioners of roads and revenues in the counties of F. B. D. S. & G. embraces but one subject. *Speir v. Groover*, 80 Ga. 581. So also an act providing for the construction of an insane asylum, and that money used for that purpose shall be taken from the school fund and interest-bearing state bonds deposited in its place, and for a tax to pay such bonds. *Klein v. Kinkead*, 16 Nev. 194; and an act providing for fees for the collection of taxes, and a payment of a part of the fees into the county treasury, *Ream v. Siskiyou County*,

36 Cal. 620; and an act providing for the construction and protection of drains and for the organization of drainage districts, *Blake v. People*, 109 Ill. 504; and an act levying a tax on dogs, providing for the assessment and collection thereof, and making the failure to pay the same a misdemeanor, *Ex parte Mabry*, 5 Tex. App. 93; and an act providing for the establishment of a levee district, and means for such establishment, *Excelsior Planting Co. v. Greene*, 39 La. Ann. 455; and an act confirming, reducing, and levying certain assessments in a city applicable to several streets, *In re Van Antwerp*, 1 Thomp. & C. (N. Y.) 423; and an act legalizing assessments of taxes in a certain city and county and ratifying and confirming a resolution of the board of supervisors in respect to such taxes. *San Francisco v. Spring Valley Water Works*, 54 Cal. 574.

**2. An amendment remodeling a whole act, substituting new sections in part and adding others, is permissible if the new matter is not foreign to the title of the amended act.** *Underwood v. McDuffee*, 15 Mich. 361; 93 Am. Dec. 194; *Gibson v. State*, 16 Fla. 291.

Where an act was passed laying out a boulevard and providing that no railway should be constructed thereon by any person or corporation unless authorized by a special act of the legislature and thereafter by a change in the constitution, it was provided that powers of that class should not be granted by special act, it was held that the legislature had power to amend the original act, so as to permit a corporation organized under the general corporation law of the state, to build a railroad on the said boulevard. *Spofford v. Southern Boulevard R. Co.*, 4 N. Y. Supp. 388.

A private person acquires no vested right in a penalty under a penal statute by merely suing for it and the legislature may amend or repeal a law imposing the penalty as well after as before suit brought to recover it. *Mix v. Illinois Cent. R. Co.*, 116 Ill. 502.

The right to amend existing special charters of municipal corporations, even though local legislation, is reserved by

as such, must relate to an existing statute, and not to one which is non-existent,<sup>1</sup> or has been repealed,<sup>2</sup> or declared unconstitutional.<sup>3</sup>

A statute, if complete and original in itself, may stand as an independent enactment, although it purports to be an amendatory act and is insufficient as such.<sup>4</sup> Even though part of an amendatory act may be void for uncertainty, the rest may stand, unless the two parts are inseparable and mutually dependent on one another.<sup>5</sup>

**2. Form—*a.* IN GENERAL.**—An amendatory act refers usually to the title, chapter, and time of passage of the act to be amended,

the constitution of *Colorado*. *People v. Londoner*, 13 Colo. 303.

In *Harland v. Territory*, 3 Wash. Ter. 131, an act entitled, "An act to amend section 3050 of chapter 238 of the Code of *Washington Territory*," was held to be void on the ground that the code referred to in the title was a private and unauthentic compilation of the laws of *Washington*, and because there was no such section known to the laws of the territory as the one sought to be amended.

The "Compiled Statutes" of the state of *Nebraska*, being printed under authority of law and supposed to contain a correct compilation of the laws in force in the state when the book was published, are a standard book, and the legislature in amending a statute may refer to a particular part of a statute set forth in this work. All that is required in such case is a reasonable degree of certainty as to the statute to be amended. *In re White*, 33 Neb. 812.

But in *Fenton v. Yule*, 27 Neb. 758, the court said: "The act to be amended after all is the act enrolled by the secretary of state and on file in his office; and all references to compilations or biennial publications as session laws are matters merely of convenience and it often happens that that which is used for convenience fails of its purpose in a greater or lesser degree." See also *State v. Partridge*, 28 Neb. 748.

In these two cases it was held that though the section of the law to be amended was printed in a foot-note to the compiled laws of the state with a query as to its being in force, a law amending it was valid on the ground that the law to be amended was the enrolled act on file in the office of the secretary of state.

1. *Draper v. Falley*, 33 Ind. 465.

2. *State v. Benton*, 33 Neb. 823; *State*

*v. Benton*, 33 Neb. 834; *Wall v. Garrison*, 11 Colo. 515; *Blakemore v. Dolan*, 50 Ind. 194; *Marion County v. Smith*, 52 Ind. 420; *Brokaw v. Gibson County*, 73 Ind. 543; *McIntyre v. Marine*, 93 Ind. 193; *Feibleman v. State*, 98 Ind. 516; *Hall v. Craig*, 125 Ind. 529.

So where a later act attempted to amend an earlier one, previously repealed by implication, the copying of parts of the earlier act into the amendment was held not to re-enact it. *Stingle v. Nevel*, 9 Oregon 62; *Maxwell v. State*, 89 Ala. 150. Compare *Pond v. Maddox*, 38 Cal. 574.

But where the constitution provided that a statute amended by a subsequent one should be thereby repealed, it was held that a later amendment to the original act after it had been once amended was valid and the first amendatory act thereby repealed. *State v. Warford*, 84 Ala. 15; *Wilkinson v. Ketler*, 59 Ala. 306; see *Blake v. Brackett*, 47 Me. 28.

In *Massachusetts*, where a section of a statute was superseded and impliedly repealed by a subsequent enactment covering the whole field of the original section and a statute was passed amending the original section so repealed "to read as follows," again enacting a provision covering the whole ground covered by the original section, it was held that the last statute was valid, though it purported to amend a repealed statute, the decision being based on the ground that the legislature evidently intended to amend the amendatory act rather than the original one. *Com. v. Kenneson*, 143 Mass. 418.

3. *Grubbs v. State*, 24 Ind. 299; *Igoe v. State*, 14 Ind. 239.

4. *Gandy v. State*, 86 Ala. 20; *State v. Bennett* (Mo. 1888), 11 S.W. Rep. 264.

5. *Campau v. Detroit*, 14 Mich. 275.

in the absence of a particular constitutional requirement as to form.<sup>1</sup> An error in the reference is immaterial where the intent is apparent;<sup>2</sup> but if the error is so glaring that the act to be amended cannot be ascertained definitely, the amendatory act is void for uncertainty.<sup>3</sup> Usually, however, there is a constitutional provision which governs the form of amendatory enactments.<sup>4</sup>

*b. BY REFERENCE TO TITLE.*—Many state constitutions provide that no act shall be amended by reference to its title only; but that the section altered or amended shall be enacted or published at length.<sup>5</sup> Usually these provisions are deemed man-

1. See *Garland v. Hickey*, 75 Wis. 178; *Land, etc., Co. v. Brown*, 73 Wis. 294; *People v. Hatter*, 22 N. Y. Supp. 688.

2. *School Directors v. School Directors*, 73 Ill. 249; *Madison, etc., Plank Road Co. v. Reynolds*, 3 Wis. 287; *People v. King*, 28 Cal. 265; *Lane v. Missoula County*, 6 Mont. 473; *Carruthers v. Madison County*, 6 Mont. 482.

It was held in *Saunders v. Pensacola*, 24 Fla. 226, that an error in the amendatory act in stating the date of the approval of the former statute did not render void the amendatory act.

Where a law possessing all the requisites of a valid statute is passed, containing clear requirements capable of being carried into effect in connection with an existing general law on the same subject, a mistaken reference to a previous statute will not render the law void. *School Directors v. School Directors*, 73 Ill. 249.

So where the section referred to did not express the legislative intent but another section was found which did express that intent, the reference was treated as having been made to the latter section. *People v. King*, 28 Cal. 266.

Under the constitution of *Missouri* the prefatory part of an act of the legislature is not an essential part of the act, and such prefatory part of an amendatory act, which states how the original statute is to be amended, is not required by the constitution, and is not an essential part of such act, and it is plain that the dates in the non-essential part must yield to those in the essential part, where the act, as amended, is set out in full. *Scott v. Missouri Pac. R. Co.*, 38 Mo. App. 523.

3. *Murphey v. Ehey* (Md. 1893), 25 Atl. Rep. 993. In this case it was attempted to amend some section of a previous act by changing it so as to

read as set out in the amendatory act, but it not appearing from anything in the latter act for what provision the proposed reading was to be substituted, the latter act was held void for uncertainty.

4. See various state constitutions.

*Recital of Title of Act Amended.*—In *Tennessee* the constitution requires that an amendatory act shall, in its caption or otherwise, recite the title of the law amended, and statutes not meeting this requirement are void. *State v. Gaines*, 1 Lea (Tenn.) 734; *Ransome v. State* (Tenn. 1892), 20 S. W. Rep. 310; *Burnett v. Turner*, 87 Tenn. 124; *State v. Runnells* (Tenn. 1893), 21 S. W. Rep. 665.

A provision in an act amendatory of an act relating to horse races, that the amendment "shall apply to trotting and pacing as well as running races," is sufficient as a recital of the title or substance of the amended act. *Ransome v. State* (Tenn. 1892), 20 S. W. Rep. 310.

The provision in the text does not apply to statutes which are amendatory by implication only. *Poe v. State*, 85 Tenn. 495.

5. See various state constitutions. The purpose of these provisions is given by Cooley, J., in *People v. Mahaney*, 13 Mich. 497: "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes

datory, so that a disregard of them renders the amendatory act void.<sup>1</sup> It has been held sometimes that the amendatory act may stand if the legislative intention is clear, although the reference

drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation."

"The evil aimed at by such clause was not the difficulty of ascertaining the legislative will, when amendatory legislation affected its purpose by mere reference, but, as has been frequently pointed out in this court, the opportunity of imposition and fraud on legislators and the public afforded by such modes of legislation. To prevent this a limitation was imposed, not on the power of the legislature, but upon the means by which it might exercise its power." *Magie, J.*, in *State v. Trenton*, 53 N. J. L. 570.

It was contended that under the section of the constitution of *Texas* declaring that "no law shall be revived or amended by reference to its title: but in such case the act revived or the section or sections amended shall be re-enacted and published at length," the legislature had no power to alter or in any way change the provisions of the previous law except by amendment enacted in accordance with the section of the constitution. The court said: "It would, perhaps, have been the better way to have enacted said section as an amendment to the code; but we are not aware of any constitutional requirement to that effect or of any constitutional limitation upon the power of the legislature that would render the section in question invalid." *Washington v. State*, 28 Tex. App. 411.

In *Georgia*, the constitutional provision is "no law or section of the code shall be amended or revived by mere reference to its title or to the number of the section of the code, but the amending or repealing act shall distinctly describe the law to be amended or repealed as well as the alteration to be made." An amending act was passed describing the section to be amended and the alteration to be made as follows: "Be it enacted by the general assembly that from and after the passage of this act, section 3623 of Code of 1873, which provides for appeals *in forma pauperis* be amended by adding after the words 'in any suit at law' in the second line thereof, the words 'or proceeding in the court of

ordinary.'" This description was held sufficient, but the court expressed a grave doubt as to its expediency. *Fite v. Black*, 85 Ga. 413.

1. *Todd v. State*, 85 Ala. 339; *Rogers v. Torbut*, 58 Ala. 523; *Bolling v. Le Grand*, 87 Ala. 482; *Stewart v. Hale County*, 82 Ala. 209; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Judson v. Bessemer*, 87 Ala. 240; *Watkins v. Eureka Springs*, 49 Ark. 131; *Smith v. State*, 29 Fla. 408; *Walker v. Caldwell*, 4 La. Ann. 297; *Duverge v. Salter*, 5 La. Ann. 94; *State v. Hackett*, 5 La. Ann. 91; *Kohn v. Carrollton Tp.*, 10 La. Ann. 719; *Arnoult v. New Orleans*, 11 La. Ann. 56; *Halher v. Caldwell*, 4 La. Ann. 297; *State v. Miller*, 100 Mo. 439; *Smith v. State*, 34 Neb. 683; *State v. Corner*, 22 Neb. 265; 3 Am. St. Rep. 267; *Portlander v. Stock*, 2 Oregon 70; *Com. v. Mercer*, 9 Pa. Co. Ct. Rep. 461; *McKeever v. Victor Oil Co.*, 9 Pa. Co. Ct. Rep. 284. See also *Johnson v. Martin*, 75 Tex. 33; *Evansville v. State*, 118 Ind. 426.

Where an act is expressly amendatory and is declared to be an intended amendment to previous legislation, it must conform to the provision of the constitution which provides that "no law shall be amended by reference to its title only, but the section or sections amended shall be inserted at length or it will be void." *State v. Trenton*, 53 N. J. L. 566; *citing Campbell v. Board of Pharmacy*, 45 N. J. L. 241; 47 N. J. L. 347.

The said clause of the constitution is both prohibitory and mandatory. It forbids amendment by mere reference to title and enjoins the insertion of the section or sections amended at length. *Evernham v. Hult*, 45 N. J. L. 53.

In *Haring v. State*, 51 N. J. L. 386, the court, by Van Syckel, J., observed, in respect to an amendatory act under consideration: "It attempts to amend the first section of the act of 1880, and to restrict its application, by reference to its title without setting out at length the section as amended. The act itself does not show what the law is to be. That can be ascertained only by reference to the prior law. . . . It is not an amendment by implication but a direct alteration of the previously

is merely to sections of the act which it is designed to amend;<sup>1</sup> but this has been questioned even when permitted.<sup>2</sup>

Even where the stricter rule is followed, if certain sections only of a statute are to be amended, the whole of the statute, including unamended as well as amended sections, need not be set out,<sup>3</sup> but only the latter.<sup>4</sup> It is a sufficient compliance with the re-

existing law by reference to its title in order to conceal the change it was intended to effect. The object of the constitution amended was to show the law-maker the true meaning of a proposed enactment without the necessity of resorting to the old law." *Citing* *State v. Parsons*, 40 N. J. L. 123; *Colwell v. Chamberlin*, 43 N. J. L. 388; *Evernham v. Hulit*, 45 N. J. L. 53; *Campbell v. Board of Pharmacy*, 45 N. J. L. 241; *State v. McNeal*, 48 N. J. L. 407.

Reference to dates, titles, and subjects of amended acts is insufficient. *Pittsburgh's Petition*, 138 Pa. St. 401.

A provision in a law clearly amendatory in character that a certain act mentioned by title, "be amended by adding thereto as follows," is invalid as an amendment by reference to title only. *Barrett's Appeal*, 116 Pa. St. 486.

The constitutional requirement is said to have for its object "the prevention of obscurity, confusion and uncertainty in the laws," and to "deal with such amendments of existing legislation as change the application, force, or effect of an act or a portion thereof." It was held therefore that an act "amending the Revised Statutes and the General Laws of *Idaho* of the 15th session," by changing the word "territory" to "state," and "comptroller" to "auditor," did not change the application, force, or effect of the sections amended, and was not unconstitutional. *Gilbert v. Moody* (*Idaho* 1891), 25 Pac. Rep. 1092.

1. *People v. Judge*, 39 Mich. 195; *Callaghan v. Chipman*, 59 Mich. 616; *People v. Detroit*, 38 Mich. 636; *People v. Pritchard*, 21 Mich. 236; *Fenton v. Yule*, 27 Neb. 758; *State v. Babcock*, 23 Neb. 128.

So an act to amend sections of a previous act which are designated will be sustained; and if it was sought to amend sections not in the act to be amended the latter sections will be rejected as surplusage. *Miller v. Hurford*, 13 Neb. 17; *State v. Laughlin* (Mo. 1882), 14 Cent. L. J. 454; *Kansas v. Payne*, 71 Mo. 159; *State v. Ranson*, 73 Mo. 78.

In *Nebraska* it is said that all the

law requires is that the amendatory statute shall be definite and certain as to the statute amended and germane to the title of the original act, and this we think may be accomplished as well by designating the chapter in a compiled statute as by referring to the act by its title. The legislature alone decides upon the title of an act or an amendment thereto, and it will not be declared unconstitutional unless it is clearly so. *Dogge v. State*, 17 Neb. 143; *State v. Babcock*, 23 Neb. 128.

2. *Callaghan v. Chipman*, 59 Mich. 616; *People v. Judge*, 39 Mich. 195.

"The practice of amending by reference to sections instead of by reference to subjects or to the entire statute, is one which creates a great deal of mischief and in no way carries out the real design of the constitution and is of no practical service in most cases in indicating what changes are to be made or what precise point is in view. It is liable to lead to dangerous ambiguities." *Campbell, C. J.*, in *People v. Judge*, 39 Mich. 195.

3. *Wilkinson v. Kettler*, 59 Ala. 309; *Arnoult v. New Orleans*, 11 La. Ann. 56; *Callahan v. Jennings*, 16 Colo. 471; *Edwards v. Denver*, etc., R. Co., 13 Colo. 559.

An act amending an original act concerning the limits and boundaries of a certain city by re-enacting so much of the original act as governed the said limits and boundaries, was valid though the whole of the original act was not re-enacted. *Boonville v. Trigg*, 46 Mo. 288.

4. *Martinsville v. Frieze*, 33 Ind. 509. "But can a section of a statute be amended without setting forth the whole section as amended? The constitutional provision furnishes a conclusive answer to this question. That requires the 'section' (where it is a section only that is amended) to be set forth as amended. The term 'section' means nothing less than the whole section, however long it may be, or into however many clauses it may be divided. It has been the custom, in modern times, in *England*, and the *United States*, and probably all other coun-



quirement to set out the law as amended, without reciting the old law as it stood before the amendment,<sup>1</sup> or specifying the changes made.<sup>2</sup>

The requirement does not apply to supplemental acts not in

tries where the science of legislation has made any considerable progress, to divide legislative enactments into sections; and this was undoubtedly had in view when the constitution was adopted. The framers of that instrument intended that upon the amendment of a statute, nothing less than the whole section as amended should be set forth, having in view the custom of thus dividing statutes into sections. Were it to be held that because a section happened to be divided into different clauses, the requirements of the constitution might be dispensed with, and a clause substituted for a section in setting forth the amendment, the door would be opened to other evasions of the constitutional requirement." By Worden, J., in *Martinsville v. Frieze*, 33 Ind. 509.

"It was intended that each amendment and each revisal should speak for itself; should stand independent and apart from the act revised or the section amended. It was therefore provided that in such cases if the object was to revise an act, it should be re-enacted throughout; and if the object was to amend an act, then the section amended should be re-enacted and published." *Arnoult v. New Orleans*, 11 La. Ann. 56.

1. *People v. McCallum*, 1 Neb. 182; *Martinsville v. Frieze*, 33 Ind. 507; *Bush v. Indianapolis*, 120 Ind. 476; *Feibleman v. State*, 98 Ind. 516; *Greencastle, etc., Turnpike Co. v. State*, 28 Ind. 382; *People v. Pritchard*, 21 Mich. 236; *People v. Mahaney*, 13 Mich. 481; *Mok v. Detroit Bldg., etc., Assoc.*, 30 Mich. 511; *State v. Duval County*, 23 Fla. 506; *State v. Draper*, 47 Mo. 29; *Boonville v. Trigg*, 46 Mo. 288; *State v. Chambers*, 70 Mo. 625; *Montclair v. New York, etc., R. Co.*, 45 N. J. Eq. 436; *State v. American Forcite Powder Mfg. Co.*, 50 N. J. L. 75; *State v. Parsons*, 40 N. J. L. 123; *Colwell v. Chamberlain*, 43 N. J. L. 387, *distinguishing* *Everham v. Hulit*, 45 N. J. L. 53; *The Borrowdale*, 39 Fed. Rep. 376; *overruling* *Langdon v. Applegate*, 5 Ind. 327; *Littler v. Smiley*, 9 Ind. 118; *Portland v. Stock*, 2 Oregon 69; *Rogers v. State*, 6 Ind. 31; *Kennon*

*v. Shull*, 9 Ind. 154; *Armstrong v. Berreman*, 13 Ind. 426; *Wilkins v. Miller*, 9 Ind. 102.

"In view of our former decisions, on which the legislative department has repeatedly acted, we adhere to the ruling that where the amended law is germane to the original one, and complete in itself, so as to show at a glance the full scope and terms of the amendment, the fact that the old sections are not republished or recited in the new law does not make it unconstitutional." *Barclay, J., in State v. Bennett*, 102 Mo. 364.

"As we understand this clause of the constitution, it requires, in the case of an amendment of a section or sections of a prior statute, that the new act shall contain not the section or sections which it proposes to amend, but the section or sections in full as it purports to amend them. That is, it requires not a recital of the old section, but a full statement in terms of the new one. Such has been the almost uniform legislative construction given to this clause; and a different judicial construction would invalidate nine-tenths of the amendatory acts of state legislation passed since 1850." *Scott, J., in Lehman v. McBride*, 15 Ohio St. 602. In this case it was held that an act "to enable qualified voters of this state in the military service of this state or of the United States to exercise the right of suffrage," was not amendatory of previously existing election laws and therefore it did not operate to repeal them. *Lehman v. McBride*, 15 Ohio St. 602.

If, however, the former provision, which is amended, is recited in the new enactment, it will be regarded as surplusage; and a mistake made in such recital does not render the new act void as in contravention of the clause of the constitution. *Draper v. Falley*, 33 Ind. 465.

2. *Morrison v. St. Louis, etc., R. Co.*, 96 Mo. 602; *State v. Chambers*, 70 Mo. 626; *State v. Miller*, 100 Mo. 439.

Where the title of an act shows that it is amendatory of a prior act, the fact that the words "amend" or "amendment," are not embraced in the body of

any way altering or modifying the original act,<sup>1</sup> to those merely adding new sections to an existing statute without modifying it,<sup>2</sup> nor to acts, complete and perfect in themselves, not purporting to be amendatory, which by implication amend other legislation on the same subject.<sup>3</sup> But where the act is not complete in itself, but in its effect is simply and clearly amendatory of a former statute, it falls directly within the constitutional inhibition and is void. Nor does it matter whether the new statute by its title or in the body of the act is assumed to be amendatory or not; it is enough if it clearly has that effect.<sup>4</sup>

the act will not affect the validity of its provisions. *Ballou v. Black*, 17 Neb. 389.

The constitutional provision does not require that when a section is amended the act amending it shall recite or show on its face that it does so or that it shall in any manner indicate that such section previously existed. *Shields v. Bennett*, 8 W. Va. 74.

But in *Georgia* it is prescribed by the constitution that the alteration to be made shall also be described. *Georgia Code*, § 5076.

1. *State v. Hancock*, 54 N. J. L. 393; *Bradley, etc., Co. v. Loving*, 54 N. J. L. 227; *Lockhart v. Troy*, 48 Ala. 579.

2. *Edwards v. Denver, etc., R. Co.*, 13 Colo. 559; *Boonville v. Trigg*, 46 Mo. 288; *The Borrowdale*, 39 Fed. Rep. 376; *State v. Thruston*, 92 Mo. 325; 1 Am. St. Rep. 720; *State v. Chambers*, 70 Mo. 625; *Morrison v. St. Louis, etc., R. Co.*, 96 Mo. 602; *State v. Hendrix*, 98 Mo. 374; *In re White*, 33 Neb. 812.

Under the constitution of *Texas*, providing that no law shall be amended by reference to its title but that any section amended shall be published at length, an act of the legislature authorizing municipal corporations to take control of their public schools, is not unconstitutional. So held on the ground that the act did not amend the city charter but only added to it. *Werner v. Galveston (Tex. 1888)*, 7 S. W. Rep. 726.

3. *State v. Trenton*, 53 N. J. L. 571; *Evernham v. Hulit*, 45 N. J. L. 53; *People v. Mahaney*, 13 Mich. 496; *Underwood v. McDuffee*, 15 Mich. 361; 95 Am. Dec. 194; *People v. Wands*, 23 Mich. 385; *Swartout v. Michigan Air Line R. Co.*, 24 Mich. 399; *Mok v. Detroit Bldg., etc., Assoc.*, 30 Mich. 511; *Davis v. State*, 7 Md. 152; 61 Am. Dec. 331; *Stricklett v. State*, 31 Neb. 677; *Smith v. State*, 34 Neb. 689; *School Directors v. School Directors*, 135 Ill. 464; *People v. Wright*, 70 Ill. 396;

*Timm v. Harrison*, 109 Ill. 593; *Ex parte Pollard*, 40 Ala. 100; *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497; *State v. Crost*, 38 Kan. 696; *Lehman v. McBride*, 15 Ohio St. 573; *Baum v. Raphael*, 57 Cal. 361; *Shields v. Bennett*, 8 W. Va. 74; *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768; *Denver, etc., R. Co. v. Nestor*, 10 Colo. 403; *Home Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *Ballentine v. Pulas-ki*, 15 Lea (Tenn.) 633; *State v. Geiger*, 65 Mo. 306; *Poe v. State*, 85 Tenn. 495; *Lake v. State*, 18 Fla. 501; *Anderson v. Com.*, 18 Gratt. (Va.) 295; *Ware v. St. Louis Bagging, etc., Co.*, 47 Ala. 667; *Fleischner v. Chadwick*, 5 Oregon 152; *State v. Cain*, 8 W. Va. 720; *Falconer v. Robinson*, 46 Ala. 340.

In *People v. Mahaney*, 13 Mich. 496, it was said: "If, whenever a new statute is passed, it is necessary that all prior statutes, modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to because embracing a large number of objects, only one of which can be covered by its title."

4. *Smails v. White*, 4 Neb. 353; *Sov-*

An act which attempts to extend the application of a pre-existing law by reference to its title only is invalid under some constitutions.<sup>1</sup> But an act complete in itself may provide for ancillary proceedings to accomplish the purposes expressed in the act or adopt a rule of construction, by a reference to general laws on the subject, without violating this constitutional provision.<sup>2</sup> The

*ereign v. State*, 7 Neb. 409; *Stricklett v. State*, 31 Neb. 674; *In re House Roll* 284, 31 Neb. 505.

1. *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627; *Beard v. Wilson*, 52 Ark. 290; *Watkins v. Eureka Springs*, 49 Ark. 131; *Bay Shell-road Co. v. O'Donnell*, 87 Ala. 376; *Barnhill v. Teague* (Ala. 1892), 11 So. Rep. 444.

An act which amends the prohibitory part of a license law so as to include alcohol within its prohibition, and then declares that the act shall have operation in every part of the state, irrespective of other prohibitory acts, is not an extension of the provisions of the license law by reference merely. *Baird v. State*, 52 Ark. 329.

But the repeal of the exception in a statute, although it practically extended the operation of its provisions to the class previously excepted, does not render it necessary to re-enact the general provisions, nor to continue them in force. *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768.

An act permitting the impounding of straying animals provided that in such case "the person taking up the same shall proceed as though such animal was astray and in accordance with the laws provided in the case of estrays." This was held to be a violation of the constitutional provision. *Barnhill v. Teague* (Ala. 1892), 11 So. Rep. 444; *Bay Shell-Road Co. v. O'Donnell*, 87 Ala. 376.

Acts of *Pennsylvania*, 1887, extending and conferring the benefit of the acts of 1836 and 1845, in relation to mechanics' liens, to a large class of claimants without the re-enactment of a single one of the provisions of the acts so extended, and by a reference to their titles only, is invalid, the court saying: "It would be difficult to imagine a plainer violation of the constitutional provision that 'no law shall be revived, amended, extended or conferred by reference to its title only.'" *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627.

A provision that certain sections of a volume of compiled laws shall apply to

sales of real estate under decrees in chancery in like manner as to sales of real estate under execution, is void under the constitutional provisions that no act shall be extended by reference to title only. *Beard v. Wilson*, 52 Ark. 298.

In *New York* and *New Jersey* the provision is "that no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of the act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act," and the cases in these states cited in this title were decided under this provision. The constitutional prohibition is mandatory even when the act compared with other legislation plainly discloses the legislative intent, for legislation cannot be effected by means and in modes prohibited by the fundamental law. *State v. Trenton*, 53 N. J. L. 570; *People v. Banks*, 67 N. Y. 568.

2. *State v. Hancock*, 54 N. J. L. 393; *State v. Hibernia Underground R. Co.*, 47 N. J. L. 49; *Campbell v. Board of Pharmacy*, 45 N. J. L. 244; *affirmed* 47 N. J. L. 347; *People v. Banks*, 67 N. Y. 568; *People v. Hayt*, 7 Hun (N. Y.) 39; *In re Application of Union Ferry Co.*, 98 N. Y. 139; *People v. Whipple*, No. 2, 47 Cal. 592; *Watkins v. Eureka Springs*, 49 Ark. 131; *State v. Geiger*, 65 Mo. 306.

In *Denver*, etc., *R. Co. v. Nestor*, 10 Colo. 403, the provision in question was that the superior courts within the cities and towns for which they were created, should have concurrent jurisdiction with the district court, and that the proceedings, practice, and pleading therein should be the same as in the latter court. The constitutional inhibition was that no law should be extended, or conferred, by reference to its title only, but so much thereof as was extended or conferred, should be re-enacted and published at length. In construing this provision the court, by Beck, C. J., said: "It was not intended to apply to all legislative enactments, including those wherein a reference to the general laws becomes necessary

rule has been extended to include references to local as well as general laws,<sup>1</sup> and has been held not to apply to an act purporting to amend existing laws.<sup>2</sup>

3. **Effect.**—An amendatory act takes effect from the time of its passage and has no retroactive effect, in the absence of an expressed intent to the contrary.<sup>3</sup> The original statute governs rights which have accrued before its amendment,<sup>4</sup> but as to future acts the law as amended governs.<sup>5</sup>

for the means of enforcing and carrying their provisions into effect. Such an unrestricted interpretation is not admissible because it would be an unreasonable construction, and one that would impose upon the people more serious evils than those sought to be cured or avoided by the several sections and clauses of the constitution referred to."

1. *In re Lorillard* (Supreme Ct.), 13 N. Y. Supp. 83; *Weinckie v. New York Cent., etc., R. Co.* (Supreme Ct.), 15 N. Y. Supp. 689. In the former case the court said: "It is true that the similar reference contained in the act then before the court (*People v. Banks*, 67 N. Y. 568) was to a general law of the state, while here it is to a local act. But that difference will justify no distinction in the application of the principle. Sustaining this reference to a general law will equally require it to be maintained when the reference is made to a local law. No reasonable distinction can be made between the cases and that was virtually assumed in the decision of the case last mentioned, for it was there said that "there is no evil of this or any nature to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure for giving effect to a statute otherwise perfect and complete."

2. *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893.

The section of the constitution "does not require that an act amending a prior one shall contain the whole of such prior act; such section should only be applied when in a subsequent statute a former act is referred to, not for the purpose of amending it, but to give effect to the provisions of the new act; that is, the new act must by its express terms provide that an existing law shall be made or deemed a part of it." *Wells v. Buffalo*, 14 Hun (N. Y.) 438.

3. *In re Miller*, 110 N. Y. 216; *Reid v. Albany County*, 128 N. Y. 364; *Ely v. Holton*, 15 N. Y. 595; *Moore v.*

*Mausert*, 49 N. Y. 332; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; 20 Am. Rep. 513; *People v. Montgomery County*, 67 N. Y. 110; *Goillotel v. Holton*, 87 N. Y. 445; *Central Pac. R. Co. v. Shackelford*, 63 Cal. 261; *McGeehan v. Burke*, 37 La. Ann. 156; *State v. Hill*, 32 Minn. 275. See *Burwell v. Tullis*, 12 Minn. 572.

An amendment limiting the time within which actions for personal injury may be brought to one year, does not apply to causes of action which accrued before the amendment. *Goillotel v. New York*, 87 N. Y. 441; *Carpenter v. Shimer*, 24 Hun (N. Y.) 464.

An estate was left by a testator to an adopted child, and a collateral inheritance tax allowed by statute was assessed thereon. It was held that a law passed after the death of the testatrix exempting from the payment of the collateral inheritance tax estates left to "adopted children," did not apply, all the proceedings to collect the tax having taken place prior to the passage of the amendment. *In re Miller*, 110 N. Y. 216.

4. *People v. Montgomery County*, 67 N. Y. 109; *Moore v. Mausert*, 49 N. Y. 332; *Ely v. Holton*, 15 N. Y. 595; *Reid v. Albany County*, 128 N. Y. 373.

Where a section of a statute is amended by making it read in a particular way, the portions of the section which are repealed are to be considered as having been the law from the time when they were first enacted to the time of their repeal. *Ely v. Holton*, 15 N. Y. 596.

Where an attempted amendatory act fails of its purpose, the act intended to be amended remains unaffected. *Judson v. Bessemer*, 87 Ala. 240.

5. *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton*, 36 Ill. 385; *Richmond County v. People*, 3 Ill. App. 216; *People v. Sweetser*, 1 Dakota Ter. 308; *McEwen v. Bulkley*, 24 How. (U. S.) 242.

A statute amending a former act operates as to matters thereafter occur-

**4. Construction.**<sup>1</sup>—In construing an amended statute the general intent of the legislature is the object aimed at.<sup>2</sup> In attaining this end, the original statute and the amendment are to be viewed as one act, and no portion of either is to be declared inoperative if they can be made to stand together without wresting words from their appropriate meaning.<sup>3</sup> The old law must be considered; the mischiefs, inconveniences, or hardships produced by it; and then the remedy proposed by the amendatory law.<sup>4</sup> Where a law is amended and re-enacted those parts of the law simply repeated are not repealed and re-enacted, but are considered to have continued in force from the beginning,<sup>5</sup> and rights which have accrued under the original statute remain unaffected.<sup>6</sup>

Though it is a general rule that an amended statute is to be understood, as far as future acts are concerned, in the same sense as if it had read from the beginning as it reads as amended,<sup>7</sup> still

ring precisely as if the amendatory section had been added to the prior act at the time of the latter's adoption, and the two acts must be considered together and as one statute. *Holbrook v. Nichol*, 36 Ill. 161.

1. For the treatment of the rules applied in the construction of statutes generally, see *infra*, this title, *Interpretation and Construction*.

2. *Parsons v. Wayne Circuit Judge*, 37 Mich. 289.

The re-enactment or modification of provisions in a city charter cannot be presumed to affect special legislation outside of the charter unless such intent is clear. *Taggart v. Detroit*, 71 Mich. 92.

3. *Harrell v. Harrell*, 8 Fla. 46; *Conrad v. Nall*, 24 Mich. 275.

In the construction of an amended act, the whole act as amended must be construed together and reference in the amended part of the act to provisions "herein" applied to the unamended part as well. *McKibben v. Lester*, 9 Ohio St. 627.

4. *People v. Greer*, 43 Ill. 213; *Maus v. Logansport, etc.*, R. Co., 27 Ill. 77.

5. *Ely v. Holton*, 15 N. Y. 595; *Bay v. Gage*, 36 Barb. (N. Y.) 447; *Kelsey v. Kendall*, 48 Vt. 24; *Kamerick v. Castleman*, 21 Mo. App. 587; *Burwell v. Tullis*, 12 Minn. 572; *Haritwen v. Olsen*, 52 Fed. Rep. 652; *Central Pac. R. Co. v. Shackelford*, 63 Cal. 261. See, *infra*, this title, *Repeal*.

6. *Junction City v. Webb*, 44 Kan. 71. In this case a suit pending under the old statute at the time of the amendment was held not to be affected by the amendment.

7. *Kamerick v. Castleman*, 21 Mo. App. 587; *Goldman v. Kennedy*, 49 Hun (N. Y.) 157; *Farrell v. State*, 54 N. J. L. 421; *Parsons v. Wayne Circuit Judge*, 37 Mich. 287; *Conrad v. Nall*, 24 Mich. 275.

So much so is this the rule that if by an act subsequent to the amendatory act the original statute be repealed, the amendment incorporated therein is also thereby repealed. *Kamerick v. Castleman*, 21 Mo. App. 587; *State v. Ranson*, 73 Mo. 88; *Greer v. State*, 22 Tex. 588; *McKibben v. Lester*, 9 Ohio St. 627; *Holbrook v. Nichol*, 36 Ill. 162.

The rule in the text is followed although the amendment declares that the "section is amended so as to read as follows." *Moore v. Mausert*, 5 Lans. (N. Y.) 173; *Ely v. Holton*, 15 N. Y. 595.

Where a new proviso was substituted for an old one of like purport, it was held that the new proviso and the original statute should be read as one act—as if the new proviso appeared in the original act. *Reg. v. Overseers of St. Giles in the Fields*, 3 El. & El. 224; 107 E. C. L. 224.

Where by a reference to a general act its provisions are made applicable to a subsequent one, the legal effect of such reference is the same as though the act referred to had been inserted in the subsequent one. *People v. Whipple No. 2*, 47 Cal. 592.

Where the original act is limited to a particular locality, one amending it is so limited unless an intent to the contrary is expressed. *U. S. v. Crawford*, 6 Mackey (D. C.) 319.

this rule cannot be applied when the effect would be to defeat the manifest intent of the legislature in adopting the amendment.<sup>1</sup>

Where the language in an act has received a judicial construction and is adopted into an amendatory act, the construction placed upon it is also adopted;<sup>2</sup> and a word used in the re-enacted part of the statute and repeated in the amendatory part, is to be similarly construed in the absence of contrary intent.<sup>3</sup> Of two constructions equally warranted by the language of an amendment, that is to be preferred which best harmonizes with the general tenor and spirit of the act amended.<sup>4</sup>

Where by a clause of reference the provisions of an existing statute are adopted into a subsequent one, only the general powers and provisions of the statute referred to, and not its special and particular ones, are embraced;<sup>5</sup> and if a statute has been enacted with special reference to a particular subject, and by a subsequent enactment its provisions are directed in general terms to be applied to another subject of an essentially different nature, it must be presumed that only such provisions of the original statute as are applicable and appropriate to the new subject are adopted.<sup>6</sup>

**VIII. PLEADING—1. Public Statutes.**—As courts take judicial notice of the public statutes of the state wherein the courts sit,

1. *Parsons v. Wayne Circuit Judge*, 37 Mich. 287.

So where an amendment adopted twenty-two years after the original statute was passed provided that actions on judgments "heretofore rendered" should be barred in ten years after entry thereof, the amendment was held not to be applicable to judgments rendered before the original act was passed. *Parsons v. Wayne Circuit Judge*, 37 Mich. 287.

The word "hereafter" in an amended statute must be construed distributively. As to cases within the statute as originally enacted, it means subsequent to the passage of the original act; as to cases brought within the statute by the amendment, it means subsequent to the time of the amendment. *In re Peugnet*, 67 N. Y. 441; *Ely v. Holton*, 15 N. Y. 596; *Moore v. Mausert*, 49 N. Y. 332.

In construing a provision of the *New York Code Civil Procedure*, regarding the limitation of actions, it was held that in the provision that rules prescribed should "not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases according to the subject of the action and without

regard to form," the words "now" and "already" were to be taken distributively and applied not merely to the date of the original enactment, but to any subsequent amendment. *Goillotel v. New York*, 87 N. Y. 444; *Carpenter v. Shimer*, 24 Hun (N. Y.) 464.

2. *Gonder v. Estabrook*, 33 Pa. St. 374; *Burwell v. Tullis*, 12 Minn. 572. See *Robbins v. Omnibus R. Co.*, 32 Cal. 472.

3. *Pitte v. Shipley*, 46 Cal. 154. See *State v. Cumberland County*, 78 Me. 100.

4. *Griffin's Case*, Chase's Dec. 364. The same rules apply to acts and their supplements. *Van Riper v. Essex Public Road Co.*, 38 N. J. L. 23.

5. *Ex parte Greene*, 29 Ala. 52, where by statute it was provided that the judge of a certain court should have the same powers and perform the same duties in a certain county as the judges of the circuit courts of the state had or might thereafter be invested with, it was held that he had the power to grant an injunction, which power was given to the other judges of the state by a specific clause in the constitution, on the ground that the said power was general and not particular. *Ex parte Greene*, 29 Ala. 52.

6. See to this effect the case of *Jones v. Dexter*, 8 Fla. 276.

neither the contents nor the substance of such a statute need be set forth or recited in a pleading.<sup>1</sup> At common law the existence of a public statute cannot be denied or put in issue by plea of *nul tiel record*.<sup>2</sup> It is only necessary to state the facts which will appear to the court to be affected by the statute.<sup>3</sup> If, however, an offense be created by a statute, and a penalty inflicted, the mere statement of the facts constituting the offense will be insufficient, for there must be an express reference to the statute, as by the words "contrary to the form of the statute," or similar words, in order that it may appear that the plaintiff grounds his case upon and intends to bring it within the statute.<sup>4</sup> If part of a statute be public, and the residue private, it is not necessary that the part which is public should be recited in pleading.<sup>5</sup>

1. Bac. Abr. Stat. L.; Stephen on Pl. 347; 1 Bl. Com. 85; Chitty Pl. 215; Gould Pl., ch. 111, § 16; Dive v. Manningham, Plowd. 65; Partridge v. Strange, Plowd. 84; Boyce v. Whitaker, Dougl. 97; Tappan v. Cleveland, etc., R. Co., 4 West. L. Mo. 67; Smith v. Tallapoosa Co., 2 Woods (U. S.) 574; Hatch v. Hansom, 46 Mo. App. 323; Denver, etc., R. Co. v. De Graff (Colo. 1892), 29 Pac. Rep. 664; Clark v. North Muskegon, 88 Mich. 308; Hays v. West Bay City, 91 Mich. 418.

It is a general rule that in an action founded on a public statute, it is not necessary that the statute should be set out or referred to in the complaint or declaration. It is sufficient if the cause of action be stated within the statute. 1 Saund. Pl. & Ev. 34; 135, n. 3; 5 East 244; Clark v. North Muskegon, 88 Mich. 308; Hayes v. West Bay City, 91 Mich. 418; McHarg v. Eastman, 7 Robt. (N.Y.) 137; Bayard v. Smith, 17 Wend. (N.Y.) 88; Yertore v. Wiswall, 16 How. Pr. (N. Y.) 8.

It is not only unnecessary to recite a public statute, but it is never advisable to do so, as a misrecital may sometimes be fatal. Bayard v. Smith, 17 Wend. (N. Y.) 88; Bacon's Abr. *Statute Law*.

Where certain circumstances are made necessary by statute to the validity of an act, which is valid at common law without such circumstances, *e. g.*, by the Statute of Frauds, the statute need not be referred to in a pleading founded upon such act. Bacon's Abr. *Statute Law*; Stephen's Pl. (Tyler's ed.) 330; Birch v. Bellamy, 12 Mod. 540; 1 Saund. 276, n. 2; 211, n. 2; Anonymous, 2 Salk. 519. Thus an assignment of a lease by a tenant need not be alleged to have been in writing, though invalid

by 29 Car. 2, ch. 3, unless in writing. Birch v. Bellamy, 12 Mod. 540.

2. Bac. Abr. Stat. L.

3. 1 Chitty's Pl. 237; Spiers v. Parker, 1 T. R. 14; Bently v. Leigh, Lane 71; Stephen's Pl. (5th ed.) 384. The pleadings must bring the case within the statute. Denton v. Moore, 2 Overt. (Tenn.) 168.

In *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178, it was said: "In setting up a defense under a public statute it is not necessary, either in this court or in a court of law, that the pleader should set forth the statute in his plea, or that he should allege the existence of a statute of which the court is bound to take notice judicially. It is sufficient for him to state the facts which are necessary to bring the case within the operation of the statute, and to insist that upon those facts the plaintiff's right or remedy is at an end, or never existed. The court will then judicially notice the existence of the statute, and declare its legal effects upon the case as made by the pleadings. Although it is usual to set forth the statute in the plea, yet Lord Redesdale, as well as Mr. Beames, have considered it unnecessary. And they both state that the substance of the plea consists in the averment of matters which are necessary to bring the case within the particular statute. Mitf. Pl. 258; Beames' Pl. in Eq. 164. Indeed, it seems more appropriate, in this court, to plead the facts merely which bring the case within the operation of the principle of the statute, than to plead the statute, in terms, as a bar."

4. 1 Chitty's Pl. 237; Wells v. Iggulden, 3 B. & C. 186; 10 E. C. L. 48; INDICTMENT, vol. 10, pp. 515, 572.

5. Bacon's Abr. Stat. L.

2. **Private Statutes.**—Courts do not take judicial notice of the existence and contents of private statutes.<sup>1</sup> Consequently such parts of them as may be material to the action or defense must be stated in pleading,<sup>2</sup> and may be replied to by plea of *nul tiel record*.<sup>3</sup> But courts will take judicial notice of a statute of a private nature if it contains a clause declaring it to be a public act;<sup>4</sup> also, of a private act expressly amended and recognized by a public act;<sup>5</sup> and of provisions of a public or general character in a private or local statute.<sup>6</sup> In *England*,<sup>7</sup> and in many of the states of the Union the common-law rule requiring private acts to be recited in the pleadings has been changed, and a provision very generally exists that it shall be sufficient to plead a private statute by a mere reference to its title and the date of its passage.<sup>8</sup> But a pleading in which a private statute is pleaded by title and date must set forth facts sufficient to bring it within the statute.<sup>9</sup>

1. JUDICIAL NOTICE, vol. 12, p. 167.

2. Bac. Abr. Stat. L.; Stephen's Pl. 347; 1 Bl. Com. 85 Chitty's Pl. 216; Cochran v. Couper, 1 Harr. (Del.) 200; Atchison, etc., R. Co. v. Blackshire, 10 Kan. 477; Hailes v. State, 9 Tex. App. 170; Boyce v. Whitaker, Dougl. 97; Goshen, etc., Turnpike Co. v. Sears, 7 Conn. 92; Broad Street Hotel Co. v. Weaver, 57 Ala. 26.

In *Greswolde v. Kemp, Car. & M. 635*; 41 E. C. L. 345, it was held that where copies of a private act, printed by the government printer, were made evidence, counsel could not make an objection founded on that act the ground of an application for non-suit, unless the act had been given in evidence on the part of the plaintiff, because not being an act to be judicially noticed, it was only before the court when given in evidence.

3. Bac. Abr. Stat. L. But if an exemplification of a private statute under the great seal be pleaded, *nul tiel record* cannot be replied. Bac. Abr. Stat. L. The Prince's Case, H. H. C. L. 16; 8 Rep. 28.

4. 1 Greenl. Ev., § 481; *Beaumont v. Mountain*, 10 Bing. 404; 25 E. C. L. 183; *Woodward v. Cotton*, 1 C. M. & R. 44, *overruling* *Brett v. Beales*, 1 M. & M. 421; *Brookville Ins. Co. v. Records*, 15 Blackf. (Ind.) 170; JUDICIAL NOTICE, vol. 12, p. 158.

5. *Lavalle v. People*, 6 Ill. App. 197; *Rogers' Case*, 2 Me. 301; Bac. Abr. Stat. L.; *Smith Com.*, § 810.

6. *Bretz v. New York*, 4 Abb. Pr. N. S. (N. Y.) 258; 35 How. Pr. (N. Y.) 130.

7. 13 and 14 Vict. ch. 21, § 7.

8. *Pittsburgh, etc., R. Co. v. Moore*, 33 Ohio St. 384; 31 Am. Rep. 543; *Halbert v. Skyles*, 1 A. K. Marsh (Ky.) 368; *Hewitt v. Grand Chute*, 7 Wis. 282. JUDICIAL NOTICE, vol. 12, pp. 158, 168.

A provision that in pleading a private statute it shall be sufficient to refer to it by stating its title and the day on which it became a law must be complied with; consequently a plea that defendant is a charitable organization organized under a special act is insufficient. *Zabel v. Louisville Bap. Orphans' Home* (Ky. 1891), 17 S. W. Rep. 212. See also, *Pittsburg, etc., R. Co. v. Moore*, 33 Ohio St. 384; 31 Am. Rep. 543.

A plea of a private statute by reference to its title and date of approval, and by alleging so much of the substance as may be pertinent to the cause of action, or defense, places before the court the entire act so far as it relates to the authority claimed, and the court may examine the act to see whether its provisions are properly stated. The object of the statute allowing this mode of pleading a private act is to relieve the pleader of the necessity of setting forth the act, or its provisions, in full, and to give him, his adversary and the court the same benefit of these provisions as if they formed a part of his pleading; hence upon a demurrer to the answer the court may look at the act and see if the substance of the provision relied on is properly alleged. *East Line, etc., R. Co. v. Ruching*, 69 Tex. 306.

9. *Hewitt v. Grand Chute*, 7 Wis. 282.



At common law where a statute is pleaded, neither the title<sup>1</sup> nor the preamble<sup>2</sup> need be recited, since they are not part of the statute.

**3. Foreign Laws.**—Courts do not take judicial notice of foreign laws; such laws are facts to be proved;<sup>3</sup> and the states of the Union are foreign to one another in the sense that the law of another state is a foreign law.<sup>4</sup> In pleading a foreign statute, it

1. Bacon's Abr. *Statute Law*; Chance v. Adams, Ld. Raym. 77; Eckert v. Head, 1 Mo. 593.

2. Bacon's Abr. *Statute Law*; 6 Mod. 62; Mills v. Wilkins, 8 Mod. 144.

3. See FOREIGN LAWS, vol. 8, p. 435; JUDICIAL NOTICE, vol. 12, p. 154; Gunn v. Howell, 27 Ala. 663; 62 Am. Dec. 785; Shed v. Augustine, 14 Kan. 282; Davis v. Rogers, 14 Ind. 424; Hemphill v. Bank of Ala., 6 Smed. & M. (Miss.) 44; Uhler v. Semple, 20 N. J. Eq. 288; Leatherwood v. Sullivan, 81 Ala. 458; Hempstead v. Reed, 6 Conn. 480; Bank of Commerce v. Fuqua, 11 Mont. 285; Herring v. Selding, 2 Aik. (Vt.) 12; Adams v. Gay, 19 Vt. 358; McDaniel v. Pressler, 3 Wash. 636; Rothschild v. Rio Grande West R. Co. 59 Hun (N. Y.) 454; Holmes v. Broughton, 10 Wend. (N. Y.) 75; 25 Am. Dec. 536; Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. 397; Liverpool, etc., Steam Co. v. Insurance Co. of N. A., 129 U. S. 464; Chicago, etc., R. Co. v. Wiggins Ferry Co., 119 U. S. 615; Continental Nat. Bank v. McGeoch, 73 Wis. 332; Bryant v. Kelton, 1 Tex. 434; Crosby v. Huston, 1 Tex. 203; Tyler v. Trabue, 8 B. Mon. (Ky.) 306; Smith v. Bartram, 11 Ohio St. 690; Hite v. Lenhart, 7 Mo. 22; Leak v. Elliott, 4 Mo. 446; Babcock v. Babcock, 46 Mo. 243; Beach v. Workman, 20 N. H. 379; Pickard v. Bailey, 26 N. H. 152; Mostyn v. Fabrigas, Cowp. 174.

**Where Action Is Not Founded on the Statute.**—It has been said that a foreign statute may be offered in evidence without having been pleaded when the action is not founded on the statute. Hatch v. Hanson, 46 Mo. App. 323.

Foreign statutes must be set out; a reference to their titles and dates for a statement of their general provisions will be insufficient. Carey v. Cincinnati, etc., R. Co., 5 Iowa 357; Bean v. Briggs, 4 Iowa 464; Becht v. Harris, 4 Minn. 504; Hoyt v. McNeil, 13 Minn. 390; Monroe v. Douglass, 5 N. Y. 447.

In a suit to foreclose a mortgage executed in another state, averments that

the note and mortgage are in accordance with the laws of that state are insufficient; the laws in question should be set out. Lomb v. Pioneer Sav., etc., Co. (Ala. 1892), 11 So. Rep. 154.

The law of another state must be pleaded with such distinctness that the court may apply it to the facts appearing in the case. Roots v. Merriweather, 8 Bush (Ky.) 397.

It is not sufficient to allege that by the law of the place of contract the plaintiff alone can sue; it will be presumed that a foreign statute is referred to which should have been set out. Wilson v. Clark, 11 Ind. 385.

In an action founded on a foreign statute it is not sufficient for the complaint to allege that the provisions of the foreign statute are the same as those of the domestic statute; the provisions of the foreign statute should be alleged. Fagan v. Strong (Supreme Ct.), 7 N. Y. Supp. 919.

A defendant seeking to avail himself of the laws of another state must show by his pleading what those laws are and in what respect they differ from those of his own state; in default of such averments he cannot show at the trial what those laws are. National German-American Bank v. Lang, 2 N. Dak. 66.

In *Indiana*, a copy of the foreign statute must be filed or the statute fully set out in the pleadings. Swank v. Hufnagle, 111 Ind. 453; Wilson v. Clark, 11 Ind. 385; Mendenhall v. Gately, 18 Ind. 149; Tyler v. Kent, 52 Ind. 583; Milligan v. State, 86 Ind. 553.

The usury laws of another state must be pleaded. Millard v. Truax, 73 Mich. 381; Insurance Co. of N. A. v. Forchheimer, 86 Ala. 541; Bagwell v. McTighe, 85 Tenn. 616; Templeton v. Brown, 86 Tenn. 50; National German-American Bank v. Lang, 2 N. Dak. 66.

4. Sedgwick Stat. and Const. Law 363; Hempstead v. Reed, 6 Conn. 480; Brackett v. Norton, 4 Conn. 517. See article, JUDICIAL NOTICE, vol. 12, p. 154, and notes, *supra*, this subdivision.

is not necessary that it be set forth *in hæc verba*; it is sufficient if the substance be averred; <sup>1</sup> but averments which state merely the effect of foreign laws are insufficient.<sup>2</sup>

In the absence of anything to the contrary, it will be presumed by the courts of one state that the laws of another state, whose system of jurisprudence is derived from the same source as its own, are in substance the same as the domestic laws.<sup>3</sup>

Though a statute provides that a foreign law may be pleaded by reference to its title and date of its passage, it is not error to plead the substance of the statute instead.<sup>4</sup>

It has been said that where one state recognizes acts done in pursuance of the laws of another state, the courts will take judicial notice of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them.<sup>5</sup>

The state courts take judicial notice of federal public laws, including those which relate exclusively to the *District of Colum-*

A different rule prevails in some of the states. See FOREIGN LAWS, vol. 8, p. 435; *Phenix Ins. Co. v. Church*, 59 How. Pr. (N. Y.) 293.

In *Dodge v. Coffin*, 15 Kan. 277, it was held, Brewer, J., delivering the opinion, that the Supreme Court of *Kansas* would take judicial notice of the constitution of another state, in so far as it showed the jurisdiction of the courts of that state. A vigorous dissenting opinion was delivered by Valentine, J.

1. *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Stacy v. Baker*, 2 Ill. 418; *Hyman v. Payne*, 83 Ill. 258; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125; 15 Am. St. Rep. 494. Compare *Walker v. Maxwell*, 1 Mass. 113; *Throop v. Hatch*, 3 Abb. Pr. (N. Y.) 23; *Holmes v. Broughton*, 10 Wend. (N. Y.) 75; 25 Am. Dec. 536; *Wilson v. Clark*, 11 Ind. 387; *Tyler v. Kent*, 52 Ind. 584; *Roots v. Merriweather*, 8 Bush (Ky.) 397. See also *Brackett v. Norton*, 4 Conn. 517; *Dyer v. Smith*, 12 Conn. 384; *Kilgore v. Bulkley*, 14 Conn. 362; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539; 39 Am. Dec. 308; *Lockwood v. Crawford*, 18 Conn. 361.

A foreign statute must be set out with certainty to a common intent. *Hempstead v. Reed*, 6 Conn. 480.

2. *Temple v. Brittan* (Ky. 1889), 12 S. W. Rep. 306.

Averments in a bill to foreclose a mortgage that the note and mortgage are "in accordance with" the laws of another state, "with respect to which the same were made," and that the for-

feiture was made "in accordance with" the regulations and by-laws of the corporation making the loan, and an averment stating the effect of such laws, are insufficient pleadings of a foreign statute. *Lomb v. Pioneer Sav., etc., Co.* (Ala. 1892), 11 So. Rep. 154.

3. See PRESUMPTIONS, vol. 19, p. 46, and the number of cases there cited; see also *Sharp v. Sharp*, 35 Ala. 574; *Cox v. Morrow*, 14 Ark. 603; *Furrow v. Chapin*, 13 Kan. 107; *Dodge v. Coffin*, 15 Kan. 277; *Hickman v. Alpaugh*, 21 Cal. 225; *Hill v. Grigsby*, 32 Cal. 55; *Rape v. Heaton*, 9 Wis. 329; 76 Am. Dec. 269; *Walsh v. Dart*, 12 Wis. 635; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Crane v. Hardy*, 1 Mich. 96; *Cooper v. Reaney*, 4 Minn. 528; *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118; *Green v. Rugely*, 23 Tex. 539; *State v. Patterson*, 2 Ired. (N. Car.), 346; 38 Am. Dec. 699.

4. *Central Trust Co. v. Burton*, 74 Wis. 329.

5. Field, J., in *Carpenter v. Dexter*, 8 Wall. (U. S.) 513, citing *Vance v. Schuyler*, 1 Gilm. (Ill.) 160; *Secrist v. Green*, 3 Wall. (U. S.) 749.

This was said in reference to an objection taken in an *Illinois* court to a *New York* deed, the objection being that the certificate of acknowledgment by the *New York* judge was not accompanied by any certificate of his official character, and that it did not appear that the certificate was in conformity with *New York* law. Field, J., said further: "Unless the statute requires evidence of official character

*bia*.<sup>1</sup> The federal courts judicially<sup>2</sup> notice the public laws of the state in which the court is held.<sup>3</sup>

The laws in force in territory ceded by other governments to the *United States* are judicially noticed by the federal courts and by the courts of the state formed from such territory.<sup>4</sup>

The Supreme Court of the *United States*, in the exercise of its general appellate jurisdiction over a lower court of the *United States*, will take judicial notice of the laws of every state of the Union.<sup>5</sup> But upon error to a decision of the highest court of a state, the Supreme Court of the *United States* will take judicial notice of the laws of that state only; the laws of other states being only known to the court below as facts to be proved as such.<sup>6</sup>

4. **Misrecitals.**—The matter, year, day, and place of a statute, if recited, must be recited truly.<sup>7</sup> A misrecital of a material part

to accompany the official act which it authorizes, none is necessary."

1. See JUDICIAL NOTICE, vol. 12, p. 154.

2. *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 63.

3. See JUDICIAL NOTICE, vol. 12, p. 154; *Elwood v. Flannigan*, 104 U. S. 562; *Breed v. Northern Pac. R. Co.*, 36 Fed. Rep. 642; *Knower v. Haines*, 31 Fed. Rep. 513; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Smith v. Tallapoosa County*, 2 Woods (U. S.) 574; *Newberry v. Robinson*, 36 Fed. Rep. 841.

In *Breed v. Northern Pac. R. Co.*, 35 Fed. Rep. 642, it was held that the district court of the *United States* must take judicial notice of the laws of every state, and this, though an action was brought in one state and afterwards removed to the district court, and the statute of another state was relied on, which by the laws of the state in which the case originated it would have been necessary to plead, no demurrer having been filed.

4. *Bouldin v. Phelps*, 30 Fed. Rep. 547; *U. S. v. Turner*, 11 How. (U. S.) 668; *Fremont v. U. S.*, 17 How. (U. S.) 557; *U. S. v. Perot*, 98 U. S. 430; *Payne v. Treadwell*, 16 Cal. 231; see also JUDICIAL NOTICE, vol. 12, p. 163.

5. *Course v. Stead*, 4 Dall. (U. S.) 27; *Hinde v. Vattier*, 5 Pet. (U. S.) 398; *Owings v. Hull*, 9 Pet. (U. S.) 625; *U. S. v. Turner*, 11 How. (U. S.) 668; *Pennington v. Gibson*, 16 How. (U. S.) 65; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 230; *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Junction R. Co. v. Bank of Ashland*,

12 Wall. (U. S.) 230; *Lamar v. Micou*, 114 U. S. 218; *Hanley v. Donoghue*, 116 U. S. 1.

6. *Hanley v. Donoghue*, 116 U. S. 1; citing *Scott v. Coleman*, 5 Litt. (Ky.) 349; 15 Am. Dec. 71; *Thomas v. Robinson*, 3 Wend. (N. Y.) 267; *Shelden v. Hopkins*, 7 Wend. (N. Y.) 435; *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Elliott v. Ray*, 2 Blackf. (Ind.) 31; *Cone v. Cotton*, 2 Blackf. (Ind.) 82; *Snyder v. Snyder*, 25 Ind. 399; *Pelton v. Platner*, 13 Ohio 209; 42 Am. Dec. 197; *Horton v. Critchfield*, 18 Ill. 133; 65 Am. Dec. 701; *Rape v. Heaton*, 9 Wis. 328; 76 Am. Dec. 269; *Crafts v. Clark*, 31 Iowa 77; *Taylor v. Barron*, 30 N. H. 78; 35 N. H. 484; 64 Am. Dec. 281; *Bank of U. S. v. Merchants' Bank*, 7 Gill (Md.) 431; *Coates v. Mackey*, 56 Md. 419; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615. Compare *State v. Hinchman*, 27 Pa. St. 479; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411.

7. *Bac. Abr. Stat. L.* 5; *Bro. Parl.*, pl. 87; *Cro. Ja.* 211; 2 *Hawk.*, ch. 25, § 104; *Partridge v. Staunge*, *Plow.* 79.

A statute passed at a session of parliament which commenced in one reign but was continued into another, should be referred to as a statute passed at a parliament held in both years and not as a statute passed in both years. *Gibbs v. Pike*, 8 M. & W. 223.

It should not be recited as passed in both years, even though recited in a later statute as having been so passed. *Rex v. Biers*, 1 *Add. & El.* 327; 28 *E. C. L.* 98.

of a statute is fatal;<sup>1</sup> but it is otherwise if the part misrecited is immaterial.<sup>2</sup> The misrecital of a public statute is not cured by a verdict,<sup>3</sup> unless the misrecital be of a part of the statute which does not go to the ground of the action.<sup>4</sup> The misrecital of a

The misrecital of the title of a statute is immaterial if it be so stated that the judges are enabled to know that there is but one act referred to and to identify the act. *Reg. v. Westley*, Bell C. C. 193.

The description of an act as having been passed in the twenty-fifth year of a reign, when in fact the parliament in which the act was passed was continued by prorogation from the twenty-fourth to the twenty-fifth year of the reign, is immaterial and does not constitute a misdescription. *Rex v. Windsor*, 2 Chit. 513; *Nixon v. Nanney*, 1 Q. B. 747; 41 E. C. L. 758.

A recital of 7 Geo. IV, ch. 46, as "An act of parliament made and passed in the seventh year of the reign of George IV, for (among other things) the better regulating copartnership of bankers in England," is sufficient. *Esdaille v. Maclean*, 15 M. & W. 277.

But in *Beck v. Beverly*, 11 M. & W. 845, it was held that in reciting a statute in pleading, the whole of the title should be stated, though it comprise several subject-matters other than those to which the pleading related.

There being no parliament roll for the twenty-ninth year of Elizabeth, statutes passed in that year relate to the first day of the session which commenced in the twenty-eighth year of her reign. *Rumsey v. Tufnell*, 2 Bing. 257; *Savage v. Smith*, Black R. 1101.

But the recital of a statute as 29 Eliz. under a *videlicet* instead of 28 Eliz., was held immaterial. *Holmes v. Sparks*, 12 C. B. 242.

In pleading a private statute, the misrecital of the day of the commencement of the parliament in which it was made has been held fatal. *Bishop of Norwich's Case*, Mo. 551; *Ld. Raym.* 210, 343.

The description of a private statute in a declaration as having been made in the fourth year of a reign instead of the fourth and fifth years of a reign, has been held fatal. *Rann v. Green*, Cowp. 746.

A description of a statute as having been made on a particular day, will be fatal if it appear that parliament was adjourned on that day; the adjourn-

ment being only a continuance of the session. Anonymous, 12 Mod. 602; 2 Mod. 242; *Ld. Raym.* 343; *Bac. Abr. Stat. L.*

It has been held that the misrecital of the day of the passage of an act by parliament, though fatal in a declaration, is not so in the plea in bar. *Woolsey v. Shepard*, 1 Brownl. 196.

An averment that a statute was made on a certain day between the first and second years of the reign of a certain king, is fatal for repugnancy; it being impossible that a statute should be passed on the same day in two different years. *Langly v. Haines*, Mo. 302; 2 Hawk, ch. 25, § 104.

If the declaration conclude "against the form of the statute," the misrecital will not be fatal. *Platt v. Hale*, *Ld. Raym.* 382; *Plowd.* 79, 84; *Cro. Car.* 233; *Freem.* 311. The reason given is that the judges will take notice of the true contents of a public statute which is misrecited, but if the declaration conclude "against the form of the aforesaid statute," or "by force of the aforesaid statute," the misrecital is fatal; the pleader, by his conclusion, being tied to the misrecital of the statute. *Bac. Abr. Stat. L.*

1. *Cro. Car.* 136, 622; *Ld. Raym.* 382; 2 Mod. 98; *Bac. Abr. Stat. L.*

The omission of the words "or in any other manner," in undertaking to recite a provision of 8 Hen. VI, ch. 9, that "it will be found by a verdict or in any other manner by due form of law as a party, etc.," has been held fatal. *Farr v. East*, *Cro. Eliz.* 186; *Ld. Raym.* 382.

For other instances of fatal omission, see *Vanderplanhen v. Griffith*, *Cro. Eliz.* 263; *Cro. Car.* 136.

2. *Bac. Abr. Stat. L.*; *Cro. Car.* 136, 522; *Ld. Raym.* 382; 2 Mod. 98; *Ship Nancy v. Fitzpatrick*, 3 Cal. (N. Y.) 38. See also *Boyce v. Whitaker*, *Dougl.* 97; *Mills v. Wilkins*, 6 Mod. 62. For other illustrations of this rule, see *Crosse v. Stanhope*, *Godb.* 246; 2 Bulst. 47; 2 Mod. 99.

3. *Bac. Abr. Stat. L.*; *Love v. Wotton*, *Cro. Eliz.* 245.

4. *Bac. Abr. Stat. L.*; *Boomer v. Cleve*, *Styles*. See also *Ship Nancy v. Fitzpatrick*, 3 Cal. (N. Y.) 38.

private statute is cured by a verdict.<sup>1</sup> A recital of words not contained in the statute has been held to be surplusage and immaterial.<sup>2</sup> The misrecital of the title of a statute is immaterial.<sup>3</sup>

**IX. PROOF**—**1. Public**—*a. DOMESTIC*.—Courts take judicial notice of public statutes enacted by the legislature of the state wherein the court is held.<sup>4</sup> The burden of disproving the validity of a statute is on the party assailing it.<sup>5</sup> A statute may not be declared void upon the allegations or admissions of a party as to the mode of enactment; the facts must be shown by the legislative journals or by other competent evidence.<sup>6</sup> The validity of a statute is a question for the court and not for the jury.<sup>7</sup>

*b. FOREIGN*.—Generally speaking, authenticated copies of written laws or other public instruments of a foreign government are expected to be produced.<sup>8</sup>

The usual method of authenticating a foreign statute is by an exemplification of a copy under the great seal of a state; or by copy proved to be a true copy by a witness who has examined and compared it with the original; or by the certificate of an officer properly authorized by law to give the copy, which certificate must itself also be duly authenticated.<sup>9</sup>

1. Bac. Abr. Stat. L. The reason given is that advantage should have been taken of the misrecital by plea of *null tiel record*, or by showing the statute to be otherwise. *Platt v. Hill*, Ld. Raym. 382; 2 Mod. 241.

2. Bac. Abr. L.; Bro. Nug. & Surpl., pl. a.

3. *Chance v. Adams*, Ld. Raym. 77; Pasch. 8 W. 3; Hargr. 324; Attorney General *v. Hutchinson*, Pasch. 15 Ch. 2. See also *Ship Nancy v. Fitzpatrick*, 3 Cai. (N. Y.) 38. *Contra*, *Holt, C. J.*, in *Mills v. Wilkins*, 6 Mod. 62.

4. See JUDICIAL NOTICE, vol. 12, p. 154.

5. *People v. Loewenthal*, 93 Ill. 191; *State v. Kiesewetter*, 45 Ohio St. 254.

6. *Happel v. Brethauer*, 70 Ill. 166; 22 Am. Rep. 70; Attorney-General *v. Rice*, 64 Mich. 385; *Ryan v. Lynch*, 68 Ill. 160; *Legg v. Annapolis*, 42 Md. 203; *People v. Com'rs of Highways*, 54 N. Y. 279; 13 Am. Rep. 581; *Graves v. Alsap*, 1 Arizona 274.

Inaccuracies in a code of public laws may be corrected by comparison with the original in the office of the secretary of state. *Hunt v. Wright* (Miss. 1892), 11 So. Rep. 608.

See *supra*, this title, *Enactment*.

7. *South Ottawa v. Perkins*, 94 U. S. 260; *Amoskeag Bank v. Ottawa*, 105 U. S. 667; *Blessing v. Galveston*, 42 Tex. 641; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *Evans v. Browne*, 30

Ind. 514; 95 Am. Dec. 710; *Post v. Kendall County*, 105 U. S. 668; *Walnut v. Wade*, 103 U. S. 683; *Legg v. Annapolis*, 42 Md. 224; *Ramsey County v. Heenan*, 2 Minn. 330; *Weeks v. Smith*, 81 Me. 546; *Williams v. Taylor*, 83 Tex. 667; *People v. Com'rs of Highways*, 54 N. Y. 278; 13 Am. Rep. 581; *People v. Chenango*, 8 N. Y. 317, held that objections to the validity of a law are not available unless raised by the pleading or on the return.

An answer averring that a statute on which the plaintiff's right is grounded was illegally passed is equivalent to a demurrer, and the issue thereon should be tried by the court and not by the jury. *Scott v. Clark County*, 34 Ark. 283.

8. See generally FOREIGN LAWS, vol. 8, p. 437; 1 Greenl. Ev., § 487; Story's Conflict of Laws, § 640; *Bailey v. McDowell*, 2 Harr. (Del.) 34; *Stanford v. Pruet*, 27 Ga. 243; *State v. Twitty*, 2 Hawks (N. Car.) 441; *Adams v. Gay*, 19 Vt. 358; 1 Greenl. Ev., §§ 501, 508. Citations to the English statutes and authorities are not sufficient to show an English statute; its existence and contents must be proved as any other fact. *Dickerson v. Matheeson*, 50 Fed. Rep. 73.

9. 1 Greenl. Ev., § 487; Story's Conflict of Laws, § 640; *Church v. Hubbard*, 2 Cranch (U. S.) 237; *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Lincoln v.*

Foreign laws may also be proved by a printed volume thereof which a witness having means of information can swear was recognized as authentic and received by the courts in the country in which such laws were alleged to exist.<sup>1</sup>

The rule requiring foreign statutes to be proved by duly authenticated copies has been relaxed, and parol testimony has been received to show the statute law of a foreign country.<sup>2</sup> Any person having probable means of information as to the law is competent to prove it, though not himself a lawyer.<sup>3</sup>

Pattelle, 6 Wend. (N. Y.) 475. In Bowles v. Eddy, 33 Ark. 645, it was held that statutes of another state could not be proved by certified abstracts therefrom made by a notary public of that state. See also EXEMPLIFICATION, vol. 7, p. 479.

1. Owen v. Boyle, 15 Me. 147; 32 Am. Dec. 143; Jones v. Maffet, 5 S. & R. (Pa.) 523; O'Keefe v. U. S., 5 Ct. of Cl. 674; Spaulding v. Vincent, 24 Vt. 501. In this case there is a *dictum* to the effect that a foreign statute cannot be proved by parol testimony.

The testimony of any credible witness, whether lawyer or layman, having reasonable means of information, is competent to show that a certain volume contains the statute law of a foreign country and is accepted as such by the courts and the public at large in that country. Dundee Mortgage, etc., Co. v. Cooper, 26 Fed. Rep. 665.

In People v. McQuade, 85 Mich. 123, the testimony of a minister of another state performing a marriage ceremony there, that a book containing the statute of that state was the only compilation of its laws; that he had seen it used in the courts of that state as a compilation of its laws for twenty years was admitted under provision of the Michigan laws, that the statute law of another state might be proved among other ways by printed copies thereof if commonly admitted in the courts of that state as *prima facie* evidence of its laws.

In Lacon v. Higgins, 3 Stark. 178, a printed copy of the French Code produced by the French Consul, resident in London, who obtained it at a bookseller's shop in Paris, was admitted as evidence of the law of France upon which the court would act.

**District Court in Admiralty.**—The law of any foreign country may be proved in the United States district court in admiralty by printed statute books, reports, text writers, and expert testi-

mony. The Pawaschick, 2 Low. (U. S.) 142; Talbot v. Seeman, 1 Cranch (U. S.) 1; Church v. Hubbard, 2 Cranch (U. S.) 187; Stein v. Bowman, 13 Pet. (U. S.) 209; Livingston v. Maryland Ins. Co., 6 Cranch (U. S.) 274; Ennis v. Smith, 14 How. (U. S.) 400; Wilcocks v. Phillips, 1 Wall. Jr. (C. C.) 47; Robinson v. Clifford, 2 Wash. (U. S.) 1; U. S. v. Ortega, 4 Wash. (U. S.) 531; Spaulding v. Vincent, 24 Vt. 501; Crosby v. Huston, 1 Tex. 203.

2. See FOREIGN LAWS, vol. 8, p. 437, and authorities there cited; Barrows v. Downs, 9 R. I. 446; 11 Am. Rep. 283; American Ins., etc., Co. v. Rosenagle, 77 Pa. St. 507.

Foreign laws must be proved like any other results of knowledge and experience in matters of which no knowledge is imputed to a judge, as facts are proved, by witnesses who can state from their own knowledge and experience, gained by study and practice, not only what is the written law but also what is the proper construction and effect of that law as applicable to the case in hand. Nelson v. Bridport, 8 Beav. 527.

A witness testifying as to a foreign law may resort to a foreign law book to refresh his memory or to correct and confirm his opinion, but the law itself must be determined upon his testimony. Sussex Peerage Case, 11 C. & F. 85.

The testimony of a person skilled in the foreign law will be admitted to prove that law. Baron De Bode's Case, 8 Q. B. 208; 55 E. C. L. 208.

But he should state the law on his knowledge and not read fragments of a code as the law. Cocks v. Purday, 2 C. & K. 269; 61 E. C. L. 268.

3. Vander Donckt v. Thellusson, 8 C. B. 812; 65 E. C. L. 811; Chattanooga, etc., R. Co. v. Jackson, 86 Ga. 676; 13 S. E. Rep. 109.

A witness whose knowledge of a

It is provided by an act of Congress passed pursuant to the constitution of the *United States*, that the statutes of a sister state shall be received in the courts of the other states of the Union when authenticated under the great seal of the state.<sup>1</sup> This method, though the safest, is not exclusive, and by statute in most of the states the statute laws of a sister state may be proved by the production of a printed statute book of such state purporting on its face to have been published by authority.<sup>2</sup> Where a code or statute of another state has been published by author-

foreign law is derived solely from his studies of that law at a university in such foreign country, is incompetent to prove what the law of that country is. *Bristow v. Sequeille*, 5 Exch. 275; or its operation and effect, *In re Bonelli*, L. R., 1 P. Div. 69.

The certificate of an ambassador under his official seal is admissible evidence of the law of his country as to the validity of a testamentary paper. *In re Klingeman*, 3 S. & T. 18.

An English Roman Catholic bishop is competent, as a person skilled in the matrimonial law of Rome, to prove that law as a witness. *Sussex Peerage Case*, 11 C. & F. 85.

1. U. S. Rev. Stat., § 905.

Copies of state laws authenticated by the seal of the state are conclusive evidence of their verity in all courts in the *United States* without any other formality. In absence of all proof to the contrary, the presumption is that the seal was affixed by the proper officer. *U. S. v. Amedy*, 11 Wheat. (U. S.) 392; *U. S. v. Johns*, 4 Dall. (U. S.) 412; *State v. Carr*, 5 N. H. 367.

The exemplification may be of such part of a statute as bears on the point of dispute, and need not be the whole statute. *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208.

A copy of an act of the legislature made and certified as true by the clerk of the federal court, with the certificate of the governor as to the official capacity of the clerk, and sealed with the great seal of state, is a sufficient authentication of the act under the act of Congress to entitle it to be read as evidence in the court of another state. *Rice's Succession*, 21 La. Ann. 614.

Statutes authenticated as directed by acts of Congress are admissible in evidence though not authenticated according to the law of the state in which they were offered in evidence. *Ansley v. Meikle*, 81 Ind. 260.

The act must be authenticated by the

great seal of the state. The seal of the secretary of state cannot be regarded as the seal of the state. *Sisk v. Woodruff*, 5 Ill. 15.

2. *Comparet v. Jernegan*, 5 Blackf. (Ind.) 375; *Commercial, etc., Bank v. Patterson*, 2 Cranch (C. C.) 346; *Rockville, etc., Turnpike Co. v. Andrews*, 2 Cranch (C. C.) 451; *Vaughn v. Griffith*, 16 Ind. 353 ("by authority" and by the "state printer" sufficient; see *Crake v. Crake*, 18 Ind. 156); *Mullen v. Morris*, 2 Pa. St. 85; *Stewart v. Swanzy*, 23 Miss. 502; *Emery v. Berry*, 28 N. H. 473; 61 Am. Dec. 622. (In *Goodwin v. Appleton*, 22 Me. 453, a printed volume of statutes, in which a former statute was referred to and repealed, was competent evidence of that former law). *Thomas v. Davis*, 7 B. Mon. (Ky.) 227. (*Kentucky* by statute provided that properly certified printed laws of other states should be proof of those laws; see *Biesenthal v. Williams*, 1 Duv. (Ky.) 329; 85 Am. Dec. 629); *Cox v. Robinson*, 2 Stew. & P. (Ala.) 91; *Hawrich v. Andrews*, 9 Port. (Ala.) 9; *Clanton v. Barnes*, 50 Ala. 260; *Hawes v. State*, 88 Ala. 71; *Clarke v. Bank of Mississippi*, 10 Ark. 516; 3 Am. Dec. 248; *Barkman v. Hopkins*, 11 Ark. 157; *Dixon v. Thatcher*, 14 Ark. 141; *Yarbrough v. Arnold*, 20 Ark. 592; *Charlesworth v. Williams*, 16 Ill. 338; *Eagen v. Connelly*, 107 Ill. 458; *Cochran v. Ward* (Ind. 1892), 29 N. E. Rep. 795; *Magee v. Sanderson*, 10 Ind. 261; *Line v. Mack*, 14 Ind. 330; *Lattourett v. Cook*, 1 Iowa 1; 43 Am. Dec. 428; *Zimmerman v. Helser*, 32 Md. 274; *Herryman v. Roberts*, 52 Md. 64; *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Ashley v. Root*, 4 Allen (Mass.) 504; *Merrifield v. Robins*, 8 Gray (Mass.) 150; *Baughan v. Graham*, 1 How. (Miss.) 220; *Bright v. White*, 8 Mo. 421; *Lord v. Staples*, 23 N. H. 448; *Toulandon v. Lachenmeyer*, 6 Abb. Pr. N. S. (N. Y.) 215; *Biddis v. James*, 6 Binn. (Pa.) 321; 6 Am. Dec. 456; *Gray v. Monongahela Nav. Co.*, 2

ity, a reprint of such book is admissible in evidence without other evidence of its sanction by the government of such state.<sup>1</sup>

There is a conflict of authority as to whether the existence and contents of a foreign law is a question for the court or for the jury; this conflict has been set out elsewhere.<sup>2</sup>

**2. Private.**—The general rule of the common law is that a printed statute book is not evidence of a private act;<sup>3</sup> but that the act must be proved by exemplified copy or other common-law method of proof.<sup>4</sup> But by statute in *England*,<sup>5</sup> and generally in the states of the Union, copies of private acts purporting to have been printed by authority are admissible in evidence in the courts of the state in which the act was passed.<sup>6</sup> If a private act contain a clause providing that it shall be judicially noticed, the production of an examined copy,<sup>7</sup> or copy printed by public authority, cannot be required.<sup>8</sup>

**X. INTERPRETATION AND CONSTRUCTION—1. Meaning of the Terms.**—Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same

W. & S. (Pa.) 156; 37 Am. Dec. 500; *Kean v. Rice*, 12 S. & R. (Pa.) 203, citing the case of *Young v. The Bank of Alexandria*, 4 Cranch (U. S.) 388; *Tenant v. Tenant*, 110 Pa. St. 478; *Martin v. Payne*, 11 Tex. 292; *Cowell v. State*, 16 Tex. App. 57; *State v. Stade*, 1 D. Chip. (Vt.) 303; *State v. Abbey*, 29 Vt. 60; 67 Am. Dec. 754; *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554; *Wright v. U. S.*, 15 Ct. of Cl. 80.

A volume of state laws purporting on the title page to have been "printed by order of the governor," sufficiently shows publication by authority. *Wilt v. Cutler*, 38 Mich. 189. See also *Pacific Pneumatic Gas Co. v. Wheelock*, 44 N. Y. Super. Ct. 566.

In an action on a judgment of another state and the statute of that state, a plea of *nul tiel record* admits the statute and dispenses with proof thereof. *Jackson v. Baxter*, 1 Ind. 42.

1. *Fernandez v. State*, 25 Tex. App. 538; *Ellis v. Wiley*, 17 Tex. 134.

2. **QUESTIONS OF LAW AND FACT,**

vol. 19, p. 635; *FOREIGN LAWS*, vol. 8, p. 438.

3. *Duncan v. Dubois*, 3 Johns. Cas. (N. Y.) 125. In this case, however, the court said there had been instances in which the printed statute book had been admitted as evidence of a private act. *Gilb.* 13; 12 Vin. 81, pl. 2; it was intimated that perhaps a private act might be given in evidence against the party for whose benefit the act was passed, since he was presumed to be conversant of it and could not be surprised by the evidence.

4. 1 Greenl. Ev., §§ 501, 508.

5. 13 & 14 Vict. ch. 21, § 7; *Lacon v. Higgins*, 3 Stark. 178.

6. See *JUDICIAL NOTICE*, vol. 12, p. 167, and the compilations of general public laws of the several states.

7. *Beaumont v. Mountain*, 10 Bing. 404; 25 E. C. L. 183; *Woodward v. Cotton*, 6 C. & P. 491; 25 E. C. L. 505.

8. *Forman v. Dawes*, C. & M. 127; 41 E. C. L. 75; *Woodward v. Cotton*, 6 C. & P. 491.



individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another; or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction; so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case.<sup>1</sup> In common use, however, the words are used interchangeably as embracing all that is properly covered by both when each is used in a sense strictly and technically correct, and so they are employed throughout this article.

**2. Object.**—Statute law is the will of the legislature, and the object of all judicial interpretation of statutes is to determine what intention is conveyed, whether expressly or by implication, by the language used.<sup>2</sup>

1. The foregoing definition is taken from Cooley's Const. Lim. (6th ed.), p. 51. See also INTERPRETATION, vol. 11, p. 507.

**Construction of Particular Words and Phrases Used in Statutes.**—For the construction of particular words and phrases as used in various statutes, as well as in wills, contracts, or other instruments, reference should be made to the specific titles throughout the Encyclopædia.

2. 1 Kent's Com. 468; Lieber Leg. Herm. 87; Leases' Case, 5 Rep. 6; Pray v. Edie, 1 T. R. 313; U. S. v. Fisher, 2 Cranch (U. S.) 399; Cleave-land v. Norton, 6 Cush. (Mass.) 380; Com. v. Kimball, 24 Pick. (Mass.) 366; 35 Am. Dec. 326; McCluskey v. Cromwell, 11 N. Y. 601; People v. New York Cent. R. Co., 13 N. Y. 78; Burch v. Newbury, 10 N. Y. 39; People v. Com'rs of Taxes, 95 N. Y. 554; Purdy v. People, 4 Hill (N. Y.) 397; Smith v. People, 47 N. Y. 330; Waller v. Harris, 20 Wend. (N. Y.) 561; 32 Am. Rep. 590; Noble v. State, 1 Greene (Iowa) 325; Scaggs v. Baltimore, etc., R. Co. 10 Md. 268; Hess v. Poultney, 10 Md. 256; *Ex parte* Trappall, 6 Ark. 9; Keener v. State, 18 Ga. 194; 63 Am. Dec. 269; Fitzpatrick v. Gebhart, 7 Kan. 35; Bonds v. Greer, 56 Miss. 716; New Orleans, etc., R. Co. v. Hemphill, 35 Miss. 17; Virginia, etc., R. Co. v. Lyon County, 6 Nev. 68;

Denton v. Reading, 22 La. Ann. 607; State v. Forkner, 70 Ind. 241; Robinson v. Schenck, 102 Ind. 307; Middleton v. Greeson, 106 Ind. 18; Miller v. State, 106 Ind. 415; Spencer v. State, 5 Ind. 56; Clare v. State, 68 Ind. 17; Taylor v. Washington County, 67 Ind. 383; Storms v. Stevens, 104 Ind. 46; Anderson v. Chicago, etc., R. Co., 117 Ill. 26; State v. McMahon, 53 Conn. 407; 55 Am. Rep. 140; *Ex parte* Marmaduke, 91 Mo. 228; 60 Am. Rep. 250; Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152.

In *People v. Greene County*, 13 Abb. N. Cas. (N. Y.) 424, Westbrook, J., said: "Any attempted construction of the act which departs from its language, and purporting to be based on the intention of the legislature, in the absence of any key to the meaning of the words afforded by other parts of the act, is mere speculation, and must necessarily vary with the convictions of the reasoner as to what the law should have been."

Mr. Justice Story said: "What the legislative intent was can be derived only from the words they used, and we cannot speculate beyond the reasonable import of these words; the spirit of the act must be gathered from the words of the act and not from conjectures *aliunde*." *Gardner v. Collins*, 2 Pet. (U. S.) 93; *Brewer v. Blougher*, 14 Pet. (U. S.) 178.

**3. Literal Construction.**—The first and most elementary rule of construction is that it is to be assumed that words and phrases are used in their popular and common acceptance, unless the subject-matter indicates that they are used in a technical sense; as when used in reference to a particular trade, business, or transaction; and from this presumption it is not allowable to depart unless adequate grounds appear for concluding that such interpretation does not give the real intention of the legislature.<sup>1</sup>

✓ If the language is clear and admits of but one meaning, there is no room for construction. It is not allowable to interpret that which has no need of interpretation.<sup>2</sup> In such a case any departure

"The primary and fundamental question in the construction of statutory provisions is this, What did the legislature intend in the enactment of the statute?" *Miller v. State*, 106 Ind. 415.

"The chief thing to be explored is the intention." *State v. Forkner*, 70 Ind. 241.

"In the construction of statutes the prime object is to ascertain and carry out the purpose of the legislature in their enactment. To do this, the words used in the instrument should be first considered in their literal and ordinary signification; but it is often necessary to inquire beyond such meaning of words." *Evansville v. Summers*, 108 Ind. 192.

In *People v. Com'rs*, etc., 95 N. Y. 554, Earl J., said: "It is the object of all interpretation and construction of statutes to ascertain the intention of the law-makers, and this is generally accomplished by a literal reading of the words used. . . . Lieber, in his *Legal and Political Hermeneutics*, page 11, very aptly defines interpretation as the art of finding out the true sense of any form of words—that is, the sense which their author intended to convey—and of enabling others to derive from them the same idea which the author intended to convey."

1. 9 *Bacon's Abr.*, tit. *Statutes* 1; *Rex v. Pease*, 4 B. & Ad. 31; 24 E. C. L. 17; *Rex v. Turvey*, 2 B. & Ad. 522; *Becke v. Smith*, 2 M. & W. 195; *Everett v. Wells*, 2 M. & G. 269; 40 E. C. L. 366; *Smith v. Lindo*, 4 C. B. N. S. 409; 93 E. C. L. 407; *Macdougall v. Paterson*, 11 C. B. 755; 73 E. C. L. 755; *Mallan v. May*, 13 M. & W. 511; *Mattison v. Hart*, 14 C. B. 385; 78 E. C. L. 383; *Grey v. Pearson*, 6 H. L. Cas. 106; *Abbott v. Middleton*, 7 H. L. 68; *Attorney Gen'l v. Westminster Chambers Assoc.*, 1 Exch. Div. 476; *Austin*

*v. Cull*, L. R., 7 C. P. 234; *Reg. v. Castro*, L. R., 9 Q. B. 360; *Bailey v. Com.*, 11 Bush (Ky.) 688; *Slate v. Clarksville, etc.*, Turnpike Co., 2 Sneed (Tenn.) 88; *Levy v. McCartee*, 6 Pet. (U. S.) 102; *Murray v. State*, 21 Tex. App. 620; 57 Am. Rep. 623; *Maillard v. Lawrence*, 16 How. (U. S.) 251; *State v. Payne County* (Oregon 1892), 29 Pac. Rep. 787; *Quigley v. Gorham*, 5 Cal. 418; 63 Am. Dec. 139; *Weill v. Kenfield*, 54 Cal. 111; *Stere v. Brownell*, 124 Ill. 27; *Martin v. Hunter*, 1 Wheat. (U. S.) 326; *State v. Engle*, 21 N. J. L. 354; *Clark v. Baltimore*, 29 Md. 283; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Jackson v. Lewis*, 17 Johns. (N. Y.) 475; *Johnson v. Hudson River R. Co.*, 49 N. Y. 455; *People v. Tighe*, 5 Hun (N. Y.) 26; *Clark v. Utica*, 18 Barb (N. Y.) 451; *Gyger's Estate*, 65 Pa. St. 311; *Fisher v. Counard*, 100 Pa. St. 63; *Schriefer v. Wood*, 5 Blatchf. (U. S.) 215; *Cummings v. Coleman*, 7 Rich. Eq. (S. Car.) 509; 62 Am. Dec. 402.

**Technical Words.**—In *Unwin v. Hanson* (1891), 2 Q. B. 115, *Esher, M. R.*, said: "If an act deals with matters affecting everybody generally, the words used have the meaning attached to them in the common or ordinary use of language. If an act is passed with reference to a particular trade, business, or transaction, then the words used have the meaning that every one conversant with that trade, business, or transaction would assign to them, though that meaning may differ from the common or ordinary meaning." See also *infra*, this title, *Technical Words*.

2. *U. S. v. Fisher*, 2 Cranch (U. S.) 386; *Clay v. Erhardt*, 48 Fed. Rep. 293; *U. S. v. Hartwell*, 6 Wall. (U. S.) 395; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 95; *Frye v. Chicago, etc. R. Co.*, 73 Ill. 399; *Martin v. Swift*, 120

from the language used would be an unjustifiable assumption of legislative power.<sup>1</sup> And where the language is susceptible of but one meaning, it must receive that meaning, although such construction leads to results which are absurd or mischievous. Courts are not to tamper with the clear and unequivocal meaning of words used, although the consequences may not be such as were contemplated by the legislature. There can be no departure from the plain meaning of a statute on grounds of its unwisdom or of public policy.<sup>2</sup>

Ill. 489; *Deere v. Chapman*, 25 Ill. 610; 79 Am. Dec. 350; *Beardstown v. Virginia*, 76 Ill. 34; *Stuart v. Hamilton*, 66 Ill. 253; *Pearce v. Atwood*, 13 Mass. 324; *McCluskey v. Cromwell*, 11 N. Y. 601; *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Johnson v. Hudson River R. Co.*, 49 N. Y. 455; *People v. Schoonmaker*, 63 Barb. (N. Y.) 49; *Furey v. People*, 7 N. Y. 97; *Gravesend Tp.*, 104 N. Y. 405; *Benton v. Wickwire*, 54 N. Y. 226; *Camden, etc., R. Co. v. Com'rs of Appeal*, 18 N. J. L. 71; *Dodge v. Love*, 49 N. J. L. 235; *Townsend v. Brown*, 24 N. J. L. 80; *Douglass v. Essex County*, 38 N. J. L. 214; *Allen v. Mutual F. Ins. Co.*, 2 Md. 111; *Maxwell v. State*, 40 Md. 293; *Smith v. State*, 66 Md. 215; *Cearfoss v. State*, 42 Md. 403; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *Rich v. Keyser*, 54 Pa. St. 86; *Selden v. Hall*, 21 Mo. App. 452; *St. Louis, etc., R. Co. v. Clark*, 53 Mo. 214; *Bidwell v. Whitaker*, 1 Mich. 450; *Swift v. Luce*, 27 Me. 285; *Pitt v. Acosta*, 18 Fla. 270; *Case v. Wildridge*, 4 Ind. 51; *Kilpatrick v. Byrne*, 25 Miss. 571; *Koch v. Bridges*, 45 Miss. 247; *Green v. Weller*, 32 Miss. 652; *Virginia, etc., R. Co. v. Lyon County*, 6 Nev. 68; *Enckling v. Simmons*, 28 Wis. 272; *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152; *York, etc., R. Co. v. Queen*, 1 El. & Bl. 864; 72 E. C. L. 864; *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190; 12 Am. Dec. 375; *Rex v. Hodnett*, 1 T. R. 96; *Rex v. Banbury*, 1 Ad. & El. 112; 28 E. C. L. 57; *Woodbury v. Perry*, 18 Ohio St. 456; *Ayers v. Trego County*, 37 Kan. 240; *In re Hinkle*, 31 Kan. 712; *Rudderow v. State*, 31 N. J. L. 512.

"The first and cardinal rule in the interpretation of a statute is to look to the statute itself, the meaning, the scope, and the object of the statute; and if upon the face of it you can gather plainly what the intention of the legislature was, those incidental rules which

are mere aids to be invoked where the meaning is clouded are not to be regarded." *Western Union Tel. Co. v. Hewett* (D. C. 1886), 2 Cent. Rep. 694.

"Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Smith v. State*, 66 Md. 215.

"If the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to nor take away from that meaning." *Newell v. People*, 7 N. Y. 97.

1. *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170; *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399; *Foley v. People*, 1 Ill. 32.

2. *Sedg. on St. and Const. Law* 231; *Cooley Const. Lim.* 197 (5th ed.); *Nixon v. Phillips*, 21 L. J. Ex. 90; 7 Exch. 192; *Midland R. Co. v. Pye*, 10 C. B. N. S. 179; *Abel v. Lee*, L. R., 6 C. P. 371; *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; *Biffin v. Yorke*, 5 M. & G. 437; *Richards v. McBride*, 8 Q. B. Div. 119; *Pray v. Eddy*, 1 T. R. 313; *Crawford v. Spooner*, 6 Moore P. C. 9; *Municipal Bldg. Soc. v. Kent*, 9 App. Cas. 273; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *Abley v. Dale*, 11 C. B. 391; 73 E. C. L. 390; *In re British Farmers, etc., Co.*, 48 L. J. Ch. 56; *Reg. v. Skeen*, 28 L. J. M. C. 94; *Reg. v. Tonbridge*, 13 Q. B. Div. 342; *Notley v. Buck*, 8 B. & C. 164; 15 E. C. L. 178; *Gwynne v. Burnell*, 6 Bing. N. Cas.

453; 37 E. C. L. 451; *In re Goodhue*, 19 Grant. Ch. (Ont.) 384; *Toronto v. Crookshank*, 4 Q. B. (Ont.) 309, 318; *U. S. v. Fisher*, 2 Cranch (U. S.) 399; *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528; *Union Pac. R. Co. v. U. S.*, 10 Ct. of Cl. 548; *Hadden v. Barney*, 5 Wall. (U. S.) 107; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 202; *Calder v. Bull*, 3 Dall. (U. S.) 359; *U. S. v. Warner*, 4 McLean (U. S.) 463; *Bennett v. Worthington*, 24 Ark. 494; *Horton v. Mobile School Com'rs*, 43 Ala. 598; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Reynolds v. Holland*, 35 Ark. 56; *Farrel Foundry v. Dart*, 26 Conn. 376; *Wright v. Defrees*, 8 Ind. 298; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *Dudley v. Reynolds*, 1 Kan. 285; *Sneed v. Com.*, 6 Dana (Ky.) 339; *Bosley v. Mattingly*, 14 B. Mon. (Ky.) 73; *Clark v. Maine Shore R. Co.*, 81 Me. 477; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559; *Collins v. Carman*, 5 Md. 530; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Flint, etc., Plank Road Co. v. Woodhull*, 25 Mich. 99; 12 Am. Rep. 233; *Leoni v. Taylor*, 20 Mich. 148; *Pitman v. Flint*, 10 Pick. (Mass.) 504; *Adams v. Howe*, 14 Mass. 341; 7 Am. Dec. 216; *Com. v. Hitchings*, 5 Gray (Mass.) 486; *State v. Washoe County*, 6 Nev. 104; *Jersey City, etc., R. Co. v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 61; *Jersey City Gas-Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Douglass v. Essex County*, 38 N. J. L. 216; *Neundorff v. Duryea*, 52 How. Pr. (N. Y.) 267; *People v. Lawrence*, 36 Barb. (N. Y.) 177; *Hyatt v. Taylor*, 42 N. Y. 259; *People v. Briggs*, 50 N. Y. 553; *Rosenplaenter v. Roessle*, 54 N. Y. 262; *People v. Huntington*, 4 N. Y. Leg. Obs. 187; *Macomber v. New York*, 17 Abb. Pr. (N. Y.) 35; *Cruger v. Cruger*, 5 Barb. (N. Y.) 225; *Com. v. Shopp*, 2 Woodw. (Pa.) 123; *Bradbury v. Wagenhorst*, 54 Pa. St. 182; *Howard Association's Appeal*, 70 Pa. St. 344; *Weister v. Hade*, 52 Pa. St. 474; *Baxter v. Tripp*, 12 R. I. 310; *In re Griffin*, 25 Tex. Supp. 633; *Miller v. Childress*, 2 Humph. (Tenn.) 320; *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399; *In re Powers*, 25 Vt. 265; *Bull v. Read*, 13 Gratt. (Va.) 78; *Gore v. Brazier*, 3 Mass. 539; 3 Am. Dec. 182; *Ayers v. Knox*, 7 Mass. 306; *Langdon v. Potter*, 3 Mass. 221; *Doane v. Phillips*, 12 Pick. (Mass.) 223; *Putnam v. Langley*, 11 Pick. (Mass.) 487.

Lord Blackburn said: "No court is entitled to depart from the intention of the legislature as appearing from the words of the act, because it is thought unreasonable." *Countess of Rothes v. Kirkcaldy*, 7 App. Cas. 702.

In *Doe v. Considine*, 6 Wall. (U. S.) 458, the court insisted upon a literal construction of the statute where there was no ambiguity in the terms, although the result was to give an intestate's estate away from his next of kin.

In *Koch v. Bridges*, 45 Miss. 259, *Peyton, C. J.*, said: "The courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of the particular enactment."

An act which imposed a penalty on any person who piloted a ship in the Thames, before he was examined and admitted as a Trinity House pilot, was held not to reach one who had been expelled from the society after his examination and admission. *Pierce v. Hopper*, 1 Stra. 249.

Even where a literal construction works an injustice and enables one to take advantage of his own wrong, it must be shown that the language of the legislature admits of no other construction. *Rex v. Bucks*, 3 East 343; *Rex v. Staffordshire*, 7 East 549; *Reg. v. Sussex*, 4 B. & S. 966; 116 E. C. L. 964.

A statute which empowered a court to summon any person, residing in a town or navigating from its port, by leaving the summons at his abode, and to proceed *ex parte* if he did not appear, was held to justify *ex parte* proceedings against a seafaring man who had, for months before the summons and during the whole proceeding, been absent beyond the seas. *Culverson v. Melton*, 12 Ad. & El. 753; 40 E. C. L. 184.

A Sunday statute provided that the act should come into operation on the day "next appointed" for the annual licensing meeting. By a literal construction the operation of the act was postponed for a year later than was in all probability intended, the court refusing to avert this result by any departure from the primary meaning of the words. *Richards v. McBride*, 51 L. J. M. C. 15.

An act which enacted that a pilot was to deliver up his license to the pilotage authorities "whenever required to do so," should be interpreted literally, however arbitrarily the power which it conferred might be misused,

and although the withdrawal of the license would effect or amount to a dismissal of the party from his employment. *Henry v. Trinity House*, 8 El. & Bl. 723; 92 E. C. L. 721.

Where an act authorized justices to hear a bastardy cause upon proof that summons was left at "the last place of abode" of defendant, it was held that they might proceed, though defendant was abroad and had no cognizance of the summons. *Cockburn. C. J.*, said: "I think we are bound by the words of the statute. . . . The defendant's counsel asked us to put a qualification upon them, but we cannot do so contrary to the express words of the statute. It is very true that when the defendant is in a foreign country it is more or less inconsistent with justice that an order should be made upon him which he has no opportunity to appeal against." *Reg. v. Damarel*, L. R., 3 Q. B. 60. See also *Rex v. Davis*, 1 Hale C. C. 91; *Reg. v. Higham*, 7 El. & Bl. 557; 90 E. C. L. 556. *Compare Reg. v. Smith*, L. R., 10 Q. B. 604.

In *Attorney Gen'l v. Lockwood*, 9 M. & W. 395, Lord Abinger said: "The act has practically had a very pernicious effect not at all contemplated, but we cannot construe it according to that result."

**Literal Construction May Defeat the Object of the Act.**—In *Rex v. Barham*, 8 B. & C. 99; 15 E. C. L. 157, Lord Tenterden says: "Our decision may in this particular case operate to defeat the object of the act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to have been the intention of the legislature." To the same effect, see *Frye v. Chicago*, etc., R. Co., 73 Ill. 399; *Smith v. State*, 66 Md. 215; *Hines v. Wilmington R. Co.*, 95 N. Car. 434; *State v. Scarborough*, 110 N. Car. 232; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 543; 17 Am. & Eng. R. Cas. 438; *Woodbury v. Berry*, 18 Ohio St. 456; *Hicks v. Jamison*, 10 Mo. App. 35; *Rex v. Stoke Damerel*, 7 B. & C. 563; 14 E. C. L. 99; *Midland R. Co. v. Pye*, 10 C. B. N. S. 179; 100 E. C. L. 178; *Attorney Gen'l v. Lockwood*, 9 M. & W. 395; *Rex v. Mabe*, 3 Ad. & El. 531; 30 E. C. L. 145; *Woodward v. Watts*, 2 El. & Bl. 452; 75 E. C. L. 452; *Rex v. Poor Law Com'r*, 6 Ad. & El. 1; 33 E. C. L. 11.

"I cannot doubt what the intention

of the legislature was, but the intention has not been carried into effect by the language used. . . . It is far better that we should abide by the words of the statute than to seek to reform it according to the supposed intention." Per Lord Campbell, in *Coe v. Lawrence*, 1 El. & Bl. 516; 72 E. C. L. 516.

In *Woodbury v. Berry*, 18 Ohio St. 462, it was said: "But notwithstanding all this, *ita lex scripta est*. The language as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied, by considerations outside of the language, that the legislature intended to enact something very different from what it did enact, but it did not carry out its intention, and we cannot take the will for the deed. It is our legitimate function to interpret legislation but not to supply its omissions."

**Statute of Limitations.**—A most familiar instance of this rule occurs in the construction of the Statute of Limitations. It was repeatedly decided at law that the Statute of Limitations, which enacts that actions shall not be brought after the lapse of certain periods from the time when the cause of action accrued, barred actions brought after the time so limited; though the cause of action was not discovered or practically discoverable by the injured party when it accrued, or was even fraudulently concealed from him by the wrongdoer until after the time limited by the act had expired. The hardship of such decisions is obvious, but the language admitted of no other construction. *Stout v. McCarthy*, 3 B. & Ald. 626; 53 E. C. L. 403; *Brown v. Howard*, 2 B. & B. 73; *Colvin v. Buckle*, 8 M. & W. 680; *Imperial Gaslight, etc., Co. v. London Gaslight Co.*, 10 Exch. 39; *Bonorui v. Backhouse*, 3 El., Bl. & El. 622; *Smith v. Fox*, 6 Hare 386; *Violet v. Simpson*, 27 L. J. Q. B. 136; *Hunter v. Gibbons*, 1 H. & N. 459; *Lamb v. Walker*, 3 Q. B. Div. 389; *Ecclesiastical Com'rs v. N. E. R. Co.*, 4 Ch. Div. 845. See also *Kirk v. Todd*, 21 Ch. Div. 484; *Gibbs v. Guild*, 9 Q. B. Div. 59; *M'Iver v. Ragan*, 2 Wheat. (U. S.) 25; *Robertson v. Alford*, 13 Smed. & M. (Miss.) 509; and see *LIMITATION OF ACTIONS*, vol. 13, p. 727.

It was held in *Paul v. Wyburn*, 2 Salk. 420, that though the courts were shut so that no suit could be brought, yet the statute would bar the action,

When once the intention is plain, it is not the province of the courts to scan the wisdom or policy of statutes.<sup>1</sup> The duty of courts is not to make the law reasonable, but to expound it as it stands according to the real sense of the words used.<sup>2</sup> The question is, not what the legislature meant, but what it said.<sup>3</sup> Nor will the motive of the legislature be allowed to overcome the clear meaning of the statute.<sup>4</sup>

If, where the meaning is clear, courts must follow the statute literally, though leading to an absurdity or to mischief, *a fortiori*, there can be no departure from the terms of the statute where no absurdity or inconvenience will follow from a literal interpretation.<sup>5</sup>

because the statute was general and must affect all cases which are not specially exempted.

In *Sacia v. De Graff*, 1 Cow. (N. Y.) 356, Savage, C. J., in delivering the opinion of the court, said: "It is not for the courts to extend the law in all cases coming within the reason of it so long as they are not within the letter." See also *Hudson v. Carey*, 11 S. & R. (Pa.) 10.

In *State Bank v. Morris*, 13 Ark. 291, the court said: "The statute which creates the limitation must also create the exception." And see *Pryor v. Ryburn*, 16 Ark. 671.

1. *Abley v. Dale*, 11 C. B. 378; 73 E. C. L. 378; *Rex v. Watson*, 7 East 214; *Rex v. Staffordshire*, 12 East 572; *Rex v. Hodnett*, 1 T. R. 100; *Archer v. James*, 2 B. & S. 87; 110 E. C. L. 85; *Miller v. Salomon*, 7 Exch. 475; *Ex parte Attwater*, 5 Ch. Div. 30; *Municipal Bldg. Soc. v. Kent*, 9 App. Cas. 273; *State v. Siedtke*, 9 Neb. 468; *Dame's App.*, 62 Pa. St. 417; *Reithmiller v. People*, 44 Mich. 280; *Winter v. Jones*, 10 Ga. 191; 54 Am. Dec. 379.

In *Priestman v. U. S.*, 4 Dall. (U. S.) 28, Chase, J., said: "I shall always deem it a duty to conform to the expressions of the legislature to the letter of the statute when free from ambiguity and doubt, without indulging a speculation, either upon the impolicy or the hardship of the law."

In *Hadden v. Barney*, 5 Wall. (U. S.) 107, Field, J., said: "What is termed the policy of the government with reference to any particular legislation, is generally a very uncertain thing upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of a court in the interpretation of statutes."

In *Dame's Appeal*, 62 Pa. St. 417,

Sharswood, C. J., said: "The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in the hunt for some intention founded on the general policy of the law, we find ourselves involved in a 'sea of trouble.' Difficulties and contradictions meet us at every turn."

2. *Biffin v. Yorke*, 6 Scott, N. S. 234; 5 M. & G. 428; 44 E. C. L. 228; *Barstow v. Smith, Walker* (Mich.) 394.

In *Everett v. Wells*, 2 Scott, N. R. 531, Tindal, C. J., says: "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing. The office of interpretation is to bring sense out of the words used, not to bring a sense into them." *McCluskey v. Cromwell*, 11 N. Y. 601.

3. *Maxwell v. State*, 89 Ala. 150; *Palmer v. Thatcher*, 3 Q. B. Div. 353; *Coxhead v. Mullis*, 3 C. P. Div. 439; *Green v. Wood*, 7 Q. B. 185; 53 E. C. L. 183; *Sedg. on Const. of Statutory and Constitutional Law*, p. 205; *Potter's Dwarrior on Statutes*, p. 146; *Niagara County v. People*, 7 Hill (N. Y.) 513.

4. *Soon Hing v. Crowley*, 113 U. S. 703; *Harpending v. Haight*, 39 Cal. 189; 2 Am. Rep. 432; *Farmers' L. & T. Co. v. Chicago, etc.*, R. Co., 39 Fed. Rep. 143; *Green v. Cheek*, 5 Ind. 107; *Coe v. Lawrence*, 1 El. & Bl. 516; *Rex v. Borham*, 8 B. & C. 99; 15 E. C. L. 157; also *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 287.

5. *Ayers v. Trego County*, 37 Kan. 240; *Ohio, etc., R. Co. v. People*, 123 Ill. 467; *Martin v. Swift*, 120 Ill. 488; *Hicks v. Jamison*, 10 Mo. App. 35; *Douglass v. Essex County*, 38 N. J. L. 214; *State v. Brewster*, 42 N. J. L. 125; *Ezekiel v. Dixon*, 3 Ga. 146; *Woodward v. Watts*, 2 El. & Bl. 452; 75 E. C. L. 452; *Hinton v. Dibben*, 2 Q. B. 646; 42 E. C. L. 847.

From the rule that where but one meaning can attach to the terms of a statute, there is no room for construction, it follows that nothing can be added to, or taken from, a statute, unless to construe its words according to their obvious meaning would give rise to manifest inconsistency, incongruity, or ambiguity.<sup>1</sup> Thus, a court may not insert limitations, nor except special cases which fall within the scope of the general terms used in the statute.<sup>2</sup> And words may not be imported into a statute, in order that it may include a case which has been omitted, merely because there

1. *Everett v. Wells*, 2 M. & G. 277; 40 E. C. L. 366; *Ex parte St. Sepulchre*, 33 L. J. Ch. 378; *In re Cherry's Estate*, 31 L. J. Ch. 351; *Ezekiel v. Dixon*, 3 Ga. 146; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 3; *Lane v. Schomp*, 20 N. J. Eq. 82; *Lacy v. Moore*, 6 Coldw. (Tenn.) 348. See also *Laird v. Buggs*, 19 Ch. Div. 33; *Hull v. Hull*, 2 Strobb. Eq. (S. Car.) 174.

It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in a statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto. *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152.

2. *Stowell v. Zouch*, Plowd. 353; *Beckford v. Wade*, 17 Ves. Jr. 93; *U. S. v. Coombs*, 12 Pet. (U. S.) 72; *Ogden v. Strong*, 2 Paine (U. S.) 584; *M'Yer v. Ragan*, 2 Wheat. (U. S.) 25; *Lake County v. Rollins*, 130 U. S. 662; *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152; *Box v. Stanford*, 13 Smed. & M. (Miss.) 93; 51 Am. Dec. 142; *Kilpatrick v. Byrne*, 25 Miss. 571; *Robertson v. Alford*, 13 Smed. & M. (Miss.) 512; *Thornton v. Crisp*, 14 Smed. & M. (Miss.) 54; *Oliver's Appeal*, 101 Pa. St. 299; *In re Bloomfield First Presbyterian Church*, 107 Pa. St. 543; *Erie County v. Erie Water Com'rs*, 113 Pa. St. 368; *Pittsburgh v. Kalchthaler*, 114 Pa. St. 47; *Bradley v. Buffalo, etc.*, R. Co., 34 N. Y. 427; *Hyatt v. Taylor*, 42 N. Y. 259; *Chicago, etc., R. Co. v. Dumser*, 109 Ill. 402; *Enckling v. Simmons*, 28 Wis. 272; *Troup v. Smith*, 42 N. Y. 33; *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 135; 8 Am. Dec. 467; *Pike v. Hoare*, 2 Eden 184; *Com. v. Kimball*, 24 Pick. (Mass.) 366; 35 Am. Dec. 326; *Hamilton v. Shepperd*, 3 Murph. (N. Car.) 115; *Cocke v. M'Ginnis*, Mart. & Y.

(Tenn.) 361; 42 Am. Dec. 809; *Callis v. Waddy*, 2 Munf. (Va.) 511.

A statute gave a reward to "whosoever shall pursue and apprehend any person who shall have stolen any mare or horse," etc. It was held that the statute made no distinction between the owner of the horse stolen and any other person who should pursue and capture the thief. *Butler County v. Leibold*, 107 Pa. St. 407.

A statute provided "that whenever any person shall die leaving a widow and children or a widow and child, it shall and may be lawful for the executor or administrator thereof to allow, out of the effects of such deceased person, a reasonable support and maintenance for the space of twelve months," etc. It was held that this entitled the widow and children of the decedent to support, whether his estate was solvent or insolvent. *Hopkins v. Long*, 9 Ga. 261.

In *Harrington v. Smith*, 28 Wis. 60, it was said: "And here another rule of interpretation becomes directly applicable, which is, that general words in a statute must receive a general construction, unless there be something in it to restrain, or, as it is otherwise frequently expressed, if there be no express exception."

In *Collins v. Carman*, 5 Md. 505, the question was upon the right of a widow to renounce the provision made for her in the will of her late husband. She was insane at its date, and so continued. By the statute of the state it was necessary that she should dissent from the provision made in the will, which, being insane, she was incapable of doing. The language of the statute was comprehensive enough to include every widow, whether sane or insane, and the statute made no exception in favor of the latter. It was decided that none could be made by the courts whether of law or equity.

It was said by Lumpkin, J., in *Tor-*

seems to be no good reason why it should have been omitted, and the omission consequently appears to have been unintentional.<sup>1</sup>

Where the language is precise and unambiguous, but at the same time incapable of reasonable meaning, and the act is consequently inoperative, a court is not at liberty to give the words on

rance *v.* McDougald, 12 Ga. 530, that this rule was considered so inflexible that the Statute of Wills, 32 Hen. VIII. having authorized all and every person or persons to devise their land, it was feared that it might enable infants and insane persons to do it, and the statute of 34 Hen. VIII was consequently passed to introduce these exceptions. See also Beckford *v.* Wade, 17 Ves. 93.

Where a statute in general terms enabled any wife without any exception as to age to file her libel for divorce, it was held that a wife, although under the age of twenty-one, might, in her own name, without acting by guardian or next friend, file her libel and obtain relief. Jones *v.* Jones, 18 Me. 308; 36 Am. Dec. 723.

**Statute of Limitations.**—The exceptions allowed to the operation of the Statute of Limitations would seem to qualify this rule; for example, the suspension of its operation during the time of war. Hanger *v.* Abbott, 6 Wall. (U. S.) 532; Braun *v.* Sauerwein, 10 Wall. (U. S.) 222; Caperton *v.* Bowyer, 14 Wall. (U. S.) 235; Washington University *v.* Finch, 18 Wall. (U. S.) 110; Ross *v.* Jones, 22 Wall. (U. S.) 586; Harrison *v.* Myer, 92 U. S. 115. See LIMITATION OF ACTIONS, vol. 13, p. 763.

1. Dwaris on Statutes (2d ed.) 579; Rex *v.* Burrell, 12 Ad. & El. 460; 40 E. C. L. 96; Lamond *v.* Eiffe, 3 Q. B. 910; 43 E. C. L. 1032; Rex *v.* Vandeleer, 1 Stra. 69; Rex *v.* Davie, 6 Ad. & El. 375; 33 E. C. L. 90; Bloxam *v.* Elsee, 6 B. & C. 169; 13 E. C. L. 133; Nettleson *v.* Burrill, 8 Scott N. R. 738; Wanklyn *v.* Woollett, 4 C. B. 86; 56 E. C. L. 85; Reg. *v.* Ashburton, 8 Q. B. 871; 55 E. C. L. 871; Higgs *v.* Schrader, 3 C. P. Div. 252; Newton *v.* Boodle, 3 C. B. 795; 54 E. C. L. 794; Hind *v.* Arthur, 7 D. & L. 252; Denn *v.* Reid, 10 Pet. (U. S.) 524; Smith *v.* Rines, 2 Sumn. (U. S.) 354; Swift *v.* Luce, 27 Me. 285; Woodbury *v.* Berry, 18 Ohio St. 462; Southwestern R. Co. *v.* Cohen, 49 Ga. 626; U. S. *v.* Breed, 1 Sumn. (U. S.) 160; Steere *v.* Brownell, 124 Ill. 27.

In Denn *v.* Reid, 10 Pet. (U. S.) 524, McClean, J., said: "Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute, at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

"We are not at liberty," says the court, in Alexander *v.* Worthington, 5 Md. 485, "to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out or inserting and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence."

A statute provided, that at any time that a vacancy may occur in the office of attorney general the governor shall appoint a person to hold the office "until the next general election when his successor shall be elected." It was contended by counsel that the statute should be interpreted as though it read "who shall hold the office until the next general election for officers of a like class, or state officers, when his successor shall be elected," etc. This construction was refused by the court, which said: "But it is importing words into the statute not found there to sustain the construction contended for, and to give the statute and the section a particular meaning which they would not bear without them, as Patterson, J., said: 'I see the necessity of not importing into the statute words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty.' Rex *v.* Burrell, 12 Ad. & El. 468; 40 E. C. L. 96."

Thus, the English Divorce Act, which provided that any order made for the protection of the earnings of a deserted married woman might be discharged by the magistrate who made it, was held not to empower his successor to discharge it though the mag-



mere conjectural grounds a meaning which does not belong to them.<sup>1</sup> It is, therefore, only in cases where the words of the statute are capable of two meanings, or where by giving them their literal interpretation the statute will be inconsistent or ambiguous, that courts resort to the secondary rules of construction to aid in determining the real intention of the legislature.<sup>2</sup>

**4. Where Meaning Is Ambiguous.**—The rule of literal construction, treated of in the preceding section, does not go very far, for it is confined to cases where the language is susceptible of but one construction, or to cases where the context or the consequence to which a literal interpretation would lead necessarily show that such interpretation would not express the real intention. Language is rarely so free from ambiguity as to be incapable of being used in more than one sense, and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punished all who drew blood in the street, the layman who wounded the priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life would have been liable to punishment.<sup>3</sup>

Another elementary rule is that a thing which is within the letter of a law is not within the law unless it is also within the meaning of the law; and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that meaning.<sup>4</sup>

istrate who had made it was dead. *Ex parte Sharp*, 5 B. & S. 322.

So also was it held that 26 & 27 Vict., ch. 29, which enacts that answers made to an election commission shall not be admitted in evidence in any proceeding, except in cases of "indictment" for perjury, left them excluded in "informations" for perjury filed by the attorney general. *Reg. v. Slater*, 8 Q. B. Div. 267.

1. *Green v. Wood*, 7 Q. B. 178; 53 E. C. L. 178; *Doe v. Carew*, 2 Q. B. 317; 42 E. C. L. 692; *Mundy v. Rutland*, Q. B., Nov. 29, 1882; *Ward v. Ward*, 37 Tex. 389; *Hughe's Case*, 1 Bland (Md.) 46; *State v. Boon*, 1 Tayl. (N. Car.) 103. See also *Johnson v. Hudson River R. Co.*, 49 N. Y. 455; *People v. Schoonmaker*, 63 Barb. (N. Y.) 49; *Pittsburgh v. Kalchthaler*, 114 Pa. St. 547; *Com. v. Bank of Pa.*, 3 W. & S. (Pa.) 173.

An act provided that "the sale of spirituous liquors shall be prohibited within three miles of . . . Mount Zion Church, Gaston county." It appeared on trial that there were two

churches bearing that name in Gaston county. It was held that the statute was inoperative. *State v. Partlow*, 91 N. Car. 550; 49 Am. Rep. 652. See also *supra*, this title, *Validity and Effect*. *Drake v. Drake*, 4 Dev. (N. Car.) 110.

2. *George v. Board of Education*, 33 Ga. 344; *Newell v. People*, 7 N. Y. 97; *McClusky v. Cromwell*, 11 N. Y. 593; *Barstow v. Smith*, Walk. (Mich.) 394; *Bidwell v. Whitaker*, 1 Mich. 469; *Denn v. Reid*, 10 Pet. (U. S.) 524; *Farrel Foundry v. Dart*, 26 Conn. 382; *Colehan v. Cooke*, Willes 397; *Priestman v. U. S.*, 4 Dall. (U. S.) 30, n.

3. 1 Bl. Com. 60; 1 Kent's Com. 462. See *U. S. v. Fisher*, 2 Cranch (U. S.) 400; *Com. v. Kimball*, 24 Pick. (Mass.) 370; 35 Am. Dec. 326; *State v. Clark*, 29 N. J. L. 96; *Henry v. Lilson*, 17 Vt. 479; *People v. Admire*, 39 Ill. 251; *Murray v. Hobson*, 10 Colo. 66; *Potter v. Douglass County*, 87 Mo. 239.

4. *Hollingsworth v. Palmer*, 4 Exch. 281; *Waugh v. Middleton*, 8 Exch. 352; *Caledonian R. Co. v. North British R. Co.*, 6 App. Cas. 122; *Edinburgh*

**5. General Means of Learning Intent by Reference to—***a.* **CONTEXT.**  
—All parts of the same statute must be taken together. If one part standing by itself is obscure, it may be aided by another.<sup>1</sup>

*St. Tramways Co. v. Torbain*, 3 App. Cas. 58; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 412; *Ex parte Walton*, 17 Ch. Div. 746.

A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. *Riggs v. Palmer*, 26 N. Y. St. Rep. 198. See also *Bacon's Abr., tit. Statute (I)* 5; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *Greensburg v. Laird*, 8 Pa. Co. Ct. Rep. 608; *Delafield v. Brady*, 108 N. Y. 524; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 339. This is true sometimes even in a criminal statute. *U. S. v. Morrissey*, 32 Fed. Rep. 147; *Lawrence v. Conner*, 12 Ky. L. Rep. 86.

In the construction of statutes the rules of grammar are less important than the intention of the legislature, and the sense and spirit of the statute prevail over the strict grammatical construction of its words. *Singer Mfg. Co. v. McCollock*, 24 Fed. Rep. 667. See also *George v. Board of Education*, 33 Ga. 344; *Murray v. State*, 21 Tex. App. 620; 57 Am. Rep. 623.

If the terms of a statute are ambiguous, it becomes the duty of the court to give such construction to it as may fairly be said to be in accordance with the intention of the legislature. It is only in cases of ambiguity, however, that the court exercises this power of controlling the language of a statute. *Hyatt v. Taylor*, 42 N. Y. 259; *Leavitt v. Blatchford*, 5 Barb. (N. Y.) 9; *Bidwell v. Whitaker*, 1 Mich. 469; *Barstow v. Smith, Walk.* (Mich.) 394; *Bradbury v. Wagenhorst*, 54 Pa. St. 180, and cases cited *supra*; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312; 45 Am. & Eng. R. Cas. 391.

1. *Beckford v. Wade*, 17 Ves. 92; *Rex v. Palmer*, 1 Leach 352; *Co. Litt.* 381a; *Lincoln's College Case*, 3 Rep. 59b; *Lord Auckland v. Westminster Board of Works*, L. R. 7 Ch. 597; *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337; *Core v. James*, L. R. 7 Q. B. 13; *Nuth v. Tamplin*, 8 Q. B. Div. 253; *Holbrook*

*v. Holbrook*, 1 Pick. (Mass.) 248; *Com. v. Robertson*, 5 Cush. (Mass.) 438; *Com. v. Alger*, 7 Cush. (Mass.) 53; *Opinion of Justices*, 22 Pick. (Mass.) 571; *Com. v. Cambridge*, 20 Pick. (Mass.) 267; *Mendon v. Worcester County*, 10 Pick. (Mass.) 235; *Ayers v. Knox*, 7 Mass. 306; *Green v. Com.*, 12 Allen (Mass.) 155; *Burke v. Monroe County*, 77 Ill. 610; *Williams v. People*, 17 Ill. App. 274; *Thompson v. Bulson*, 78 Ill. 277; *Mason v. Finch*, 3 Ill. 223; *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589; *Williams v. People*, 17 Ill. App. 274; *Crone v. State*, 49 Ind. 538; *Storms v. Stevens*, 104 Ind. 46; *Green v. Cheek*, 5 Ind. 105; *State v. Williams*, 8 Ind. 191; *May v. Hoover*, 112 Ind. 458; *Wasson v. First Nat. Bank*, 107 Ind. 206; *Lutz v. Crawfordsville*, 109 Ind. 466; *Maple Lake v. Wright County*, 12 Minn. 403; *St. Peter's Church v. Scott County*, 12 Minn. 395; *U. S. v. Landram*, 118 U. S. 81; *Pennington v. Cox*, 2 Cranch (U. S.) 33; *U. S. v. Fisher*, 2 Cranch (U. S.) 358; *The Elizabeth*, 1 Paine (U. S.) 11; *Strode v. Stafford*, 1 Brock (U. S.) 162; *Adams v. Woods*, 2 Cranch (U. S.) 336; *Ogden v. Strong*, 2 Paine (U. S.) 584; *Rice v. Minnesota, etc., R. Co.*, 1 Black (U. S.) 358; *Atkins v. Fiber Disintegrating Co.*, 18 Wall. (U. S.) 272; *Georgia v. Atkins*, 1 Abb. (U. S.) 22; *Martin v. Hunter*, 1 Wheat. (U. S.) 326; *Blanchard v. Sprague*, 3 Sumn. (U. S.) 279; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 4; *Magruder v. Carroll*, 4 Md. 335; *Alexander v. Worthington*, 5 Md. 471; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Ruggles v. Washington County*, 3 Mo. 496; *State v. Weigel*, 48 Mo. 29; *Ex parte Marmaduke*, 91 Mo. 228; 60 Am. Rep. 250; *In re Murphy*, 23 N. J. L. 180; *Van Riper v. Essex Public Road*, 38 N. J. L. 23; *State v. Patterson*, 35 N. J. L. 197; *Davey v. Burlington, etc., R. Co.*, 31 Iowa 553; *Leet v. Jno. Dare Silver Min. Co.*, 6 Nev. 218; *Torrance v. McDougald*, 12 Ga. 526; *State v. Atkins*, 35 Ga. 319; *Albrecht v. State*, 8 Tex. App. 313; 34 Am. Rep. 737; *Brooks v. Mobile School Com'rs*, 31 Ala. 227; *Wheat v. Smith*, 50 Ark. 266; *Com. v. Duane*, 1 Binn. (Pa.) 610; 2 Am. Dec. 497; *Holl v.*

Deshler, 71 Pa. St. 299; *Com. v. Conyngham*, 66 Pa. St. 99; *Small v. Small*, 129 Pa. St. 366; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; *San Francisco v. Hazen*, 5 Cal. 169; *Nicolson Pavement Co. v. Painter*, 35 Cal. 708; *Taylor v. Palmer*, 31 Cal. 240; *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Berry v. Clary*, 77 Me. 482; *Attorney Gen'l v. Bank of Michigan*, Harr. (Mich.) 315; *Attorney Gen'l v. Detroit Plank Road Co.*, 2 Mich. 138; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Hebert's Succession*, 5 La. Ann. 121; *State v. Judge*, 12 La. Ann. 777; *Catlin v. Hull*, 21 Vt. 152; *Simonds v. Powers*, 28 Vt. 354; *Nichols v. Wells*, *Sneed* (Ky.) 255; *Wenger v. Taylor*, 39 Kan. 754; *Wheeling Gas. Co. v. Wheeling*, 8 W. Va. 320; *Wilson v. Biscoe*, 11 Ark. 44; *Scott v. State*, 22 Ark. 369; *Ellison v. Mobile, etc.*, R. Co., 36 Miss. 572; *McIntyre v. Ingraham*, 35 Miss. 25.

In *Attorney Gen'l v. Sillem*, 2 H. & C. 515, *Pollock, C. B.* said: "To discover the true construction of any particular clause of a statute the first thing to be attended to no doubt is the actual language of the clause itself as introduced by the preamble. Second, the words or expressions which obviously by design are omitted. Third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

"The true rule for the construction of statutes is to look to the whole and every part of the statute and to the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law, and thus to ascertain the true meaning of the legislature, though the meaning so ascertained conflicts with the legal sense of the words." *Aldis, J.*, in *Ryegate v. Wardsboro*, 30 Vt. 745.

If any part of a statute be obscure, it is proper to consider the other parts, for the words and meaning of one

part of a statute frequently lead to the sense of another. *Bacon's Abr.*, tit. *Statutes* (1) 2; *citing* *Plowd.* 365; *Stowel v. Zouch*, 11 Mod. 161.

If one section of an act, for instance, requires that "notice" should be "given," a verbal notice would probably be sufficient; but if a subsequent section provided that it should be "served" on a person, or "left" with him in a particular manner, it would obviously show that a written notice was intended. *Moyle v. Jenkins*, 51 L. J. Q. B. 112; *Wilson v. Nightingale*, 8 Q. B. 1034; 55 E. C. L. 1034.

"But where words are so general that they must receive some limitation in construction, and cannot be construed literally, what is the restriction that ought to be imposed upon them?" This is to be learned from the context and from the general purview of the act. The object of all rules of construction being to ascertain the meaning of the language used, and, it being unreasonable to impute to the legislature inconsistent intents on the same general subject-matter, what it has clearly said in one part must be the best evidence of what it has intended to say in another. The court must apply, in such a case, the same rules which it would use in construing the limitation of a deed; it must look to the whole context, and endeavor to give effect to the provisions, enlarging or restricting, if need be, for that purpose, the literal interpretation of any particular part. *Potter's Dwar.*, p. 197; *citing* *Coleridge, J.*, *Reg. v. Poor Law Com'rs*, 6 A. & E. 7; 33 E. C. L. 12.

"One of the safest guides to the construction of sweeping general words, which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification." *Blackwood v. Reg.*, 8 App. Cas. 94.

**Section to be First Consulted.**—In *Spencer v. Metropolitan Board of Works*, 22 Ch. Div. 162, it was said by *Jessel, M. R.*, that the meaning of a word should be first determined, if possible, from the section in which it

Thus, a consideration of the whole act may expand or restrict the terms of a particular clause.<sup>1</sup> In this connection a body of Revised laws or a code is not to be construed as prior and subsequent acts, but as forming one general system of statute law.<sup>2</sup>

An act embodying several distinct acts is to be treated, for the purposes of interpretation, like separate enactments.<sup>3</sup>

was used. If that can be done, no recourse is necessary to the other sections of the act.

**An Act and Its Amendment.**—An act and its supplement must be construed as one law, so that the terms of the act may in their connection with the supplement have a broader meaning than the original possessed. *Van Riper v. Essex Public Road Board*, 38 N. J. L. 23.

It is a rule, in construing statutes, that the original act and the amendment are to be viewed as one act, and that no portion of either is to be declared inoperative, if they can be made to stand together without wrestling the words from their appropriate meaning. *Harrell v. Harrell*, 8 Fla. 46; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235.

**Correcting Mistakes—Supplying Omissions.**—In *Blanchard v. Sprague*, 3 Sumn. (U. S.) 282, Story, J., said: "I agree that in construing an act of Congress if there be a plain mistake apparent upon the face of the act which may be corrected by other language in the act itself, the mistake is not fatal."

In *Brinsfield v. Carter*, 2 Ga. 143, it was held that the omission of the word "grant" in one section of a statute might be explained by other parts of the same statute so as to supply the omitted word and give the act its intended effect.

1. *Simonds v. Powers*, 28 Vt. 354; *Covington v. McNickle*, 18 B. Mon. (Ky.) 262; *Stockett v. Bird*, 18 Md. 484; *Electro-Magnetic, etc., Co. v. Van Auken*, 9 Colo. 204; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320; *Burke v. Monroe County*, 77 Ill. 610; *Mason v. Finch*, 3 Ill. 223; *Maple Lake v. Wright County*, 12 Minn. 403; *Cape v. Doherty*, 2 De G. & J. 614; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Colquhoun v. Brooks*, 14 App. Cas. 493; *Williams v. McDoual*, 4 Chand. (Wis.) 65.

In *Covington v. McNickle*, 18 B. Mon. (Ky.) 286, Duval, J., said: "A well-known rule for the construction of statutes which, though ancient, is always adhered to, is that general words in one clause of a statute may be

restrained by the particular words in a subsequent clause of the same statute."

2. *Ashley v. Harrington*, 1 D. Chip. (Vt.) 348; *Buckstaff v. Hanville*, 14 Wis. 77; *State v. Messmore*, 14 Wis. 115; *Smith v. Smith*, 19 Wis. 522; *Ex parte Ray*, 45 Ala. 15; *O'Neal v. Robinson*, 45 Ala. 526; *Nashville, etc., R. Co. v. Comans*, 45 Ala. 437; *Mobile, etc., R. Co. v. Malone*, 46 Ala. 391; *Bryant v. Livermore*, 20 Minn. 313; *Gallegos v. Pino*, 1 N. Mex. 410. See also *Bank of Louisiana v. Farrar*, 1 La. Ann. 54.

In *Gibbons v. Brittenum*, 56 Miss. 249, Chalmers, J., said: "Differences of time are to be disregarded in construing a code, if by disregarding them and by looking at the work as a whole harmony can thereby be produced; but if this proves impossible, if after exhausting every scheme of reconciliation there still remains a palpable and irrepressible conflict, we are compelled, in the absence of anything in itself indicative of the legislative will, to determine it by adopting its latest declaration."

3. *Cope v. Doherty*, 2 De G. & J. 622, where it was said per Turner, L. J., that the Merchant Shipping Act of 1854, which was divided into several parts, each of which related to a distinct and independent branch of merchantshipping law, was to be considered as embodying several distinct acts in one act, and that one part thereof threw no more light on other parts than would be cast on them by the existence of other separate enactments to the same effect.

The constitutions of most of the states prescribe that a statute shall not relate to more than one subject, and that this shall be expressed in the title. See *supra*, this title, *Titles and Subjects Under Constitutions*.

Where sections of statutes on the same subject, enacted originally at different times, are re-enacted by a revisory act, they are to be construed together, if possible, as continuous sections of the same act; and this principle should be applied in construing the

That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect.<sup>1</sup>

sections of the statute relating to service of process, where the sheriff is a party. *Gallegos v. Pino*, 1 N. Mex. 410.

1. *Sedgwick's Stat. Law* 199; *Powler's Case*, 11 Coke 29a, 32a; *Brooks v. Mobile School Com'rs*, 31 Ala. 227; *Wheat v. Smith*, 50 Ark. 266; *Wilson v. Biscoe*, 11 Ark. 44; *Little Rock, etc., R. Co. v. Howell*, 31 Ark. 119; *Hagenbuck v. Reed*, 3 Neb. 24; *State v. Babcock*, 21 Neb. 602; *McCann v. McLennan*, 2 Neb. 286; *People v. Burns*, 5 Mich. 114; *Attorney Gen'l v. Detroit, etc., Plank Road Co.*, 2 Mich. 138; *Swartwout v. Michigan, etc., R. Co.*, 24 Mich. 388; *Montesquieu v. Heil*, 4 La. 51; 23 Am. Dec. 471; *Montclair v. Ramsdell*, 107 U. S. 147; *Ogden v. Strong*, 2 Paine (U. S.) 584; *U. S. v. Warner*, 4 McLean (U. S.) 463; *James v. Dubois*, 16 N. J. L. 285; *Judd v. Driver*, 1 Kan. 455; *Wenger v. Taylor*, 39 Kan. 754; *San Diego v. Granniss*, 77 Cal. 511; *Rawson v. State*, 19 Conn. 292; *Sams v. King*, 18 Fla. 557; *Reg. v. West Riding*, 1 Q. B. 329; *Gaudet v. Brown*, L. R. 5 P. C. 134; *The Alina*, 5 P. D. 138; *Clementson v. Mason*, L. R., 10 C. P. 209; *Hawkins v. Filkins*, 24 Ark. 321; *In re New York, etc., Bridge*, 72 N. Y. 530; *Martin v. O'Brien*, 34 Miss. 21; *Root v. Sinnock*, 24 Ill. App. 537; *affirmed* 120 Ill. 350; 60 Am. Rep. 558; *Williams v. People*, 17 Ill. App. 274; *San Francisco v. Hazen*, 5 Cal. 169; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; *People v. King*, 28 Cal. 265; *Hutchen v. Niblo*, 4 Blackf. (Ind.) 148; *Hawthorn v. Randolph County* (Ind. App. 1892), 30 N. E. Rep. 17; *Stayton v. Hulings*, 7 Ind. 145; *Humphries v. Davies*, 100 Ind. 274; 50 Am. Rep. 788; *Green v. Cheek*, 5 Ind. 105; *State v. Casteel*, 110 Ind. 174; *Patterson v. Spearman*, 37 Iowa 42; *Leversee v. Reynolds*, 13 Iowa 310; *Knowles v. Pickett*, 46 Iowa 503; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312; 45 Am. & Eng. R. Cas. 391; *Com. v. Alger*, 7 Cush. (Mass.) 89; *Com. v. Jordan*, 18 Pick. (Mass.) 228; *Opinion of Justices*, 22 Pick. (Mass.) 571; *Coffin v. Hussey*, 12 Pick. (Mass.) 289; *Dearborn v. Brookline*, 97 Mass. 466; *Com. v. Bar-*

*ber*, 143 Mass. 560; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Gee v. Thompson*, 11 La. Ann. 657; *Torreyson v. Board of Examiners*, 7 Nev. 19; *State v. Babcock*, 21 Neb. 599; *Lacy v. Moore*, 6 Coldw. (Tenn.) 348.

An Iowa statute provided that "Actions of replevin and suits commenced by attachment may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein within the county." The court refused to hold that the jurisdiction of a justice was limited to the township in which the defendant resides, or in which the property sought to be attached may be found, saying: "To hold that the jurisdiction is limited to the township of defendant's residence, or where the property may be found, would involve the necessity of rejecting, as unmeaning and surplusage, a portion of the language of the statute. For certainly, as thus construed, the words, 'and justices shall have jurisdiction therein (that is, in such cases), within the county,' would be entirely without meaning. This is never allowed, if a construction can be legitimately found, which will give force to and preserve all the words of the statute."

"To adopt either of these definitions, would render the use of the word 'assessments' tautological, as the word following it, or as to the remainder of the section. But the rule in construing the statute requires that effect is to be given to every part, and we are not to suppose words have been used which are intended to import nothing." *Palmer v. Stumph*, 29 Ind. 333.

The words and meaning of one part of a statute may sometimes lead to and furnish an explanation of the sense of another; and it is a rule in the exposition of statutes, that one part should be taken with another, and the whole considered together, and so construed that no clause, sentence or word shall, if it can be avoided, be superfluous or insignificant. *Baltimore v. Howard*, 6 Har. & J. (Md.) 383.

All parts of a statute are to be considered together, keeping in view the

There is a *prima facie* presumption that the meaning of a word repeatedly used in a statute is identical in all places, unless there is something to show that there is another meaning intended.<sup>1</sup> This presumption, however, is never deemed conclusive, and indeed is generally considered of little weight.<sup>2</sup>

If, in any particular clause of an act, expressions or words are found not so extensive in their import as those used in other parts, and if, upon a view of the whole act, the real intention of the legislature can be gathered from the larger and more extensive expressions, courts will give effect to the larger expressions, and the particular words ordinarily used in a less extensive meaning must be extended to effectuate the real purpose.<sup>3</sup> Where there is an

subject-matter of legislation, in order to ascertain the legislative intent. Effect should be given to each clause when it can be done; but one clause may be enlarged or limited by other provisions upon the same subject. No construction of words is admissible which gives to them an absurd signification, if any other reasonable construction is possible. *San Diego v. Granniss*, 77 Cal. 511.

**Private Acts and Special Clauses.**—In construing an act of a private or local character, special clauses frequently embodied in it are to be treated as isolated and foreign to the rest of the act, and, contrary to the general rule, cannot be regarded as throwing any light on the construction of such act. *East London R. Co. v. Whitechurch*, L. R., 7 H. L. 89.

1. *Pitte v. Shipley*, 46 Cal. 161; *Courtauld v. Legh*, L. R., 4 Exch. 126; *Reg. v. Poor Law Com'rs*, 6 Ad. & El. 68; 33 E. C. L. 12; *In re Kirkstall Brewery Co.*, 5 Ch. Div. 535. Compare *Bones v. Booth*, 2 W. Bl. 1226; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *Den v. Schenck*, 8 N. J. L. 34; *James v. DuBois*, 16 N. J. L. 293; *Raymond v. Cleveland*, 42 Ohio St. 529. See *infra*, this title, *Presumptions, Use of Same Language*.

In *Rhodes v. Weldy*, 46 Ohio St. 242, it was said: "Where the same word or phrase is used more than once in the same act, especially in the same section and in the same sentence, in relation to the same subject-matter and looking to the same general purpose, it is a fundamental rule of statutory construction that if in one connection the meaning is clear and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former."

2. *Texas v. White*, 7 Wall. (U. S.) 700; *U. S. v. Palmer*, 3 Wheat. (U. S.) 631; *Feagin v. Comptroller*, 42 Ala. 610; *Reg. v. Kent*, 2 Q. B. 692; 42 E. C. L. 866; *Rex v. Lewis, Dears. & B.* 182; *Angell v. Angell*, 9 Q. B. 353; 58 E. C. L. 355; *Reg. v. Allen*, L. R., 1 C. C. 367; *Henry v. Cemetery Trustees*, 48 Ohio St. 671.

This is well illustrated by a passage from Vattel, which, though applied by that author to treaties, is said by Bishop (*Bishop's Stat. Cr.*, § 95a) to have equal force in statutory construction. "If," he says, "any one of those expressions which are susceptible of different significations occurs more than once in the same piece, we cannot make it a rule to take it everywhere in the same signification. For we must take such expression, in each article, according as the subject requires, *pro substrata materia*, as the masters of the art say. The word day, for instance, has two significations. If, therefore, it be said in a convention that there shall be a truce of fifty days, on condition that commissioners from both parties shall, during eight successive days, jointly endeavor to adjust the dispute, the fifty days of the truce are civil days of twenty-four hours; but it would be absurd to understand them in the same sense in the second article, and to pretend that the commissioners should labor eight days and nights without intermission." Vattel *Law of Nations*, b. 2, ch. 17, § 281.

*A fortiori*, if the same word is used in different connections and in different statutes, there is no rule of construction requiring the same meaning to be attached to it. *Rupp v. Swineford*, 40 Wis. 28.

3. *Reynolds v. Baldwin*, 1 La. Ann. 162; *State v. Wilson*, 3 Ill. 225; *Mason*

irreconcilable conflict between different parts of the same act, the last in order of position must control.<sup>1</sup>

*b. STATUTES IN PARI MATERIA.*—Statutes which are not inconsistent with one another and which relate to the same subject-matter, are *in pari materia*, and should be construed together and effect be given to them all, although they contain no reference to one another and were passed at different times.<sup>2</sup> Especially should effect be given, if possible, to statutes *in pari materia* enacted at

*v. Finch*, 3 Ill. 223; *Burke v. Monroe County*, 77 Ill. 610; *Torrance v. McDougald*, 12 Ga. 526; *State v. Jennings*, 27 Ark. 419; *Haghn v. Rogers*, 37 Ark. 495.

In *Burke v. Monroe County*, 77 Ill. 610, the language used in the first part of an act was "all incorporated towns and cities," while in another part the act used only the word "city," and the court held that even though the word "city" was not sufficiently comprehensive to embrace "incorporated towns," yet under this principle it could not be doubted that the larger and more extensive signification was intended.

1. *People v. Dobbins*, 73 Cal. 259; *Branagan v. Dulaney*, 8 Colo. 408; *Sams v. King*, 18 Fla. 557; *Quick v. White Water Tp.*, 7 Ind. 570; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 594; *Gibbons v. Brittenum*, 56 Miss. 232; *Ryan v. State*, 5 Neb. 282; *Alberston v. State*, 9 Neb. 429; *Harrington v. Rochester*, 10 Wend. (N. Y.) 553; *State v. Shelby County*, 36 Ohio St. 326; *Packer v. Sunbury, etc.*, R. Co., 19 Pa. St. 211; *Brown v. Philadelphia County*, 21 Pa. St. 42.

But "where the last clause of one section of the statute is plainly inconsistent with the first portion of the same section, and of another preceding section of the statute, and this section and part of section conform to the obvious policy and intent of the legislature, the last clause, if operative at all, must be so construed as to give it an effect consistent with the other section and part of section, and with the policy they indicate." *Sams v. King*, 18 Fla. 557.

In construing certain sections of the railroad tax law of *Kansas*, the court, in *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 594, by Brewer, J., said: "If there be no way of reconciling the conflicting clauses, force ought to be given to those which would place this law in harmony with the general tax law and secure the rights

of both the state and railroads rather than to those which would make this incongruous and out of harmony with other legislation, and would expose the railroads to arbitrary and excessive assessments without adequate means of investigation and redress."

2. *In Pari Materia.*—*Rex v. Loxdale*, 1 Burr. 44; *Anonymous*, Lofft 398; *Ailesbury v. Pattison*, 1 Dougl. 30; *Rex v. Palmer*, 1 Leach C. C. 352; *Doe v. Yarborough*, 7 Moore 258; 1 Bing. 24; 8 E. C. L. 384; *Murray v. Thorniley*, 2 C. B. 225; 52 E. C. L. 224; *Heelis v. Blain*, 18 C. B. N. S. 106; 114 E. C. L. 105; *Orme's Case*, L. R., 8 C. P. 281; *Hadfield's Case*, L. R., 8 C. P. 306; *Smith v. Brown*, L. R., 6 Q. B. 731; *Attorney Gen'l v. Brown*, 3 Exch. Div. 276; *Reg. v. Tonbridge*, 13 Q. B. Div. 342; *Pennington v. Cox*, 2 Cranch (U. S.) 33; *Alexander v. Alexandria*, 5 Cranch (U. S.) 7; *Doe v. Winn*, 11 Wheat. (U. S.) 386; *Pollard v. Kibbe*, 14 Pet. (U. S.) 366; *U. S. v. Freeman*, 3 How. (U. S.) 564; *Converse v. U. S.*, 21 How. (U. S.) 463; *U. S. v. Walker*, 22 How. (U. S.) 299; *U. S. v. Babbitt*, 1 Black (U. S.) 55; "The Distilled Spirits," 11 Wall. (U. S.) 356; *Reiche v. Smythe*, 13 Wall. (U. S.) 162; *Ryan v. Carter*, 93 U. S. 78; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *Chicago, etc., R. Co. v. U. S.*, 127 U. S. 406; *Vane v. Newcombe*, 132 U. S. 235; *Butler v. Russel*, 3 Cliff. (U. S.) 255; *The Elizabeth*, 1 Paine (U. S.) 11; *U. S. v. Collier*, 3 Blatchf. (U. S.) 333; *Black v. Scott*, 2 Brock. (U. S.) 329; *Dubois v. McLean*, 4 McLean (U. S.) 489; *Gordon v. South Fork Canal Co.*, 1 McAll. (U. S.) 517; *Le Roy v. Chabolla*, 2 Abb. (U. S.) 448; *U. S. v. Benson*, 31 Fed. Rep. 896; *Philbrook v. U. S.*, 8 Ct. of Cl. 523; *Act for Relief, etc.*, 2 Op. Atty. Gen'l 46; *Ex parte Ray*, 45 Ala. 15; *Crawford v. Tyson*, 46 Ala. 299; *Mobile, etc., R. Co. v. Malone*, 46 Ala. 391; *State v. Sloss*, 83 Ala. 93; *McFarland v. State Bank*, 4 Ark. 410;

- 37 Am. Dec. 761; *State v. Watts*, 23 Ark. 308; *Duncan v. Owens*, 47 Ark. 388; *Harley v. Heyl*, 2 Cal. 481; *Merrill v. Gorham*, 6 Cal. 41; *People v. Phoenix*, 6 Cal. 93; *Wilson v. Broder*, 10 Cal. 488; *People v. Wells*, 11 Cal. 329; *Lick v. Madden*, 25 Cal. 207; *People v. Jackson*, 30 Cal. 427; *People v. Broadway Wharf Co.*, 31 Cal. 34; *McMinn v. Bliss*, 31 Cal. 122; *McQuade v. Whaley*, 31 Cal. 526; *Robbins v. Omnibus R. Co.*, 32 Cal. 472; *Grant v. Cooke*, 7 D. C. 165; *U. S. v. Marble*, 2 Mackey (D. C.) 12; *Bryan v. Dennis*, 4 Fla. 445; *Mitchell v. Duncan*, 7 Fla. 13; *Spencer v. McBride*, 14 Fla. 403; *Doggett v. Walter*, 15 Fla. 367; *Ex parte O'Donovan*, 24 Fla. 281; *Ferrari v. Board of Health*, 24 Fla. 390; *Harrison v. Walker*, 1 Ga. 32; *McDougald v. Dougherty*, 14 Ga. 674; *Roff v. Johnson*, 40 Ga. 555; *Chandler v. Lee*, 1 Idaho 349; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Ottawa v. La Salle County*, 12 Ill. 341; *Turney v. Wilton*, 36 Ill. 393; *Fowler v. Perkins*, 77 Ill. 274; *Young v. Stearns*, 91 Ill. 221; *Holton v. Daly*, 106 Ill. 139; *People v. Hazelwood*, 116 Ill. 323; *Hunt v. Chicago, etc., R. Co.*, 121 Ill. 644; *Dunaway v. Goodall*, 3 Ill. App. 201; *State v. Rackley*, 2 Blackf. (Ind.) 249; *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *McMahon v. Cincinnati, etc., R. Co.*, 5 Ind. 413; *State v. Springfield Tp.*, 6 Ind. 83; *La Grange County v. Cutler*, 6 Ind. 354; *Indiana Cent. Canal Co. v. State*, 53 Ind. 583; *Hutts v. Hutts*, 62 Ind. 246; *Taylor v. Washington County*, 67 Ind. 384; *Wright v. Tipton County*, 82 Ind. 335; *Carver v. Smith*, 90 Ind. 227; 46 Am. Rep. 210; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97; *Stout v. Grant County*, 107 Ind. 343; *State v. Harrison*, 116 Ind. 300; *Lorimier v. Lewis*, 1 Morris (Iowa) 253; 39 Am. Dec. 461; *State v. Shaw*, 28 Iowa 67; *Davey v. Burlington, etc., R. Co.*, 31 Iowa 553; *State v. Sherman*, 46 Iowa 415; *Rhode v. Bank*, 52 Iowa 375; *Moriarty v. Central Iowa R. Co.*, 64 Iowa 700; *Central Iowa R. Co. v. Board of Supervisors*, 67 Iowa 199; *County Seat of Linn Co.*, 15 Kan. 500; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 594; *In re Hall*, 38 Kan. 670; *Louisville v. Com.*, 9 Dana (Ky.) 70; *Wallace v. Young*, 5 T. B. Mon. (Ky.) 157; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 550; 50 Am. Dec. 528; *Nazareth Literary, etc., Inst. v. Com.*, 14 B. Mon. (Ky.) 214; *Nunes v. Wellisch*, 12 Bush (Ky.) 363; *De Armas' Case*, 10 Martin (La.) 172; *Montesquieu v. Heil*, 4 La. 56; 23 Am. Dec. 471; *Gayle v. Williams*, 7 La. 162; *Rouanet v. Hunt*, 17 La. 407; *Gas Light, etc., Co. v. Nuttall*, 19 La. 451; *Phelps v. Rightor*, 9 Rob. (La.) 531; *Desban v. Pickett*, 16 La. Ann. 350; *Richardson v. Richardson*, 38 La. Ann. 641; *Merrill v. Crossman*, 68 Me. 412; *Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Baltzell v. Foss*, 1 Har. & J. (Md.) 504; *Kiersted v. State*, 1 Gill & J. (Md.) 231; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 152; *State v. Baltimore, etc., R. Co.*, 12 Gill & J. (Md.) 399; 38 Am. Dec. 319; *Dugan v. Gittings*, 3 Gill (Md.) 138; 43 Am. Dec. 306; *Ranoul v. Griffie*, 3 Md. 54; *State v. Mister*, 5 Md. 11; *Billingslea v. Baldwin*, 23 Md. 85; *Terry v. Foster*, 1 Mass. 150; 2 Am. Dec. 6; *Church v. Crocker*, 3 Mass. 21; *Holland v. Makepeace*, 8 Mass. 423; *Somerset v. Dighton*, 12 Mass. 385; *Com. v. Martin*, 17 Mass. 362; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 254; *Haynes v. Jenks*, 2 Pick. (Mass.) 176; *Mendon v. Worcester County*, 10 Pick. (Mass.) 244; *Com. v. Cambridge*, 20 Pick. (Mass.) 271; *Goddard v. Boston*, 20 Pick. (Mass.) 409; *Com. v. Sylvester*, 13 Allen (Mass.) 248; *Sibley v. Smith*, 2 Mich. 492; *Whipple v. Circuit Judge*, 26 Mich. 342; *Simpkins v. Ward*, 45 Mich. 559; *Bryant v. Livermore*, 20 Minn. 313; *Scott v. Searles*, 1 Smed. & M. (Miss.) 590; *Gilliam v. Moor*, 10 Smed. & M. (Miss.) 137; *State v. Dickinson*, 12 Smed. & M. (Miss.) 583; *White v. Johnson*, 23 Miss. 68; *House v. State*, 41 Miss. 737; *Eskridge v. McGruder*, 45 Miss. 294; *Clements v. Anderson*, 46 Miss. 581; *Gibbons v. Brittenum*, 56 Miss. 251; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 557; *State v. Bishop*, 41 Mo. 24; *St. Louis, etc., R. Co. v. Clark*, 54 Mo. 216; *In re Bomino's Estate*, 83 Mo. 441; *Peters v. Vawter*, 10 Mont. 210; *People v. Weston*, 3 Neb. 324; *White v. Blum*, 4 Neb. 561; *Hendrix v. Rieinan*, 6 Neb. 516; *State v. Babcock*, 21 Neb. 509; *State v. Donnelly*, 20 Nev. 216; *Hayes v. Hanson*, 12 N. H. 284; *Robinson v. Tuttle*, 37 N. H. 248; *Wakefield v. Phelps*, 37 N. H. 295; *State Bank v. Receivers' Bank*, 3 N. J. Eq. 270; *Wallace v. Wallace*, 3 N. J. Eq. 619; *People's Bank v. Paterson Sav. Bank*, 10 N. J. Eq. 17; *Clement v. Kaighn*, 15 N. J. Eq. 56; *Jersey v.*



Demarest, 27 N. J. Eq. 301; Barraccliff v. Griscom, 1 N. J. L. 224; Austin v. Nelson, 6 N. J. L. 383; White v. Hunt, 6 N. J. L. 417; Brown v. Wright, 13 N. J. L. 242; The Ordinary v. Smith, 14 N. J. L. 482; Perth Amboy v. Piscataway, 19 N. J. L. 180; Den v. Wade, 20 N. J. L. 293; Rudderow v. State, 31 N. J. L. 515; New Jersey Ins. Co. v. Meeker, 37 N. J. L. 304; Koch v. Vanderhoof, 49 N. J. L. 621; Gartner v. Cohen, 51 N. J. L. 125; Rogers v. Bradshaw, 20 Johns. (N. Y.) 744; Bowen v. Lease, 5 Hill (N. Y.) 225; McCartee v. New York City Orphan Asylum, 9 Cow. (N. Y.) 507; 18 Am. Dec. 516; People v. French, 51 Hun (N. Y.) 347; Kilbourne v. Sullivan County, 62 Hun (N. Y.) 217; Fort v. Burch, 6 Barb. (N. Y.) 69; Waterford, etc., Turnpike v. People, 9 Barb. (N. Y.) 161; Rexford v. Knight, 15 Barb. (N. Y.) 627; Perkins v. Perkins, 62 Barb. (N. Y.) 531; Powers v. Shepard, 48 N. Y. 540; Chase v. Lord, 77 N. Y. 18; People v. New York Cath. Protector, 106 N. Y. 614; *In re* Livingston, 121 N. Y. 104; Bowles v. Cochran, 93 N. Car. 398; Wortham v. Basket, 99 N. Car. 70; Dodge v. Gridley, 10 Ohio 173; Manuel v. Manuel, 13 Ohio St. 464; Jones v. Carr, 16 Ohio St. 428; Seeley v. Thomas, 31 Ohio St. 304; Malone v. Toledo, 34 Ohio St. 548; State v. Cincinnati R. Co., 37 Ohio St. 170; Lowden v. Cincinnati, 2 Disney (Ohio) 207; McLaughlin v. Hoover, 1 Oregon 31; Winter v. Norton, 1 Oregon 42; Pittsburgh, etc., R. Co's Appeal, 1 Penny. (Pa.) 449; Union Canal Co. v. O'Brien, 4 Rawle (Pa.) 358; Neeld's Road, 1 Pa. St. 355; Davis' Appeal, 34 Pa. St. 256; Black v. Tricker, 59 Pa. St. 13; Keeling's Road, 59 Pa. St. 358; The Howard Association's Appeal, 70 Pa. St. 344; Com. v. Potts, 79 Pa. St. 164; Bourguignon Bldg. Assoc. v. Com., 98 Pa. St. 64; Koontz v. Howsare, 100 Pa. St. 508; Chilcoat's Appeal, 101 Pa. St. 26; Linton's Appeal, 104 Pa. St. 239; Boyle v. Horner, 104 Pa. St. 379; Jacoby v. Shafer, 105 Pa. St. 614; Booz's Appeal, 109 Pa. St. 592; Keystone Bridge Co's. Appeal (Pa. 1887), 7 Atl. Rep. 580; Coleman v. Davidson Academy, Cooke (Tenn.) 261; Smith v. Hickman, Cooke (Tenn.) 338; Hart v. Reynolds, 1 Helsk. (Tenn.) 208; Graham v. Gunn, 87 Tenn. 458; Fowler v. Poor, Dall. (Tex.) 401; Neil v. Keese, 5 Tex. 23; 51 Am. Dec. 746; Bryan v. Sundberg, 5 Tex. 418; Cannon v. Vaughan, 12 Tex. 402; Scoby

v. Sweatt, 28 Tex. 727; Napier v. Hodges, 31 Tex. 295; Austin v. Gulf, etc., R. Co., 45 Tex. 234; Berry v. State, 10 Tex. App. 315; Henry v. Tilton, 17 Vt. 479; Isham v. Bennington Iron Co., 19 Vt. 230; Whitcomb v. Rood, 20 Vt. 49; Highgate v. State, 59 Vt. 46; Warder v. Arell, 2 Wash. (Va.) 282; 1 Am. Dec. 488; Davidson v. Carson, 1 Wash. Ter. 307; Forqueran v. Donnally, 7 W. Va. 114; Storm v. Cotzhausen, 38 Wis. 139.

It is the universal rule in the construction of statutes, and a settled maxim of the common law, that all acts passed on the same subject *in pari materia* must be construed together and made to stand if capable of being reconciled. There is no exception to the universality of this rule. *McFarland v. State Bank*, 4 Ark. 410; 37 Am. Dec. 761.

Several statutes relating to the same subject will be so interpreted, if possible, as to secure harmony in their application and perpetuate the general purpose of the legislation. *Wortham v. Basket*, 99 N. Car. 70.

In construing a statute regard must be had to other current legislation *in pari materia*, "and the whole should, if possible, be made to harmonize; and if the sense be doubtful, such construction should, if possible, be given as will not conflict with the general principles of law, which it may be presumed the legislature would not intend to disregard or change." *Manuel v. Manuel*, 13 Ohio St. 464.

However broad some of the expressions of a statute may be, yet if, on examination, it clearly appears that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly. *The Elizabeth*, 1 Paine (U. S.) 11.

**Illustrations.**—The revenue laws of the United States, though made up of independent enactments, are to be regarded as one system. *Pennington v. Cox*, 2 Cranch (U. S.) 33; *U. S. v. Collier*, 3 Blatchf. (U. S.) 333.

The various acts of congress on the subject of soldiers' bounty are *in pari materia*. *Philbrook v. U. S.*, 8 Ct. of Cl. 523.

Laws upon the subject of the public lands are *in pari materia*, and are to be construed together. An authority to an individual to make an entry of any of those lands is not to be considered an isolated act, to be strictly

the same legislative session.<sup>1</sup> So contemporaneous legislation,

expounded upon its own letter, but as having relation to the general system, and to be expounded according to the meaning of congress, which is to be collected from the language of the particular law as compared with the whole system, and from the reason and nature of the case. Act for Relief, etc., 2 Op. Atty. Gen'l 46.

The sections of the revised code of *Alabama* relating to railroads are to be construed as one law. *Mobile, etc., R. Co. v. Malone*, 46 Ala. 391.

Acts providing for the sale of infants' estates by the courts, an act extending the power of the courts to decree such sales, and an act prescribing the mode of proceeding on petition of guardians and next friends for the sale of infants' real estate, are *in pari materia*. *Bol-giano v. Cook*, 19 Md. 392; *Billingslea v. Baldwin*, 23 Md. 106.

A statute in relation to attachments against steamboats and other water craft is *in pari materia* with the general attachment law. *Wallace v. Seales*, 36 Miss. 53.

The sections of a code referring to the same subject-matter are to be construed as a single statute. *Mitchell v. Long*, 74 Ga. 96; *Stidhan v. Sims*, 74 Ga. 187; *State v. Boswell*, 104 Ind. 547; *Moriarty v. Central Iowa R. Co.*, 64 Iowa 700; *Burger v. Frakes*, 67 Iowa 467; *Hunt v. Farmers' Ins. Co.*, 67 Iowa 742; *Depas v. Riez*, 2 La. Ann. 30; *Childers v. Johnson*, 6 La. Ann. 638; *St. Joseph v. Porter*, 29 Mo. App. 605; *Gibbons v. Brittenum*, 56 Miss. 251; *Hunt v. Farmers' Ins. Co.*, 67 Iowa 742; *Roberts v. Briscoe*, 44 Ohio St. 600.

An act to provide for the completion of the fence around the capitol grounds and to appropriate money therefor, and which also enacts that all the work that can be done by convict labor on said fence shall be so done, is *in pari materia* with an act passed at the same session of the legislature providing for the lease of the state penitentiary and for the number of convicts the lessees are to furnish. *St. Louis, etc., R. Co. v. Clark*, 54 Mo. 216.

An act and its supplement are to be construed as one law. *Van Riper v. Essex Public Road*, 38 N. J. L. 23.

The several statutes relating to the jurisdiction and practice of district courts, though varying in their titles,

are *in pari materia*. *Gartner v. Cohen*, 51 N. J. L. 125.

In many instances a remedy provided by one statute will be extended to cases arising on the same subject-matter under a subsequent statute. *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 744.

An act passed in 1817 for the construction of the Erie Canal vested the fee of the lands taken for the purpose in the state. In 1819 another act was passed by which also lands were taken for the construction of the canal, but no provision as to title was made. It was held that the people took the same interest under the act of 1819 as they did under that of 1817. *Rexford v. Knight*, 15 Barb. (N. Y.) 627.

All recent *New York* statutes for the protection of married women in their estates are to be construed as one in their letter, spirit, and intent, precisely as if they were contained in one act. *Perkins v. Perkins*, 62 Barb. (N. Y.) 531.

An act of 1811 incorporating a canal company did not authorize the company to erect a dam across the whole channel of the Schuylkill river. A supplementary act of 1826 did authorize the erection of such a dam. It was held that these acts were *in pari materia* and that the remedy provided by the act of 1811 for injuries to property therein mentioned could be applied to obtain redress for such injuries as the erection of the dam might have produced directly and immediately to property, or as might have been, in all cases of the like kind, the inevitable consequences of its erection under the authority contained in the act of 1826. *Union Canal Co. v. O'Brien*, 4 Rawle (Pa.) 358.

A statute relating to garnishment in aid of an execution and that relating to garnishment in attachment suits are *in pari materia*. *Storm v. Cotzhausen*, 38 Wis. 139.

1. Where two statutes of the same day relate to the same thing, and one is more comprehensive than the other, effort will be made to give to one some operation not embraced in the other, so that each may, if possible, have some effect, that the legislation may not appear to have been vain and useless. *Nazareth Literary Inst. v. Com.*, 14 B. Mon. (Ky.) 214.

not precisely *in pari materia* with the statute to be construed, may be referred to on the question of intent.<sup>1</sup>

Not only may contemporaneous and prior statutes be considered in construing a given act, but a subsequent statute may often aid in the interpretation of a prior one.<sup>2</sup> Private acts conferring special privileges and the general acts on the same subject are also to be construed together and effect is to be given to both, if possible.<sup>3</sup>

Expired and repealed acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof.<sup>4</sup>

Acts passed at the same session of the legislature are to be taken *in pari materia* and receive a construction which will give effect to each, if possible; but as each cannot have the same effect entirely when taken in connection with the other as it would have if taken singly, they must be so construed as to carry into effect what appears to have been the main intention of the legislature. *State v. Rackley*, 2 Blackf. (Ind.) 250; *Florida, etc., R. Co. v. Pensacola, etc., R. Co.*, 10 Fla. 160.

Two statutes passed upon the same subject by the same legislature at the same session should be construed together and both allowed to stand, if possible. But where they are in irreconcilable conflict with each other, then the latter supersedes the former, notwithstanding that both were intended to take effect and go into operation at the same time. The latter must be regarded as the last expressed will of the legislature. *Wright v. Tipton County*, 82 Ind. 337.

1. *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16; *Middleton v. Greeson*, 106 Ind. 22; *Stout v. Grant County*, 107 Ind. 344; *Smith v. People*, 47 N. Y. 333; *In re Rochester Water Com'rs*, 66 N. Y. 422; *Chase v. Lord*, 77 N. Y. 18. See also *Vane v. Newcombe*, 132 U. S. 235.

2. *Clarke v. Powell*, 4 B. & Ad. 846; 24 E. C. L. 174; *Smith v. Lindo*, 4 C. B. N. S. 404; 93 E. C. L. 404; *Grill v. General Iron Screw Collier Co., L. R.*, 1 C. P. 611; *Rolle v. Whyte, L. R.*, 3 Q. B. 298; *Alexander v. Alexandria*, 5 Cranch (U. S.) 7; *U. S. v. Freeman*, 3 How. (U. S.) 564; *Cape Girardeau County Ct. v. Hill*, 118 U. S. 72; *Georgia Penitentiary Co. v. Nelms*, 65 Ga. 67; 38 Am. Dec. 793; *Com. v. Sylvester*, 13 Allen (Mass.) 247; *In re Livingston*, 121 N. Y. 104; *Moyer v. Gross*, 2 Pen. & W. (Pa.)

172; *Baer v. Baer*, 33 Pa. St. 530; *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208.

If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute (*Lord Raym.* 1028); and if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute. *U. S. v. Freeman*, 3 How. (U. S.) 564. See also *Cannon v. Vaughan*, 12 Tex. 402.

In interpreting a given statute, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the subsequent act should be incorporated into the act to be construed. *Alexander v. Alexandria*, 5 Cranch (U. S.) 7.

3. *McFarland v. State Bank*, 4 Ark. 410; 37 Am. Dec. 761; *People v. Wells*, 11 Cal. 333; *Maysville Turnpike Road Co. v. How*, 14 B. Mon. (Ky.) 342; *Crane v. Reeder*, 22 Mich. 322; *State v. Macon County Ct.*, 41 Mo. 460; *Auburn Com'rs of Excise v. Burtis*, 103 N. Y. 136; *Mt. Holly Co's Appeal*, 99 Pa. St. 513; *New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 105 Pa. St. 13.

4. *Rex v. Loxdale*, 1 Burr. 44; *Goldsmid v. Hampton*, 5 C. B. N. S. 94; 94 E. C. L. 93; *Ex parte Copeland*, 2 De G. M. & G. 914; *U. S. v. Bowen*, 100 U. S. 508; *Viterbo v. Friedlander*, 120 U. S. 707; *Ferrari v. Board of Health*, 24 Fla. 410; *Harrison v. Walker*, 1 Ga. 32; *Bruce v. Schuyler*, 9 Ill. 230; 46 Am. Dec. 447; *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16; *Middleton v. Greeson*, 106 Ind. 22; *Stout v. Grant County*, 107 Ind. 348; *State v. Harrison*, 116 Ind. 300;

So repealed clauses of a statute may be considered in construing the provisions that remain.<sup>1</sup> And only when a later act is clearly repugnant to a former one will the former one be deemed repealed by implication. Seeming repugnance is not sufficient, but the two acts will be construed as *in pari materia*, and effect be given to both, if possible.<sup>2</sup>

In construing a given act the meaning of words or terms as used therein may be gathered from the consideration of other acts *in pari materia* in which such words or terms were also used.<sup>3</sup>

Coffin v. Rich, 45 Me. 513; 71 Am. Dec. 550; Baltimore v. Howard, 6 Har. & J. (Md.) 383; State v. Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399; 38 Am. Dec. 319; Church v. Crocker, 3 Mass. 21; Eaton v. Green, 22 Pick. (Mass.) 532; Medbury v. Watson, 6 Met. (Mass.) 246; 39 Am. Dec. 726; Holbrook v. Bliss, 9 Allen (Mass.) 75; Com. v. Bailey, 13 Allen (Mass.) 545; Hamilton v. Boston, 14 Allen (Mass.) 478; Ham v. Boston Police Board, 142 Mass. 94; Grand Gulf Bank v. Archer, 8 Smed. & M. (Miss.) 151; Wakefield v. Phelps, 37 N. H. 304; Daniels v. Com., 7 Pa. St. 373; Coleman v. Davidson Academy, Cooke (Tenn.) 261; Steadman v. Merchants', etc., Bank, 69 Tex. 53; Forqueran v. Donnally, 7 W. Va. 114; Kollock v. Madison (Wis. 1893), 54 N. W. Rep. 725; Flanders v. Merrimack, 48 Wis. 567.

1. Attorney Gen'l v. Lamplough, 3 Exch. Div. 227; Banks for Savings v. Field, 3 Wall. (U. S.) 495; *Ex parte* Crow Dog, 109 U. S. 556. Analogous to this rule is the principle of Com. v. Potts, 79 Pa. St. 164, in which it was held that where a section of a statute contains an unconstitutional provision, such provision cannot be stricken out in construing the section.

2. Chicago, etc., R. Co. v. U. S., 127 U. S. 406; U. S. v. One Hundred Barrels of Spirits, 2 Abb. (U. S.) 505; Wyman v. Campbell, 6 Port. (Ala.) 219; 31 Am. Dec. 677; Riggs v. Brewer, 64 Ala. 285; Merrill v. Gorham, 6 Cal. 43; Mitchell v. Duncan, 7 Fla. 18; Ottawa v. La Salle Co., 12 Ill. 341; Hunt v. Chicago, etc., Ry., 121 Ill. 638; La Grange County v. Cutler, 6 Ind. 354; Rhode v. Bank, 52 Iowa 376; De Armas' Case, 10 Martin (La.) 172; Gayle v. Williams, 7 La. 166; Hebert's Succession, 5 La. Ann. 122; Desban v. Pickett, 16 La. Ann. 351; Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 152; Dugan v.

Gittings, 3 Gill (Md.) 154; 43 Am. Dec. 306; Goddard v. Boston, 20 Pick. (Mass.) 410; Com. v. Kimball, 21 Pick. (Mass.) 377; 35 Am. Dec. 326; White v. Johnson, 23 Miss. 74; M'Cartee v. New York City Orphan Asylum, 9 Cow. (N. Y.) 437; 18 Am. Dec. 516; Bowen v. Lease, 5 Hill (N. Y.) 225; Smith v. Hickman, Cooke (Tenn.) 338; Napier v. Hodges, 31 Tex. 295; Lewis v. Aylott, 45 Tex. 199; Laughter v. Seela, 59 Tex. 177; Forqueran v. Donnally, 7 W. Va. 114.

Where two laws only so far disagree or differ as that by any other construction they may both stand together, the rule that *leges posteriores, priores contrarias abrogant* does not apply, and the latter is no repeal of the former. Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 152.

A later statute on a given subject not repealing an earlier one in terms is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject-matter. Goddard v. Boston, 20 Pick. (Mass.) 410; Dugan v. Gittings, 3 Gill (Md.) 154; 43 Am. Dec. 306; Gayle v. Williams, 7 La. 166.

In Chicago, etc., R. Co. v. U. S., 127 U. S. 406, the court, by Field J., said, that where there are two acts or provisions of law relating to the same subject, effect is to be given to both if that be practicable; if the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one or omit others or add new provisions. In such cases the latter act will operate as a repeal only where it plainly appears that it is intended as a substitute for the first act.

3. Where two acts of congress are *in pari materia*, it will be presumed, in the absence of anything to show a

The foregoing rules of construction are applicable also to penal statutes.<sup>1</sup> So in construing codifications, revisions, or re-enactments in which the language is doubtful or ambiguous, former statutes therein embodied are to be considered.<sup>2</sup>

Where a statute is *in pari materia* with a prior one which has already received an equitable construction, that construction is extended to the later one.<sup>3</sup>

The rule of construction that statutes *in pari materia* are to

contrary intent, that if the same word be used in both and a special meaning be given to it in the first act, it was intended that it should receive the same interpretation in the later act. *Reiche v. Smythe*, 13 Wall. (U. S.) 162.

Where two acts are *in pari materia* a word used in a certain sense in the first act will be presumed to have been used in the same sense in the subsequent one, unless there be something in the context or the nature of things to indicate that a different meaning was intended. *County Seat of Linn County*, 15 Kan. 500. See also *Robbins v. Omnibus R. Co.*, 32 Cal. 472; *Mickle v. Matlack*, 17 N. J. L. 93; *State v. Garthwaite*, 23 N. J. L. 143.

A subsequent statute containing a reference to a former one may be looked to in order to ascertain the meaning of terms used in the former one, even in their application to acts done between the dates of the statutes. *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208.

When terms or modes of expression are employed in a new statute which had acquired a definite meaning and application in a previous statute on the same subject, or one analogous to it, they are generally supposed to be used in the same sense, and in settling the construction of such new statute regard should be had to the known and established interpretation of the old. *Whitcomb v. Rood*, 20 Vt. 49.

1. *The Harriet*, 1 Story (U. S.) 251; *Morrison v. State*, 40 Ark. 448; *State v. Sewall*, 45 Ark. 391; *Kollenberger v. People*, 9 Colo. 233; *State v. Boswell*, 14 Ind. 547; *State v. Wells*, 112 Ind. 217; *Harriman v. State*, 2 Greene (Iowa) 274; *State v. Smith*, 7 Iowa 244; *Com. v. English*, 2 Bibb (Ky.) 81; *Green v. Com.*, 12 Allen (Mass.) 166; *Com. v. Bailey*, 13 Allen (Mass.) 545; *Com. v. Griffin*, 105 Mass. 187; *House v. State*, 41 Miss. 746; *State v. Garthwaite*, 23 N. J. L. 143; *Smith v. People*, 47 N. Y. 330; *State v. Bell*, 3 Ired. (N. Car.) 508; *Daniels v. Com.*,

7 Pa. St. 373; *State v. Wilbor*, 1 R. I. 204; 36 Am. Dec. 245; *State v. Baldwin*, 2 Bailey (S. Car.) 541; *State v. Fields*, 2 Bailey (S. Car.) 554; *State v. Mooty*, 3 Hill (S. Car.) 499; *State v. Williams*, 13 S. Car. 558; *Cain v. State*, 20 Tex. 362; *Taylor v. State*, 3 Tex. App. 169.

2. In the interpretation of a code the former statutes embodied in such code may be resorted to. *Bank for Savings v. Field*, 3 Wall. (U. S.) 495; *Baldwin v. Franks*, 120 U. S. 678; *Viterbo v. Friedlander*, 120 U. S. 707; *Nicholson v. Mobile, etc., R. Co.*, 49 Ala. 205; *Gunter v. State*, 83 Ala. 96; *Desban v. Pickett*, 16 La. Ann. 351.

When it becomes necessary to construe language so used in the Revised Statutes of the *United States* as to leave a substantial doubt as to its meaning, the original enactment may be resorted to for the purpose of ascertaining that meaning. *U. S. v. Bowen*, 100 U. S. 508; *Meyer v. Western Car Co.*, 102 U. S. 1; *Victor v. Arthur*, 104 U. S. 498; *U. S. v. Lacher*, 134 U. S. 624; *State v. Brewster*, 44 Ohio St. 252; *Heck v. State*, 44 Ohio St. 537. See also *U. S. v. Butterworth*, 3 Mackey (D. C.) 229; *In re Spencer, McA. & M.* (D. C.) 433.

Sections of a statute re enacted in the Revised Statutes of the *United States* are to be given the same meaning which they had in the original, unless the contrary intention is clearly manifested. *U. S. v. Le Bris*, 121 U. S. 278.

Where the law as expressed in a section of the public statutes of *Massachusetts* is ambiguous or doubtful, it is then most proper to examine the statutes of which it is a revision. *Pratt v. Boston Street Com'rs*, 139 Mass. 563.

3. *Vernon's Case*, 4 Rep. 4; *Sturgis v. Darrell*, 4 H. & N. 622; *Hersha v. Brennenman*, 6 S. & R. (Pa.) 2; *Eshleman's Appeal*, 74 Pa. St. 42. But see *Adam v. Bristol*, 2 Ad. & El. 389; 29 E. C. L. 125.

be treated as one law is not absolute, and is not to be resorted to where the obvious intent of the legislature would thereby be defeated, either by a strained reconciliation of such statutes or by regarding statutes as *in pari materia* which are not really so.<sup>1</sup>

1. In *United Society v. Eagle Bank*, 7 Conn. 469, it was said: "Statutes are *in pari materia* which relate to the same person or thing or to the same class of persons or things. The word *par* must not be confounded with the term *similis*. It is used in opposition to it, as in the expression. *Magis pares sunt quam similis*, intimating, not likeness merely, but identity. It is a phrase applicable to the public statutes or general laws made at different times and in reference to the same subject." See also *O'Neal v. Robertson*, 45 Ala. 535; *Waterford, etc., Turnpike v. People*, 9 Barb. (N. Y.) 169; *Highgate v. State*, 59 Vt. 46.

In *Ex parte Blaiberg*, 23 Ch. Div. 258, *Jessel, M. R.*, said that if an act can clearly have one meaning, effect ought to be given to it accordingly; since the consideration of other acts and decisions thereon may often lead to a conclusion directly contrary to the act to be construed.

The doctrine that statutes *in pari materia* are to be taken together and construed as one act is resorted to in cases of doubt and is never applicable where a statute is plain and unambiguous. *State v. Cram*, 16 Wis. 347. See, however, *McFarland v. State Bank*, 4 Ark. 416; 37 Am. Dec. 761; and *Robinson v. Tuttle*, 37 N. H. 248, where it was held that in order to ascertain the meaning of any particular section, even when the words were unambiguous, it was proper to consider other laws relating to the same subject-matter.

"It is true that statutes relating to the same subject are to be construed together, but this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous ones." *Goodrich v. Russell*, 42 N. Y. 184.

Where the words of the statute to be construed differ from the words of a former act on the same subject, it is an intimation that they are to have a different and not the same construction. *Rich v. Keyser*, 54 Pa. St. 89; *Lehman v. Robinson*, 59 Ala. 235.

"While it is true that a construction which repeals former statutes by implication is not to be favored, and it is also true that statutes *in pari materia*

and relating to the same subject, are to be taken and considered together. still when the new statute in itself comprehends the whole subject and creates a new, entire, and independent system respecting the subject-matter, it is universally held to repeal and supersede all previous systems of laws respecting the same subject-matter." *Harold v. State*, 16 Tex. App. 157. See also *Stirman v. State*, 21 Tex. 734.

The case most hostile to the construction of one statute by a resort to others *in pari materia* is *U. S. v. The Penelope*, 2 Pet. Adm. 448, in which it was held to be dangerous and unnecessary for courts to decide on a number of acts said to be *in pari materia* when a question arises only on a construction of one.

**Illustrations.**—The Statute of Frauds is not *in pari materia* with the bankrupt acts, and shares in a joint-stock banking company are not "goods" within § 17 of the Statute of Frauds. *Humble v. Mitchell*, 11 Ad. & El. 205; 39 E. C. L. 46.

A bicycle, though a carriage within the enactment against furious driving, is not a carriage within a local turnpike act imposing tolls. *Williams v. Ellis*, 5 Q. B. Div. 175.

Legislation in relation to the confinement of stock so as to prevent its running on the premises of others is not *in pari materia* with the sections of the *Alabama Code* that lay down the rule of diligence to be observed by railroads in the running of their trains, and that define their liabilities in cases where stock is killed. *Central R. Co. v. Hamilton*, 71 Ga. 465.

A statute expressed as amending a former statute so as "to read as follows," and containing a clause repealing all laws and parts of laws in conflict therewith, is not to be construed as *in pari materia* with the displaced legislation, but independently. *Cortesy v. Territory* (N. Mex. 1892), 32 Pac. Rep. 504.

So "private acts of the legislature conferring distinct rights on different individuals, which never can be considered as one statute or the parts of a general system, are not to be interpreted by mutual reference to each

As a general rule private acts cannot be considered as *in pari materia*. Nor may an act wherein the legislature seeks to construe a former statute be considered *in pari materia* therewith, as the opinion of a legislature as to the meaning of a prior statute is entitled to little weight.<sup>1</sup>

c. PURPOSE AND OBJECT.—It is a canon of interpretation that the legislative purpose and the object aimed at are to be borne in mind, and that language susceptible of more than one construction is to receive that which will bring it into harmony with such object and purpose rather than that which will tend to defeat it.<sup>2</sup>

other." *United Society v. Eagle Bank*, 7 Conn. 469, and in this case it was held that the charters of various banks were not *in pari materia*.

In the exposition of a private statute conferring special privileges or imposing particular obligations, it is not proper to resort to the language of any other private act not relating to the same parties and the same subject-matter; such private statute standing upon the same basis with contracts by deed, which are not to be affected by evidence *aliunde*. *Thomas v. Mahan*, 4 Me. 513.

When the legislature has granted special privileges at different sessions to two independent corporations, the court will not so construe any general expressions of the last grant as to effect a destruction of the first. *New Haven v. New Haven Water Co.*, 44 Conn. 105.

Where two statutes are passed, each authorizing the erection of a boom, they must be interpreted separately, though both booms become the property of one company; and an act consolidating the two boom companies, will not change the liability of either under its act of incorporation to deliver logs at its own boom—the boom in which they were caught. *Gould v. Langdon*, 43 Pa. St. 365. But see *Levering v. Philadelphia, etc., R. Co.*, 8 W. & S. (Pa.) 459, where, in the construction of a certain provision in a railroad charter, the charters of other railroad companies were considered. See also *Covington v. McNickle*, 18 B. Mon. (Ky.) 286.

1. *Bingham v. Winona County*, 8 Minn. 441. In *Dash v. Van Vleeck*, 7 Johns. (N. Y.) 508; 5 Am. Dec. 291, the court, by Kent, C. J., said that it was beyond the power of the legislature to take cognizance of judicial questions by enacting statutes wherein

a construction of former acts is attempted.

Statutes are to be construed according to their plain import without regard to mere inferences which may be drawn from the language of an act passed by a subsequent legislature. *Ingalls v. Cole*, 47 Me. 530.

The intention of one legislature in the use and application of a term in an act passed by it, is not conclusive as to the intention of another and different legislative body in the use of the term in the passage of another and different act. True, it is proper to look at such a circumstance in arriving at a correct interpretation of the subsequent law, still that interpretation must be such as is demanded by the terms of the act itself, if they are clear and unambiguous. *Feagin v. Comptroller*, 42 Ala. 522. See also *supra*, this title, *Legislative Construction*.

2. **Purpose and Object.**—*Sedgw.* on St., p. 359; *Wiltshire v. Willett*, 11 C. B. N. S. 240; *Reg. v. Edmundson*, 2 El. & El. 77; 105 E. C. L. 75; 103 E. C. L. 239; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; *Blakeney v. Blakeney*, 6 Port. (Ala.) 109; 30 Am. Dec. 574; *Horton v. Mobile School Com'rs*, 43 Ala. 604; *People v. Dana*, 22 Cal. 11; *Sherman v. Buick*, 32 Cal. 241; 91 Am. Dec. 577; *Helm v. Chapman*, 66 Cal. 291; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655; *Lake v. Caddo Parish*, 37 La. Ann. 788; *Barnard v. Gall*, 43 La. Ann. 959; *State v. Judge*, 12 La. Ann. 777; *Commercial Bank v. Foster*, 5 La. Ann. 516; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97; *Taylor v. Washington County*, 67 Ind. 383; *Krug v. Davis*, 87 Ind. 590; *Hawthorn v. Randolph County* (Ind. App. 1892), 30 N. E. Rep. 16; *Humph-*

- ries *v.* Davis, 100 Ind. 274; 50 Am. Rep. 788; Green *v.* State, 59 Md. 130; 43 Am. Rep. 542; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Winslow *v.* Kimball, 25 Me. 495; Opinion of Justices, 7 Mass. 523; Com. *v.* Kimball, 24 Pick. (Mass.) 370; 35 Am. Dec. 326; McIntyre *v.* Ingraham, 35 Miss. 25; New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 19; Ingraham *v.* Speed, 30 Miss. 413; Power *v.* Choteau County, 7 Mont. 82; Ruggles *v.* Washington County, 3 Mo. 496; St. Louis *v.* Lane, 110 Mo. 254; Jones *v.* Water Com'rs, 34 Mich. 273; Whipple *v.* Circuit Judge, 26 Mich. 341; Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26; Harrison *v.* Com., 83 Ky. 162; State *v.* Patterson, 35 N. J. L. 196; People *v.* Com'rs of Taxes, 95 N. Y. 558; People *v.* Weston, 3 Neb. 312; Keith *v.* Quinney, 1 Oregon 364; Erwin *v.* Moore, 15 Ga. 361; Clark *v.* Janesville, 10 Wis. 119; Simonds *v.* Powers, 28 Vt. 354; Catlin *v.* Hull, 21 Vt. 152; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46; Binney *v.* Chesapeake, etc., Canal Co., 8 Pet. (U. S.) 201; The Emily, 9 Wheat. (U. S.) 381; Lau Ow Bew *v.* U. S., 144 U. S. 59; Brewer *v.* Blougher, 14 Pet. (U. S.) 198; Brown *v.* Barry, 3 Dall. (U. S.) 365; U. S. *v.* Freeman, 3 How. (U. S.) 503; Leppitt *v.* Huston, 8 R. I. 415; 94 Am. Dec. 115; Reniger *v.* Foygasser, Plowd. 18; Rex *v.* Younger, 5 T. R. 449; Margate Pier Co. *v.* Hanham, 3 B. & Ald. 266; 5 E. C. L. 278; Edwards *v.* Dick, 4 B. & Ald. 210; 6 E. C. L. 455; Commercial Bank *v.* Foster, 5 La Ann. 517; New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17; Ryegate *v.* Wardsboro, 30 Vt. 746; Riddick *v.* Governor, 1 Mo. 147; Whitney *v.* Whitney, 14 Mass. 92; Reynolds *v.* Holland, 35 Ark. 56; Kennedy *v.* Kennedy, 2 Ala. 573; Thompson *v.* State, 20 Ala. 54; Sprowl *v.* Lawrence, 33 Ala. 674; Smith *v.* Randall, 6 Cal. 47; 65 Am. Dec. 475; *Ex parte* Ellis, 11 Cal. 222; People *v.* Dana, 22 Cal. 11; George *v.* Board of Education, 33 Ga. 344; People *v.* Blackwelder, 21 Ill. App. 254; State *v.* Poydras, 9 La. Ann. 165; New England Car Spring Co. *v.* Baltimore, etc., R. Co., 11 Md. 90; 69 Am. Dec. 181; Frazier *v.* Warfield, 13 Md. 279; Johnson *v.* Heald, 33 Md. 372; Gray *v.* Cumberland County, 83 Me. 429; 1 Kent's Com. 462; Bac. Ab. 1, 5; Caledonian R. Co. *v.* North British R. Co., 6 App. Cas. 122; Freme *v.* Clement, 44 L. T., N. S. 399; *Ex parte* Walton, 17 Ch. Div. 746; Hotham *v.* Sutton, 15 Ves. 320; Mitchell *v.* Mitchell, 5 Madd. 72; Dwarris on Statutes 690; Wilkinson *v.* Leland, 2 Pet. (U. S.) 662; Denn *v.* Reed, 10 Pet. (U. S.) 524; U. S. *v.* Bassett, 2 Story (U. S.) 399; Milburn *v.* State, 1 Md. 17; Clare *v.* State, 68 Ind. 25; State *v.* Tucker, 46 Ind. 355; Evansville *v.* Summers, 108 Ind. 189; Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293; Eshleman's Appeal, 74 Pa. St. 46; Hayden *v.* Foster, 13 Pick. (Mass.) 496; Pearce *v.* Atwood, 13 Mass. 343; State *v.* Canton, 43 Mo. 48; Burch *v.* Newbury, 10 N. Y. 389; People *v.* New York Cent. R. Co., 13 N. Y. 98; Oswego Starch Factory *v.* Dolloway, 21 N. Y. 461; Donaldson *v.* Wood, 22 Wend. (N. Y.) 397; Crocker *v.* Crane, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228; Watervliet Turnpike Co. *v.* M'Kean, 6 Hill (N. Y.) 619; Bell *v.* New York, 105 N. Y. 139; Eyston *v.* Studd. Plowd. 459, 465; Somerset *v.* Dighton, 12 Mass. 383; State *v.* King, 44 Mo. 283; Allen *v.* Parish, 3 Ohio 198; Simonds *v.* Powers, 28 Vt. 354; Whitney *v.* Whitney, 14 Mass. 88; Learned *v.* Corley, 43 Miss. 696; St. Louis *v.* Lane, 110 Mo. 254; Laurence *v.* Conner (Ky. 1890), 14 S. W. Rep. 77; Columbus Southern R. Co. *v.* Wright, 89 Ga. 574; Simonds *v.* Powers, 28 Vt. 354; Carolina Sav. Bank *v.* Evans, 28 S. Car. 521; Vermont L. & T. Co. *v.* Whitted, 2 N. Dak. 82; Wassel *v.* Tunnah, 25 Ark. 102; Berry *v.* Clary, 77 Me. 484; Com. *v.* Montrose, 52 Pa. St. 391; Jackson *v.* Collins, 3 Cow. (N. Y.) 89; Beall *v.* Harwood, 2 Har. & J. (Md.) 167; 3 Am. Dec. 532; Riggs *v.* Palmer, 26 N. Y. St. Rep. 198; Greensburg *v.* Laird, 8 Pa. Co. Ct. Rep. 608.
- In Spencer *v.* State, 5 Ind. 41, Stuart, J., said: "In statutory exposition, the reason, the spirit of the law, is above the mere cavil about words."
- In People *v.* Lacombe, 99 N. Y. 43, it was said: "A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute it is within the statute, although by a technical construction it is not within its letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even al-



But, to justify a departure from the literal meaning of words, the intention must appear with reasonable certainty;<sup>1</sup> for, where the words plainly express the intent, the construction must be in accordance therewith.<sup>2</sup>

Language, though apparently general, may be limited in its operation and effect where it may be gathered from the object and purpose of the statute that the language was designed to apply only to certain persons or things, or was to operate only under certain conditions;<sup>3</sup> and the intention thus to limit the effect of

though such construction is contrary to the literal meaning of some provisions of the statute." And in *Com. v. Kimball*, 24 Pick. (Mass.) 370; 35 Am. Dec. 326, Shaw, C. J., said: "It is unquestionably a well settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute."

In *Taylor v. Goodwin*, 4 Q. B. Div. 228, it was held that "furiously driving any sort of carriage" applied to a bicycle; for it was the object of the act to prevent injury from the furious driving of any kind of vehicle.

The charter of a cemetery provided its property should be exempt from taxes so long as it should be used for the purpose of the corporation. This was held not to apply to a tax levied for paving a street in front of the property, the purpose of the statute being merely to exempt it from taxes imposed for revenue. *Baltimore v. Greenmount Cemetery*, 7 Md. 517.

1. *Hawbecker v. Hawbecker*, 43 Md. 516; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248; *Napier v. Foster*, 80 Ala. 379; *State v. Boyd*, 2 Gill & J. (Md.) 366; *Bidwell v. Whitaker*, 1 Mich. 469; *Barstow v. Smith*, Walk. (Mich.) 394; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17; *Bradbury v. Wagenhorst*, 54 Pa. St. 180; *Goodno v. Oshkosh*, 31 Wis. 130; *Rich v. Keyser*, 54 Pa. St. 86. See *supra*, this title, *Literal Construction*.

2. *Rex v. Ramsgate*, 6 B. & C. 712; 13 E. C. L. 302; *Rex v. Turvey*, 2 B. & Ad. 522; *Notley v. Buck*, 8 B. & C. 164; 15 E. C. L. 178; *Hawbecker v. Hawbecker*, 43 Md. 516; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17.

In *Rex v. Borhom*, 8 B. & C. 104, Lord Tenterden said: "Our decision

may perhaps operate to defeat the object of the statute, but it is better to abide by this construction than to put upon it a construction not warranted by the words of the act, in order to give effect to what we suppose to be the intention of the legislature."

Where the object of the legislature is plain and unequivocal, courts ought to adopt such constructions as will best effectuate the intention of the law-giver. But they must not, in order to give effect to what they may suppose to be the intention of the legislature, put upon a provision of a statute a construction not supported by the words, though the consequence would be to defeat the object of the act. *Rex v. York Damerel*, 7 B. & C. 569; 14 E. C. L. 99.

3. *Jones v. Jones*, 18 Me. 308; 36 Am. Dec. 723; *Torrance v. McDougal*, 12 Ga. 526; *Stradling v. Morgan*, Plowd. 204; *Cope v. Doherty*, 2 De G. & J. 614; *Minet v. Leman*, 20 Beav. 278; *Waugh v. Middleton*, 8 Exch. 357; *Hills v. Shepherd*, 1 F. & F. 191; *Robinson v. Collingwood*, 34 L. J. C. P. 18; *Jefferys v. Boosey*, 4 H. L. 815; *Hill v. East & West India Dock Co.*, 22 Ch. Div. 14; 9 App. Cas. 453; *Railton v. Wood*, 15 App. Cas. 366; *Brewer v. Blougher*, 14 Pet. (U. S.) 198; *Covington v. McNickle*, 18 B. Mon. (Ky.) 286; *Stockett v. Bird*, 18 Md. 484.

If the purpose of the act plainly be to affect only a particular class of persons, the generality of the language will not have the effect of including a single individual not belonging to that class. *U. S. v. Saunders*, 22 Wall. (U. S.) 492.

The act known as The Friendly Societies Act, provided that "every matter in dispute" between a society and any of its members should be referred to arbitration. The law was held to be confined in its operation to disputes with members as such; and a breach of covenant by a member to repay a

the language used may be gathered from particular expressions in other parts of the statute and from a general view of the scope of the statute.<sup>1</sup> But, if the object and purpose of the statute as well as the language used indicate that the language should receive its natural and more extended meaning, this it should receive.<sup>2</sup>

*d. SUBJECT-MATTER—(1) In General.*—The words of a statute are to be construed with reference to the subject-matter of the enactment and to the object sought to be attained. Their meaning is to be found not so much in the strict etymological propriety of language, nor even in its popular use, as in the subject or occasion on which they are used.<sup>3</sup> In conformity with the rule that the meaning of words is to be adapted to the particular subject-matter in reference to which they are used, general

sum borrowed from the society, was held not to fall within the arbitration clause, as the dispute was with a member as debtor, not as member. *Morrison v. Grover*, 4 Exch. 430; *Prentice v. London, L. R.*, 10 C. P. 679.

1. *Fredrichs v. Howie*, 1 H. & C. 381; *Reg. v. Midland R. Co.*, 10 Q. B. 389; *Foster v. Blount*, 18 Ala. 687; *Stockett v. Bird*, 18 Md. 484; *Covington v. McNickle*, 18 B. Mon. (Ky.) 262; *Woodworth v. State*, 26 Ohio St. 196. See also *Long v. Culp*, 14 Kan. 412; *Electro-Magnetic, etc., Co. v. Van Auker*, 9 Colo. 204.

2. *Whitney v. Whitney*, 14 Mass. 92; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 380; *Scott v. Legg*, 2 Ex. Div. 42; *Rex v. Hodnett*, 1 T. R. 96; *Burke v. Monroe County*, 77 Ill. 614; *Milburn v. State*, 1 Md. 17; *Maxwell v. Collins*, 8 Ind. 39; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 152; *Shumate v. Williams*, 34 Ga. 251; *Henderson v. Alexander*, 2 Ga. 88; *Booth v. Williams*, 2 Ga. 255; *Ragland v. Justices*, 10 Ga. 71; *Sprowl v. Lawrence*, 33 Ala. 674.

Acts which gave a "single woman" who had a bastard child the right to sue the putative father for its maintenance, have been held to include in that expression not only a widow but a married woman living apart from her husband. *Antony v. Cardenham*, 2 Bott. 194; *Reg. v. Wymcondham*, 2 Q. B. 541; 42 E. C. L. 798; *Reg. v. Collingwood*, 13 Q. B. 681; 64 E. C. L. 680.

An act which required a railway company to make, for the accommodation of the owners and occupiers of the adjacent lands, sufficient fences for protecting the lands from trespass and the cattle of owners and occupiers from straying, was held to include in the

term "occupier" a person who had merely put his cattle on land with the license of the occupier. *Reg. v. Warwick*, 8 Q. B. 926; 55 E. C. L. 926.

A statute provided a punishment for any person, who, in the night, should willfully disturb any "neighborhood or family." It was held that under this statute an indictment could lie for disturbing a woman occupying a dwelling house alone. *Noe v. People*, 39 Ill. 96.

An act which prohibited the carrying of concealed weapons, provided that "carrying concealed weapons shall be lawful when the person has reasonable ground to believe his person or the person of some of his family, or his property, is in immediate danger from violence or crime." In *Bailey v. Com.*, 11 Bush (Ky.) 688, the court held that the carrying was authorized whenever and wherever a person had reasonable grounds to believe that he would encounter the person from whom he apprehended that he would receive injury, and that the word "immediate" was not intended to be confined to its limited construction.

3. Per Abbott, C. J., in *Rex v. Hall*, 1 B. & C. 136; 8 E. C. L. 59; *Reg. v. Collingwood*, 12 Q. B. 686; 64 E. C. L. 680; *Miller v. Salomons*, 7 Exch. 475; *House of Lords*, 3 Bing. 193; 11 E. C. L. 93; *River Wear Comrs v. Adamson*, 2 App. Cas. 743; *Jolliffe v. Rice*, 6 C. B. 1; 60 E. C. L. 1; *Opinion of Justices*, 7 Mass. 523; *Brewer v. Blougher*, 14 Pet. (U.S.) 198; *Com. v. Bryan*, 6 S. & R. (Pa.) 80; *Small v. Small*, 129 Pa. St. 366; *Catlin v. Hull*, 21 Vt. 152; *Woodruff v. State*, 3 Ark. 285; *Wassell v. Tunnah*, 25 Ark. 101; *Ruggles v. Washington County*, 3 Mo. 504; *Carry v. Paterson*, 35 N. J. L.

words are to be restricted or expanded to suit the subject-matter to which they are applied.<sup>1</sup> Thus, the term "persons," as used in a statute, is construed as including or not including corporations, according to the subject-matter of the statute and the occasion upon which the term is used.<sup>2</sup> So the general terms "inhabitant," "resident," "owner," "occupier," etc., are frequently restricted or expanded in their meaning by the subject-matter.<sup>3</sup> But no greater restriction should be put upon the generality of the

196; *Green v. State*, 59 Md. 123; 43 Am. Rep. 542; *Broome v. New York*, etc., Telephone Co., 49 N. J. L. 624; *Cincinnati Gas Light, etc., Co. v. Avondale*, 43 Ohio St. 257; *Tracy v. Card*, 2 Ohio St. 441; *State v. Hueston*, 44 Ohio St. 6; *Jones v. Dexter*, 8 Fla. 276; *Olive v. Walton*, 33 Miss. 114; *Green v. Weller*, 32 Miss. 650. See also *U. S. v. Caldwell*, 19 Wall. (U. S.) 264; 1 Bl. Com. 60.

In *Lion Assurance Assoc. v. Tucker*, 12 Q. B. Div. 186. Brett, M. R., says: "Whenever you have to construe a statute or document, you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. This, I take it, is the cardinal rule."

"The same words mean a very different thing when put in to impose a tax from what they would mean when exempting from a tax." *Blackburn, J.*, in *Rein v. Lane*, L. R., 2 Q. B. 151.

Thus by referring to the subject-matter and object of the act, which were the exemption of the home from sale and execution, it was held that the words, "one town or city lot" were not confined to one lot according to the survey or plat of the city, but one lot or piece of ground upon which the head of the family had a house. *Wassell v. Tunnah*, 25 Ark. 101.

Thus in the English Succession Duty Act, which provides that the installments of duty payable by a successor shall cease at his death except when he is "competent to dispose by will of a continuing interest in the property," the "competency" intended is obviously not mental sanity or freedom from personal incapacity, but the possession of an estate of inheritance which the successor is capable of dis-

posing of by will. *Attorney Gen'l v. Hallett*, 2 H. & N. 368.

So an act prohibiting parish officers from being concerned in contracts for supplying goods, materials or provisions "for the use of the workhouse" means for the use of persons in the workhouse, and does not apply to a contract for the supply of materials for the repair of the building. *Barber v. Waite*, 1 Ad. & El. 514; 28 E. C. L. 138.

The object of the *California* Act of 1851, commonly called the "Water Lot Act," was to provide for the disposition of the water-lot property, and not to interfere with the location of streets; and the designation therein of one of the boundaries of that property as the "eastern line of East street to its point of intersection with the northern line of Jackson street" was not intended, nor did it operate to extend East street northward to Jackson. *People v. Dana*, 22 Cal. 11.

1. *Reiche v. Smythe*, 13 Wall. (U. S.) 162; *U. S. v. Saunders*, 22 Wall. (U. S.) 492; *Moore v. American Transp. Co.*, 24 How. (U. S.) 1; *Brewer v. Blougher*, 14 Pet. (U. S.) 178; *Minis v. U. S.*, 15 Pet. (U. S.) 445; *Whitney v. Whitney*, 14 Mass. 92; *Somerset v. Dighton*, 12 Mass. 382; *Murphy v. Barlow*, 5 Ind. 230; *Maxwell v. Collins*, 8 Ind. 40; *Stradling v. Morgan*, Plowd. 204; *Jackson v. Collins*, 3 Cow. (N. Y.) 85; *Monegon v. People*, 55 N. Y. 613; *Cruger v. Cruger*, 5 Barb. (N. Y.) 225; *Barnes v. Buck*, 1 Lans. (N. Y.) 268.

2. *Rex v. Gardner*, Cowp. 79; *Rex v. York*, 6 Ad. & El. 419; 33 E. C. L. 98; *Rex v. Beverley Gas. Co.*, 6 Ad. & El. 645; 33 E. C. L. 161; and see for many cases upon this point *PERSON*, vol. 18, p. 403.

3. See *INHABITANT*, vol. 10, p. 770; *RESIDENT*, vol. 21, p. 122; *OWNER*, vol. 17, p. 299; *OCCUPIER*, vol. 17, p. 29. As to "laborer," see *LABORER*, vol. 12, p. 532.

words than the nature of the provision and the subject-matter to which it relates necessarily impose.<sup>1</sup>

(2) *Technical Words.*—As a natural corollary of the rule that words are to be construed by reference to the subject-matter of the enactment, technical words, when used in referring to a technical subject, are to be given the meaning which they have when applied to the particular art or science with reference to which they are used—*i. e.*, their technical meaning.<sup>2</sup> So an act relating to commerce is interpreted by the vocabulary of merchants.<sup>3</sup> And, where the legislature, in legislating upon subjects relating to courts and legal process, use technical terms, they may be presumed to have used them in their technical sense, unless from the statute itself it appears that they have made use of the terms in a more popular sense.<sup>4</sup>

Words in a statute which have acquired a particular legal meaning are, in the absence of other controlling circumstances, when applied to the subject-matter as to which they have acquired such

1. *Sullivan v. Mitcalfe*, 5 C. P. Div. 460.

2. *Lawrence v. Allen*, 7 How. (U. S.) 785; *U. S. v. Weise*, 2 Wall. Jr. (U. S.) 72; *McCool v. Smith*, 1 Black (U. S.) 459; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Lee v. Lincoln*, 1 Story (U. S.) 613; *U. S. v. Breed*, 1 Sumn. (U. S.) 159; *Arthur v. Morrison*, 96 U. S. 108; *Unwin v. Hanson* (1891), 2 Q. B. 115; *Evans v. Stevens*, 4 T. R. 462; *Morall v. Sutton*, 1 Phil. 533; *Doe v. Jesson*, 2 Bligh 2; *Doe v. Harvey*, 4 B. & C. 610; 10 E. C. L. 419; *Abbott v. Middleton*, 7 H. L. 68; *Boucicault v. Chatterton*, 5 Ch. Div. 275; *Stephenson v. Higginson*, 3 H. L. Cas. 638; *Ex parte Hall*, 1 Pick. (Mass.) 261; *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405; *De Veaux v. De Veaux*, 1 Strobh. Eq. (S. Car.) 283; *State v. Dorsey*, 118 Ind. 167; 10 Am. St. Rep. 111; *State v. Paterson*, 35 N. J. L. 196; *State v. Mace*, 5 Md. 337; *State v. Smith*, 5 Humph. (Tenn.) 394; *Clark v. Utica*, 18 Barb. (N. Y.) 451; *People v. Hulse*, 3 Hill (N. Y.) 309; *Brocket v. Ohio*, etc., R. Co., 14 Pa. St. 241.

In *Laird v. Briggs*, 19 Ch. Div. 34, *Jessel, M. R.*, said: "The whole of a section, and the whole of the act, is of a strictly technical character from beginning to end. So far as I can see, technical words are used in their proper technical sense. The nature of the rights defined, and the nature of the remedies given are all technical, and *prima facie*, it appears to me, that the rule applies that technical words must have their technical meaning given to

them, unless you can find something in the context to overrule them."

3. *U. S. v. Sarchet, Gilp.* (U. S.) 273; *The Danelm.* 9 P. Div. 171.

**Revenue Laws.**—In revenue laws the terms used are given the meaning which they have in trade. *Attorney Gen'l v. Bailey*, 1 Exch. 281; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137. See *REVENUE LAWS*, vol. 21, p. 302. For example, if *Bohea tea* is mentioned, it means the article known in trade by that name and not in science. *Two Hundred Chests of Tea*, 9 Wheat. (U. S.) 430.

In the case of *Two Hundred Chests of Tea*, 9 Wheat. (U. S.) 438, the court decided that, in imposing duties, congress must be understood as describing the article upon which the duty is imposed, according to the commercial understanding of the terms used in the law in our own markets. This doctrine was reaffirmed in the case of *U. S. v. 112 Casks of Sugar*, 8 Pet. (U. S.) 277; and again in 10 Pet. (U. S.) 137, in the case of *Elliott v. Swartwout*. *Curtis v. Martin*, 3 How. (U. S.) 106.

4. *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 411; *Gordon v. State*, 4 Kan. 489; *Snell v. Bridgewater*, etc., Mfg. Co., 24 Pick. (Mass.) 299; *Campbell v. Thompson*, 16 Me. 117.

The term "proceeding," as used in an *Alabama* code, which declared that "no action or proceeding commenced before the adoption of the code shall be affected by its provisions," is held not to include a judgment which is an entire act, an act which cannot in any

meaning, to be taken in their technical sense.<sup>1</sup> But where, from the subject, context, or otherwise, it is plain that the legislature did not intend to use the term in its technical sense, courts will not impute that meaning to it.<sup>2</sup>

proper sense be said to be commenced before a certain day. *Daily v. Burke*, 28 Ala. 328.

1. *The Abbotsford*, 98 U. S. 440; *Rice v. Minnesota, etc., R. Co.*, 1 Black (U. S.) 58; *U. S. v. Jones*, 3 Wash. (U. S.) 209; *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *McCool v. Smith*, 1 Black (U. S.) 459; *U. S. v. Magill*, 1 Wash. (U. S.) 463; *U. S. v. Wilson, Baldw.* (U. S.) 78; *U. S. v. Smith*, 5 Wheat. (U. S.) 153; *U. S. v. Furlong*, 5 Wheat. (U. S.) 184; *Campbell v. Thompson*, 16 Me. 117; *Apple v. Apple*, 1 Head (Tenn.) 348; *Williams v. Dickenson*, 28 Fla. 99; *State v. Mace*, 5 Md. 337; *Bennac v. People*, 4 Barb. (N. Y.) 164; *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405; *Macy v. Raymond*, 9 Pick. (Mass.) 285; *Adams v. Turrentine*, 8 Ired. (N. Car.) 147; *Kitchen v. Tyson*, 3 Murph. (N. Car.) 314; *State v. Berdett*, 73 Ind. 185; 38 Am. Rep. 117; *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469; *Halbert v. McCulloch*, 3 Metc. (Ky.) 456; 79 Am. Dec. 556. *Ex parte Vincent*, 26 Ala. 145; 62 Am. Dec. 714; *Spencer v. State*, 20 Ala. 24; *Brocket v. Ohio, etc., R. Co.*, 14 Pa. St. 241; 53 Am. Dec. 534; *Allen's Appeal*, 99 Pa. St. 196; 44 Am. Rep. 101; *Reg. v. Ellis, C. & M.* 560; 41 E. C. L. 307; *Williams v. Lear, L. R.*, 7 Q. B. 285; *Sheppard v. Gosnold*, Baugh 159; *Ruckmaloye v. Mottichund*, 8 Moore P. C. C. 4; *Stephenson v. Higginson*, 3 H. L. Cas. 638. See also *The Kate Heron*, 6 Sawy. (U. S.) 106.

An act incorporating the Ohio & Pennsylvania Railroad Co. authorized that road to appropriate as much land as should be deemed necessary for its road, etc. It was contended in *Brocket v. Ohio, etc., R. Co.*, 14 Pa. St. 241; 53 Am. Dec. 534, that the act did not authorize the removal of a dwelling house; but it was held that the word lands was plainly used in its technical sense—i. e., that it included not only the face of the earth, but everything under it or over it.

In *Western Union Tel. Co. v. Scircle*, 103 Ind. 229, it is said: "Where the statute employs common-law terms having a known meaning, it is presumed, unless the contrary affirm-

atively appears, that the terms were used in their common-law meaning."

Thus the word "crimes" has been held according to its legal sense to include indictable misdemeanors. *Lehigh County v. Schock*, 113 Pa. St. 373; *Figg v. Snook*, 9 Ind. 202.

In *Buckner v. Real Estate Bank*, 4 Ark. 441, it was said: "If a statute makes use of a word, the meaning of which is well known and has a definite sense at the common law, the word shall be expounded and restricted to that sense."

In *Hillhouse v. Chester*, 3 Day (Conn.) 211; 3 Am. Dec. 265, it was said: "It is a sound rule that whenever our legislature use a term without defining it, which is well known in the English law, and there has a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law." See also *U. S. v. Smith*, 4 Day. (Conn.) 121.

**Month.**—In *Rives v. Guthrie*, 1 Jones (N. Car.) 88, it was held that in a statute prescribing the limitation to an action of slander, the word "month" is to be taken as a lunar month. The court said: "We are bound to give to words, when used in a statute, the meaning attached to them at common law. . . . Several English authorities are cited to sustain this position; but it must be borne in mind that they all recognize the common-law rule that a statute month is a lunar month."

But that "month" in a statute is now generally construed to mean a calendar month, see *Brown v. Williams*, 34 Neb. 376; and *MONTH*, vol. 15, p. 712.

**Heir.**—So where a statute uses the word "heir," which has a definite technical meaning at common law, it will be received in that sense, unless it clearly appears that a different sense was intended. *State v. Engle*, 21 N. J. L. 347.

**Infamous Crimes.**—The term "infamous crimes," as used in a statute, has been confined to its legal sense. *Rex v. Heckman*, 1 Moody 34; *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

2. *Bishop's Statutory Crimes*, § 100; *Robinson v. Varnell*, 16 Tex. 382; *Mc-*

(3) *Popular Meaning*.—It is a general and primary rule of construction, where there is nothing in the statute to indicate that a word is used in a peculiar or technical sense, that it is to be taken in its ordinary and popular meaning.<sup>1</sup>

*Bride's Appeal*, 72 Pa. St. 480; *People v. Tighe*, 5 Hun (N. Y.) 25; *People v. May*, 3 Mich. 598; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Schrieffer v. Wood*, 5 Blatchf. (U. S.) 215; *Cummings v. Coleman*, 7 Rich. Eq. (S. Car.) 509; 62 Am. Dec. 402; *Green v. Weller*, 32 Miss. 650. See the succeeding section, *Ordinary Meaning*.

Thus, in *Alabama*, where outlawry is unknown, it was held that the term "outlaw" in a statute was not to be taken in its common-law significance. But the court, looking at the condition of the state at the time when the act was passed, held that it meant lawless and disorderly persons roaming about in disguise and committing outrages upon citizens. *Dale County v. Gunter*, 46 Ala. 118.

So in construing a statute exempting a dwelling house from sale and execution, the term "dwelling house" will not receive the technical meaning which it has acquired in the law of burglary, arson, etc. *In re Lammer*, 7 Biss. (U. S.) 269.

In *Morse v. State*, 6 Conn. 9, it was held that a person attending recitations and lectures at a college, having been examined and admitted for that purpose, though not matriculated, was "a student" of the college within a statute prohibiting the giving of credit to students of the college under certain penalties.

1. *Gross v. Fowler*, 21 Cal. 392; *People v. Reis*, 76 Cal. 269; *State v. Bernard*, 40 La. Ann. 172; *Canal Co. v. Schroeder*, 7 La. Ann. 615; *Medley v. Williams*, 7 Gill & J. (Md.) 71; *Parkinson v. State*, 14 Md. 196; 74 Am. Dec. 522; *Allen v. Mutual F. Ins. Co.*, 2 Md. 111; *Favers v. Glass*, 22 Ala. 621; *Wetumpka v. Winter*, 29 Ala. 660; *Green v. Weller*, 32 Miss. 650; *Engelking v. VonWamel*, 26 Tex. 469; *Barker v. State*, 12 Tex. 273; *Robinson v. Varnell*, 16 Tex. 382; *Maillard v. Lawrence*, 16 How. (U. S.) 251; *Georgia v. Atkins*, 1 Abb. (U. S.) 22; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188; *Schrieffer v. Wood*, 5 Blatchf. (U. S.) 218; *U. S. v. Clayton*, 2 Dill. (U. S.) 219; *Martin v. Hunter*, 1 Wheat. (U. S.) 326; *Ready v. Fitzgerald*, 6 H. L. 877; *Rex v. In-*

*habitants*, 2 B. & Ald. 522; *Austin v. Cull*, L. R., 7 C. P. 234; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *Johnson v. Harris*, 15 C. B. 357; 80 E. C. L. 356; *Rex v. Wooldridge*, 1 Leach (4th ed.) 307; *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. Div. 914; *Weister v. Hade*, 52 Pa. St. 474; *Philadelphia, etc., R. Co. v. Catawissa, etc.*, R. Co., 53 Pa. St. 59; *School Directors v. Carlisle Bank*, 8 Watts (Pa.) 289; *Fox's Appeal*, 112 Pa. St. 337; *Gyger's Estate*, 65 Pa. St. 311; *Deitz v. Beard*, 2 Watts (Pa.) 170; *Waller v. Harris*, 20 Wend. (N. Y.) 555; 32 Am. Rep. 590; *Clark v. Utica*, 18 Barb. (N. Y.) 451; *Rupp v. Swineford*, 40 Wis. 28; *State v. Nann*, 21 Wis. 684; *State v. Clarksville, etc., Turnpike Co.*, 2 Sneed (Tenn.) 91; *Strong v. Birchard*, 5 Conn. 357; *Avery v. Pixley*, 4 Mass. 460; *State v. Gupton*, 8 Ired. (N. Car.) 273.

In *Kentucky*, it is provided by statute that "all words and phrases shall be construed and understood according to the common and approved usage of language;" and this was held in *Bailey v. Com.*, 11 Bush (Ky.) 688, to be only declaratory of the common law.

In a statute exempting certain articles from execution, the term "wagon" was held not to include a hackney-coach, upon the principle that the words of a statute are to be interpreted according to their common acceptation. *Quigley v. Gorham*, 5 Cal. 418; 63 Am. Dec. 139.

Thus, in accordance with the popular signification of the term, the word "child," as used in a statute defining an aggravated assault, was held not to be synonymous with the word "minor." *McGregor v. State*, 4 Tex. App. 599.

In *State v. Clarksville, etc., Turnpike Co.*, 2 Sneed (Tenn.) 91, it was said: "It is a general rule that the words of a statute, if of common use, are to be taken in their natural and ordinary sense and without any forced or subtle construction to limit or extend their import."

Thus in *Ex parte Hillman*, 10 Ch. Div. 622, it was held that the word "purchaser" in a bankruptcy act was to be taken in its ordinary commercial

Where to construe the words of a statute technically would render it inoperative, but to construe them according to their popular signification would give it a reasonable operation, the latter construction must prevail.<sup>1</sup> A statute is to be interpreted in accordance with the meaning of its words at the time of its passage.<sup>2</sup>

Words referring to time are to be construed as spoken at the time when the act took effect, unless other intent appears. Such words are "already,"<sup>3</sup> "hereafter,"<sup>4</sup> "heretofore,"<sup>5</sup> "existing."<sup>6</sup>

**6. Aids to Construction—*a.* TITLE.**—The title has generally been considered as no part of the act.<sup>7</sup> In *England* it has been said that in the construction of a statute the title should not be taken into consideration.<sup>8</sup> But there are English authorities to the

sense as the equivalent of "buyer," and not in its technical legal sense.

**Action.**—Thus the court has refused to give a technical meaning to the term "action." *Fenwick v. East London R. Co.*, 1 L. R., 20 Eq. 544; *Walker v. Clements*, 15 Q. B. 1046; 69 E. C. L. 1046; *Rawley v. Rawley*, 1 Q. B. Div. 460.

**Children.**—Thus, though "children" means technically legitimate children, it has been given its larger and more popular meaning, where the mischief sought to be remedied demanded it, so as to include illegitimate children. *Rex v. Hodnett*, 1 T. R. 96; *Rex v. Cornforth*, 2 Stra. 1162. See also *Reg. v. St. Giles-in-the-Fields*, 11 Q. B. 173; 63 E. C. L. 173; *Reg. v. Brighton*, 1 B. & S. 447; 101 E. C. L. 446; *CHILDREN*, vol. 3, p. 230.

1. *Robinson v. Varnell*, 16 Tex. 382. See also *Reg. v. Pembridge*, 3 Q. B. 901; 43 E. C. L. 1028; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 522; 17 Am. & Eng. R. Cas. 438.

2. *Mobile v. Eslava*, 16 Pet. (U. S.) 231; *St. Cross v. Howard*, 6 T. R. 338; *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. Div. 914. And see *Aerated Bread Co. v. Gregg*, L. R., 8 Q. B. 355, with which compare *Reg. v. Wood*, L. R., 4 Q. B. 559.

"In matters of description a statute must necessarily refer to things as they exist at the time of its passage." *Griswold v. Atlantic Dock Co.*, 21 Barb. (N. Y.) 228. See also *Com. v. Erie*, etc., R. Co., 27 Pa. St. 353; 67 Am. Dec. 471; *Pontchartrain R. Co. v. Lafayette*, etc., R. Co., 10 La. Ann. 741; *Morris Canal Co. v. State*, 24 N. J. L. 62.

3. *Jackman v. Garland*, 64 Me. 133.

4. *State v. Hicks*, 48 Ark. 515. And

see *Charless v. Lamberson*, 1 Iowa 435; 63 Am. Dec. 457, where "heretofore" and "hereafter" were held to refer to the time when the code went into effect and not to the time of its enactment. See also *State v. Connell*, 43 N. J. L. 106. See *supra*, this title, *Time When Statutes Take Effect*.

5. *Parsons v. Wayne*, 37 Mich. 287.

6. *Rogers v. Vass*, 6 Iowa 405. But see also *Indianapolis*, etc., R. Co. v. *Blackman*, 63 Ill. 117, in which "existing" was applied to objects before as well as after passage of act.

7. *State v. Welsh*, 3 Hawkes (N. Car.) 404; *Cohen v. Barrett*, 5 Cal. 195; *Garrigus v. Parke County*, 39 Ind. 66; *Eastman v. McAlpin*, 1 Ga. 157; *Bradford v. Jones*, 1 Md. 351; *Com. v. Slifer*, 53 Pa. St. 71; *State v. Stephenson*, 2 Bailey (S. Car.) 334; *Burgett v. Burgett*, 1 Ohio 469; *Hadden v. Barney*, 5 Wall. (U. S.) 110; *Ogden v. Strong*, 2 Paine (U. S.) 584; *Plummer v. People*, 74 Ill. 361; *Mills v. Wilkins*, 6 Mod. 62; *Atty. Gen'l v. Weymouth*, 1 Amb. 22; *Rex v. Williams*, 1 W. Bl. 95; *Chance v. Adams*, 1 Ld. Raym. 77; *Earl of Shrewsbury v. Scott*, 6 C. B. N. S. 1; 95 E. C. L. 1; *Jeffreys v. Boosey*, 4 H. L. 982; *Morant v. Taylor*, 1 Exch. Div. 194.

8. *Hunter v. Nockolds*, 1 Mac. & G. 640; *Mills v. Wilkins*, 6 Mod. 62; *Atty. Gen'l v. Weymouth*, 1 Amb. 22; *Rex v. Williams*, 1 W. Bl. 95.

In *Salkeld v. Johnson*, 2 Exch. 283, it was said: "The title, though it has occasionally been referred to as aiding in the construction of an act, is certainly no part of the law, and in strictness ought not to be taken into consideration at all." See also *Stephen's Case*, 11 Coke 33.

contrary.<sup>1</sup> In the *United States*, where the meaning of an act is doubtful, recourse is frequently had to the title for explanation, and it is regarded as a legitimate aid in determining the intention of the legislature.<sup>2</sup>

Of course, if there is no ambiguity in the statute itself, there can be no necessity for resort to the title;<sup>3</sup> it cannot be used to extend or restrain positive provisions contained in the statute,<sup>4</sup>

1. *Rex v. Cartwright*, 4 T. R. 490; *Rex v. Wright*, 1 Ad. & El. 446; 28 E. C. L. 117; *Stradling v. Morgan*, Plowd. 199; *Alexander v. Newman*, 2 C. B. 141; 52 E. C. L. 140; *Rex v. Gwenop*, 3 T. R. 133; *Taylor v. Newman*, 4 B. & S. 93; 116 E. C. L. 91; *Rawley v. Rawley*, 1 Q. B. Div. 466; *Bentley v. Rotheram Local Board*, 4 Ch. Div. 588; *Chance v. Adams*, 1 Ld. Raym. 77; *Rex v. Marks*, 3 East 157; *Brett v. Brett*, Addams Eccl. 211; *Shaw v. Rudelin*, 9 Ir. Ch. Rep. 214; *Reg. v. Mallow Union*, 12 Ir. C. L. Rep. 35; *Coomber v. Berks*, 9 Q. B. Div. 33.

2. *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550; *Meyer v. Western Car Co.*, 102 U. S. 1; *Holy Trinity Church v. U. S.*, 143 U. S. 457; *U. S. v. Palmer*, 3 Wheat. (U. S.) 631; *Hadden v. Barney*, 5 Wall. (U. S.) 107; *U. S. v. Union Pac. R. Co.*, 91 U. S. 72; *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Rushville v. Rushville Gas Co.*, 132 Ind. 575; *Smith v. State*, 28 Ind. 321; *Garrigus v. Parke County*, 39 Ind. 66; *Wilson v. Spaulding*, 19 Fed. Rep. 304; *U. S. v. Union Pac. R. Co.*, 37 Fed. Rep. 551; *In re Boston Min., etc., Co.*, 51 Cal. 624; *Barnes v. Jones*, 51 Cal. 303; *Ex parte Kohler*, 74 Cal. 38; *Cohen v. Barrett*, 5 Cal. 195; *Eastman v. McAlpin*, 1 Ga. 157; *State v. Stephenson*, 2 Bailey (S. Car.) 334; *Burgett v. Burgett*, 1 Ohio 469; *State v. Archer*, 73 Md. 44; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1; *Clark v. Baltimore*, 29 Md. 285; *State v. Fields*, 2 Bailey (S. Car.) 554; *State v. Smith, Cheves* (S. Car.) 157; *Bradford v. Jones*, 1 Md. 351; *Connecticut Mut. L. Ins. Co. v. Albert*, 39 Mo. 181; *Hines v. Wilmington, etc., R. Co.*, 95 N. Car. 434; *Smith v. People*, 47 N. Y. 348; *People v. Davenport*, 91 N. Y. 574; *Cumines v. Jefferson Co.*, 63 Barb. (N. Y.) 293; *Bell v. New York*, 105 N. Y. 139; *People v. Molyneux*, 40 N. Y. 113; *Brick v. Gannar*, 36 Hun (N. Y.) 55; *People v. Spicer*, 99 N. Y. 233; *In re Kellum*, 6 Lans. (N. Y.) 3; *Com. v. Slifer*, 53 Pa. St. 71; *Blakeney*

*v. Blakeney*, 6 Port. (Ala.) 109; 30 Am. Dec. 574; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *Torreyson v. Board of Examiners*, 7 Nev. 19; *Camden, etc., R. Co. v. Briggs*, 22 N. J. L. 644; *Stockton v. Central R. Co.* (N. J. 1892), 24 Atl. Rep. 964; *Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis. 295.

In *U. S. v. Fisher*, 2 Cranch (U. S.) 386, Marshall, C. J., said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived, and in such case the title claims a degree of notice, and will have its due share of consideration;" and again in *U. S. v. Palmer*, 3 Wheat. (U. S.) 610: "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature."

Although the title is no part of an act, yet where the enacting clause is doubtful or too general, the title may be resorted to for explanation in restraint of its generality. *Field v. Gooding*, 106 Mass. 310.

3. *Hunter v. Nockolds*, 1 M. & G. 640; *Eastman v. McAlpin*, 1 Ga. 157; *In re Boston Min., etc., Co.*, 51 Cal. 624; *Com. v. Slifer*, 53 Pa. St. 71; *U. S. v. McArdle*, 2 Sawy. (U. S.) 367; *State v. Archer*, 73 Md. 44; *Bell v. New York*, 105 N. Y. 139; *Hines v. Wilmington, etc., R. Co.*, 95 N. Car. 434.

4. *Flynn v. Abbott*, 16 Cal. 358; *State v. Cazeau*, 8 La. Ann. 114; *In re Boston Min., etc. Co.*, 51 Cal. 624. In *Hadden v. Barney*, 5 Wall. (U. S.) 107, Field, J., says: "The title of an act furnishes little aid in the construction of its provisions. . . . It cannot be used to extend or restrain any positive provision contained in the body of the act. It is only when the meaning is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature."

In *Connecticut Mut. L. Ins. Co. v. Albert*, 39 Mo. 183, it was said: "The title of the act itself is so very clear



nor can it control express words in the statute.<sup>1</sup> If the words of the enacting clause are larger than those of the title, they must prevail.<sup>2</sup>

Especially may the title of an act be consulted to aid in its interpretation where, as is the case in many states, the constitution provides that the subject of the act shall be expressed in the title.<sup>3</sup> And under such constitutional provisions, the title becomes a part of the act and may confine the effect and operation of words in the enacting clause to the objects expressed therein.<sup>4</sup>

5. *PREAMBLE.*—The preamble, like the title, is no part of the statute, but, as setting out the object and intention of the legislature in passing it, is given more consideration in its construction than is the title.<sup>5</sup> Therefore, whenever there is ambiguity, or wherever the words of the act have more than one meaning, or there is doubt as to the subject-matter to which they are to be applied, the preamble may be consulted. As said by Lord Coke, it is a good means to find out the meaning of the statute, and is a true key to open the understanding thereof.<sup>6</sup>

and explicit that no doubt can exist as to what was intended. It is not safe to rely alone upon the title of a statute, and it has been declared to be 'not a safe exposition of the law,' but the better rule, we think, is to presume that the true intention and meaning is to be found in the title, unless it is plainly contradictory of the express terms in the body of the act."

1. *Stevens v. Lake George, etc., R. Co.*, 82 Mich. 430; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *U. S. v. Fisher*, 2 Cranch (U. S.) 386; *Hadden v. Barney*, 3 Wall. (U. S.) 107; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 90; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Flynn v. Abbott*, 16 Cal. 358; *State v. Cazeau*, 8 La. Ann. 114. See also *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642.

2. *U. S. v. Briggs*, 9 How. (U. S.) 351; *Blue v. McDuffie, Busb.* (N. Car.) 131.

3. *Meyer v. Western Car Co.*, 102 U. S. 1; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164; 50 Am. Rep. 360; *Halderman's Appeal*, 104 Pa. St. 251.

In *Eby's Appeal*, 70 Pa. St. 314, *Sharswood, J.*, says: "However it was in *England*, where the title was held to be no part of the statute, indeed was commonly framed by the clerk of parliament after the bill had passed, without any vote being taken upon it, certainly since the first amendment of the constitution adopted in 1864, art. 11, § 8, it is now necessarily a part of the act, and a very important guide to its right

construction." See also *Halderman's Appeal*, 104 Pa. St. 259; and *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164; 5 Am. Rep. 360. Compare *In re Boston Min., etc., Co.* 51 Cal. 624.

4. *Halderman's Appeal*, 104 Pa. St. 251; *Dobbins v. Northampton*, 50 N. J. L. 496; *Nazro v. Merchants' Mut. Ins. Co.*, 14 Wis. 295; *Dodd v. State*, 18 Ind. 56; *Howland Coal, etc., Works v. Brown*, 13 Bush (Ky.) 681. See, generally, *supra*, this title, *Title and Subjects Under Constitutions*.

5. *Bishop Stat. Cr.* § 48; *Mills v. Wilkins*, 6 Mod. 62; *Bac. Abr. Statutes A*; *Potter's Dwar.* 265; *Fellowes v. Clay*, 4 Q. B. 313; 45 E. C. L. 338; *Morns v. State*, 12 Gill & J. (Md.) 1; *Com. v. Marshall*, 69 Pa. St. 328; *Erie, etc., R. Co., v. Casey*, 26 Pa. St. 288; *Edwards v. Pope*, 4 Ill. 464; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174.

6. *Co. Litt.* 79a; *Plowd.* 379; *Potter's Dwar.* 265; *Bish. Stat. Cr.*, § 48; *Bac. Abr. Statutes I*, 2; *Halton v. Cove*, 1 B. & Ad. 538; 20 E. C. L. 440; *Crespigny v. Wittenoom*, 4 T. R. 793; *Atty. Gen'l v. Powis*, 1 Kay 186; *Crowder v. Stewart*, 16 Ch. Div. 370; *Nash v. Allen*, 4 Q. B. 784; 45 E. C. L. 783; *Boulton v. Bull*, 2 H. Bl. 500; *Sutton's Hospital*, 10 Co. 23, 24b; *Salters Co. v. Jay*, 3 Q. B. 109; 43 E. C. L. 654; *Edwards v. Rusholme, L. R.*, 4 Q. B. 554; *Emanuel v. Constable*, 3 Russ. 436; *Doe v. Roe*, 1 Dowl. 247; *Carr v. Royal Exchange Assurance Corp.*, 5 B. & S. 941; 117 E. C. L. 941;

It has been said that the preamble may extend but not restrain the enacting part of a statute;<sup>1</sup> but it would seem difficult to support this doctrine with reason. The function of the preamble is to explain what is ambiguous in the enactment; and there

*In re Masters*, 33 L. J. Q. B. 146; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388; 95 E. C. L. 386; *Salkeld v. Johnson*, 1 Hare 196; *Mills v. Wilkins*, 6 Mod. 62; *Mason v. Armitage*, 13 Ves. 36; *Yazoo, etc.*, R. Co. v. Thomas, 132 U. S. 174; *Beard v. Rowan*, 9 Pet. (U. S.) 317; *U. S. v. Webster, Dav.* (U. S.) 38; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Fowler v. State*, 5 Day (Conn.) 81; *Edwards v. Pope*, 4 Ill. 465; *Nichols v. Wells, Sneed* (Ky.) 255; *State v. Cazeau*, 8 La. Ann. 114; *Davidson v. Clayland*, 1 Har. & J. (Md.) 546; *Montesquieu v. Heil*, 4 La. Ann. 51; 23 Am. Dec. 471; *Chesapeake, etc., Canal Co. v. Baltimore, etc.*, R. Co., 4 Gill & J. (Md.) 1; *Lucas v. McBlair*, 12 Gill & J. (Md.) 1; *Cleveland v. Norton*, 6 Cush. (Mass.) 383; *James v. Dubois*, 16 N. J. L. 285; *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *Constantine v. Van Winkle*, 6 Hill (N. Y.) 184; *Blue v. McDuffie, Busb.* (N. Car.) 131; *Dedrick v. Wood*, 15 Pa. St. 9; *Erie, etc., R. Co. v. Casey*, 26 Pa. St. 287; *Com. v. Marshall*, 69 Pa. St. 328; *York County v. Crafton*, 100 Pa. St. 619; *Clark v. Bynum*, 3 McCord (S. Car.) 298; *Tripp v. Goff*, 15 R. I. 299; *State v. Stevenson*, 2 Bailey (S. Car.) 334; *Nazoo v. Merchants' Mut. Ins. Co.*, 14 Wis. 295; *Hart v. Albany*, 9 Wend. (N. Y.) 571; 24 Am. Dec. 165; *Sutherland v. De Leon*, 1 Tex. 250; 46 Am. Dec. 100.

In an *English* statute, which empowered every person who had served in the militia and was married, to set up in trade in a corporate town, as freely as soldiers might under an earlier enactment, and declared that "no such militiaman" should be removable from the town until he became chargeable, —it being open to doubt whether this expression included all married militiamen, or only married militiamen who had set up in trade in towns, the preamble of the earlier act fixed the latter as the true construction, as it stated that the mischief to be remedied was the state of the law which prevented soldiers from setting up in trade in corporate towns. *Rex v. Gwenop*, 3 T. R. 133.

The *English* statute which enacted that "any order" of quarter sessions might be removed to the queen's bench for enforcement, was similarly confined to orders in appeal cases, by the preamble, which, in reciting that it was expedient that the law should be made uniform in cases of appeal, showed the limited scope of the act. *Reg. v. Bateman*, 8 El. & Bl. 584; 92 E. C. L. 584.

An act which made it penal for a publican to allow bad characters to "assemble and meet together" in his house, would not be broken by his permitting such persons to enter for taking refreshments and remaining there as long as was reasonably necessary for that purpose, when the preamble showed that the object in view was the repression of disorderly conduct, not the absolute denial of all hospitality to persons of bad character. *Greig v. Bendeno*, El. Bl. & El. 133; 96 E. C. L. 132. See *Belasco v. Hannant*, 3 B. & S. 13; 113 E. C. L. 12.

Lord Blackburn says: "We are to give effect to the preamble to this extent, namely, that it shows us what the legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent is the preamble material." *West Ham Assessment Committee v. Iles*, 8 App. Cas. 387.

**To Fix Subject-matter.** — "It is admitted that the preamble of an act may be legitimately used to ascertain and fix the subject-matter to which the enacting part is to be applied, and even in some cases to control and cut down the enacting part. But the former use of it only is required on the present occasion; and no doubt can be entertained as to the propriety of such use." *Fellowes v. Clay*, 4 Q. B. 339; 45 E. C. L. 338. See also *Com. v. Marshall*, 69 Pa. St. 328.

1. *Rex v. Athos*, 8 Mod. 144; *Copeman v. Gallant*, 1 P. Wms. 320; *Walker v. Richardson*, 2 M. & W. 889; *Heyman*

seems to be no difference whether the intention of the legislature, as gathered from this explanation, tends to restrict or extend the scope of the statute; in either case it must be regarded. There are numerous cases in which a resort to the preamble as an aid to construction has been followed by a restricted interpretation of the language used in the enactment clause.<sup>1</sup>

But where the meaning of the enacting clause is clear and free from ambiguity it cannot be restricted or extended by the preamble. When the words are clear and positive, and there is no doubt as to their meaning or as to the scope of the enactment or the subject-matter to which it applies, recourse to the preamble is unnecessary.<sup>2</sup>

It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation—the remedy may both consistently and wisely be extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in

*v. Flewker*, 13 C. B. N. S. 519; 106 E. C. L. 518; *Drummond v. Drummond*, L. R., 2 Ch. 44; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388; 95 E. C. L. 386.

1. *Ryall v. Rowles*, 1 Atk. 174; 1 Ves. 365; *Rex v. Gwenop*, 3 T. R. 133; *Reg. v. Bateman*, 8 El. & Bl. 584; 92 E. C. L. 584; *Edwards v. Rusholme*, L. R., 4 Q. B. 554; *Emanuel v. Constable*, 3 Russ. 436; *Reg. v. Manchester*, 7 El. & Bl. 453; 90 E. C. L. 453; *Bryan v. Childs*, 5 Exch. 368; *Salkeld v. Johnson*, 1 Hare 196; *Hughes v. Chester*, etc., R. Co., 1 Dr. & Sm. 524; *Wigan v. Fowler* cited, 1 Stark. 459. See also *Seidenbender v. Charles*, 4 S. & R. (Pa.) 166; 8 Am. Dec. 682.

In *Halton v. Cabe*, 1 B. & A. 538, Lord Tenterden said: "The enacting words of an act of parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it; yet the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the act; and the preamble affords a good clue to discover what that object was."

2. *Caledonian R. Co. v. North Brit. R. Co.*, 6 App. Cas. 114; *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388; 95 E. C. L. 386; *Sutton v. Sutton*, 22 Ch. Div. 521; *Hughes v. Chester*, etc., R. Co., 1 Dr. & Sm. 524; *Copeland v. Davies*, L. R., 5 H. L. 358; *Mann v. Cammel, Lofft* 783; *Doe v. Brandling*, 7 B. & C. 643; 14 E. C. L. 108; *Patti-*

*son v. Bankes*, Cowp. 543; *Crespigny v. Wittenoom*, 4 T. R. 793; *Lees v. Summerhill*, 17 Ves. 508; *Taylor v. Oldham Corp.*, 4 Ch. Div. 395; *Rex v. Athos*, 8 Mod. 136; *Mason v. Armistage*, 13 Ves. 36; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174; *Bentley v. Rotherham Local Board*, 46 L. J., Ch. Div. 284; *Tripp v. Goff*, 15 R. I. 299; *Eastman v. McAlpin*, 1 Ga. 157; *Kirk v. Dean*, 2 Binn. (Pa.) 341; *Seidenbender v. Charles*, 4 S. & R. (Pa.) 151; 8 Am. Dec. 682; *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *Kent v. Somervell*, 7 Gill & J. (Md.) 265; *Laidler v. Young*, 2 Har. & J. (Md.) 69; *Covington v. McNickle*, 18 B. Mon. (Ky.) 262; *Clark v. Bynum*, 3 McCord (S. Car.) 298; *State v. Findley*, 1 Brev. (S. Car.) 107; *State v. Butler*, 3 McCord (S. Car.) 383; *Blue v. McDuffie*, Busb. (N. Car.) 131; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248; *Hart v. Albany*, 9 Wend. (N. Y.) 571.

A preamble cannot introduce doubt or uncertainty into the meaning of a statute, when otherwise it would be clear. *James v. Dubois*, 16 N. J. L. 285. See also *Erie, etc., R. Co. v. Casey*, 26 Pa. St. 288.

In *Wilson v. Knubley*, 7 East 128, Lord Ellenborough said: "I agree that the grievances recited in the preamble of the act would have led one to suppose that the legislature meant to have given a larger remedy than the action of debt, against the devisee of land, to recover damages for a

the preamble appears to be the real one, effect is to be given to it, notwithstanding the less extensive import of the preamble.<sup>1</sup> So when the preamble is more extensive than the enacting clause, if the latter is free from ambiguity and doubt, it must prevail, and the statute receive the more limited construction, notwithstanding the wider purport of the preamble.<sup>2</sup>

*c.* CHAPTER AND SECTION HEADINGS; MARGINAL NOTES, ETC.—The headings prefixed to sections or sets of sections are sometimes considered in modern statutes as preambles to those

breach of covenant by the deviser. But for us to extend the words to the action of covenant would be to legislate, and not to construe, the acts of the legislature."

1. *Rex v. Athos*, 8 Mod. 144; *Fel-  
lowes v. Clay*, 4 Q. B. 349; 45 E. C. L.  
347; *Doe v. Brandling*, 7 B. & C. 660;  
14 E. C. L. 108; *Copeland v. Gallant*,  
1 P. Wms. 320; *York v. Middlesbor-  
ough*, 2 Y. & J. 214; *Salkeld v. John-  
son*, 1 Mac. & G. 264; 1 Hare 196;  
*Fellowes v. Clay*, 4 Q. B. 313; 45 E. C.  
L. 338; *Mace v. Cammel*, Lofft 782;  
*Colehan v. Cooke*, Willes 395; *Laidler  
v. Young*, 2 Har. & J. (Md.) 69; *Jack-  
son v. Gilchrist*, 15 Johns. (N. Y.)  
89; *Holbrook v. Holbrook*, 1 Pick.  
(Mass.) 251.

In *Rex v. Marks*, 3 East 157, Law-  
rence, J., said: "It is nothing unusual  
in acts of parliament for the enacting  
part to go beyond the preamble; the  
remedy often extends beyond the par-  
ticular act of mischief which first sug-  
gested the necessity of the law."

In *Freeman v. Lambert*, 4 M. & S.  
238, Mansfield, C. J., said: "I confess  
I am not for restraining the generality  
of the enacting clause by the preamble  
without some reason for it." And  
Dampier, J., said: "I have always un-  
derstood it as a standing rule in the  
construction of acts of parliament,  
that the enacting clause shall not be  
restrained by the preamble, if the  
enacting words are large enough to  
comprehend the case."

In *Hughes v. Done*, 1 Q. B. 301;  
64 E. C. L. 550, Lord Denman said:  
"To introduce, in the enacting part,  
an exception not there to be found, and  
which, if intended, might have been  
so easily introduced and expressed,  
is, we think, to curtail and abridge the  
meaning of plain words in a manner  
which no rule of construction war-  
rants."

A statute, after reciting that the  
king's subjects were charged with con-

veying "felons and other malefactors  
and offenders against the law," to jail,  
punishable by imprisonment there, en-  
acted that "every person" committed  
to the county jail by a justice "for  
any offense or misdemeanor," should  
bear his own charges of conveyance, if  
he had property, and that if he had  
not, they should be borne by the  
parish where he was apprehended,  
was held not to be confined by the  
preamble to offenders against the  
ordinary law, but to apply to deserters  
from the army. *Rex v. Pierce*, 3 M.  
& S. 62.

So, a preamble which recited the  
mischief of granting colonial offices to  
persons who remained in *England* and  
discharged the duties of their offices by  
deputy, was not suffered to exclude  
judicial offices from the general enact-  
ing part, which authorized the gov-  
ernor and council to remove "any" of-  
ficeholder for misconduct; although  
the mention of delegation in the pre-  
amble showed that the judicial office  
was not there in contemplation. *Willis  
v. Gipps*, 5 Moo. P. C. 379.

2. *Wilson v. Knubley*, 7 East 128;  
*Farley v. Briant*, 3 Ad. & El. 839; 30  
E. C. L. 239; *Jenkins v. Briant*, 6 Sim.  
603; *Morse v. Tucker*, 5 Hare 79.

An act which made it penal to dye  
seeds so as to give them the appear-  
ance of seeds of "another kind," could  
not be extended to similar manipula-  
tions of old or inferior seeds, to make  
them appear as new of the same species  
by a recital that the practice of adul-  
terating seeds in fraud of the queen's  
subjects and the detriment of agricul-  
ture required repression. *Francis v.  
Maas*, 3 Q. B. Div. 341.

An act which required the trustees  
of a turnpike trust to apply the money  
which they received, first, in paying  
"any interest which might from time  
to time be owing," next, in keeping the  
road in repair, and finally, in paying off  
the principal sums due by the trust,

sections,<sup>1</sup> and in some instances have been held to be of more weight in interpretation than the title.<sup>2</sup> These headings are generally, however, inserted for mere convenience, and although they may help in ascertaining the legislative intent, when this is doubtful, they will not be allowed to control the words and phrases of the statute when the real purpose may be determined from their plain meaning.<sup>3</sup> In construing several sections relating to the same subject the safer rule is to read and construe them together without reference to the particular article or heading under which they may be placed.<sup>4</sup>

was held not to authorize the payment of arrears of interest; although this enactment was prefaced by a preamble which recited that arrears of interest as well as principal sums were due by the trust, and could not be paid off unless further powers were granted. *Market Harborough v. Kettering Highway Board*, L. R., 8 Q. B. 308.

1. *Earl of Shrewsbury v. Beazley*, 19 C. B. N. S. 651; 115 E. C. L. 651; *Latham v. Lafone*, L. R., 2 Exch. 115; *Hammersmith, etc., R. Co. v. Brand*, L. R., 4 H. L. Cas. 171; *Lang v. Kerr*, 3 App. Cas. 536; *Eastern Counties R. Co. v. Marriage*, 9 H. L. Cas. 41.

2. *Bishop Stat. Crimes*, § 62; *Barnes v. Jones*, 51 Cal. 303; *People v. Molyneux*, 40 N. Y. 113. In this latter case *Hunt, C. J.*, said that a section heading, "Of the public officers of the state other than militia and town officers," was a part of the enactment and would control its effect and operation, and held that the appointing of militia officers was expressly excepted from the effect of the statute which was in reference to the governor's power of appointment. But *Murray, J.*, in the same case, said that such section heading could not be considered as a part of the enactment, but would operate merely as any other title. See also *Rex v. Threlkeld*, 4 B. & Ad. 239; 24 E. C. L. 50; *Rex v. Newark-Upon-Trent*, 3 B. & C. 63; 10 E. C. L. 17.

3. *Wilberforce Stat. Law* 296; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 448; *Union Steamship Co. v. Melbourne Harbor, etc., Com'rs*, 9 App. Cas. 365; *Hammersmith, etc., R. Co. v. Brand*, L. R., 4 H. L. Cas. 217; *Battle v. Shivers*, 39 Ga. 409.

4. *State v. Popp*, 45 Md. 432; *Thompson v. Bulson*, 78 Ill. 277. In this connection it may be added that where one section of a statute treats solely and especially of a matter, that section prevails in reference to that matter

over other sections in which only incidental reference is made thereto. *Long v. Culp*, 14 Kan. 413; *Griffith v. Carter*, 8 Kan. 565.

A group of sections was prefaced, "With respect to the purchase and taking of lands otherwise than by agreement." It was held that this heading did not limit the effect of a section providing compensation for injury to land, to taking by compulsion, for such was not the purpose of the act. *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 447.

So an act in general terms suspending all statutes of limitations was held not to effect a provision prescribing the time when judgments should become dormant, although under the chapter heading, "Statutes of Limitation." *Battle v. Shivers*, 39 Ga. 405.

**Marginal Notes.**—These notes are usually nothing more than mere abstracts of the contents of sections, printed with the law as published by the public printer, and adopted to facilitate reference. Formerly they never appeared on the parliament-roll, and consequently, not forming a part of the law, could not be looked to for an exposition of its meaning. And although now they sometimes appear in the roll, as they are not considered in enacting the law, they cannot be relied on in ascertaining its meaning. *Claydon v. Green*, L. R., 3 C. P. 511; *Sutton v. Sutton*, 22 Ch. Div. 513; *Birtwhistle v. Vardill*, 7 Cl. & F. 929. In *Venour v. Sellou*, 2 Ch. Div. 525, *Jessel, M. R.*, said: "This view is borne out by the marginal note; and I may mention that the marginal notes of acts of parliament now appear on the parliament roll and consequently form part of the act; and in fact are so clearly so that I have known them to be subject to motion and amendment." But in *Sutton v. Sutton*, 22 Ch. Div. 513, he said, referring to *Venour v. Sel-*

*d. PUNCTUATION.*—Punctuation in a statute forms no part of the law, but is the work of the draughtsman, engrosser, or public printer.<sup>1</sup> It is, therefore, of little importance in the construction; and although, in doubtful cases, it may throw some light,<sup>2</sup> yet it cannot have a controlling effect.<sup>3</sup> It may be and frequently is

lou. 2 Ch. Div. 525: "The *dictum* in that case is not strictly correct. I have since ascertained that the practice is so uncertain that it cannot be laid down that they are always on the roll." And Baggallay, J., in *Atty Gen'l v. Great Eastern R. Co.*, 11 Ch. Div. 461, said: "I never knew an amendment set down or discussed upon the marginal note to a clause. The house of commons never has anything to do with the amendment of a marginal note. I never knew a marginal note considered by the house of commons."

But what is in form a marginal note may be part of a statute. In *Rex v. Milverton*, 5 Ad. & El. 841; 31 E. C. L. 454, it was held that a marginal note which, instead of being a mere abstract of a section, gave express direction to the form of an order which it accompanied, and was in the margin of the legislative roll, was a part of the statute.

**Schedule.**—A schedule, whether adopted within or appended to a statute, does not control positive words, but may be an aid in explaining what is doubtful. *Wilberforce on Statute Law*, 306, 308; *Rex v. Epsom*, 4 El. & Bl. 1003; 82 E. C. L. 1003; *Allen v. Flicker*, 10 Ad. & El. 640; 37 E. C. L. 204. See also *Reg. v. Russell*, 13 Q. B. 237; 66 E. C. L. 235.

A form given in a schedule, even when referred to in the body of an act, is to be regarded merely as an example. *Hannah v. Whyman*, 2 C. M. & R. 239; *Rex v. Russell*, 13 Q. B. 237.

And although the schedule should be followed implicitly, when to do so would not sacrifice the effect and operation of the act; *Hannah v. Whyman*, 2 C. M. & R. 239; *Davidson v. Gill*, 1 East 64; *Reg. v. Pinder*, 24 L. J. Q. B. 148; *Liverpool, etc., Bank v. Turner*, 1 J. & H. 159; yet, when its provisions or forms are repugnant to the provisions in the body of the statute, the latter will prevail. *Bartlett v. Gibbs*, 5 M. & G. 96; 44 E. C. L. 53; *Reg. v. Baines*, 5 Ad. & El. 227; 40 E. C. L. 48; *Allen v. Flicker*, 10 Ad. & El. 640; 37 E. C. L. 204; *Reg. v. Russell*, 13 Q. B. 237; 66

E. C. L. 235; *Dean v. Green*, L. R., 8 P. D. 79; *Clarke v. Grant*, L. R., 8 Exch. 252.

1. *Doe v. Martin*, 4 T. R. 65; *Barrow v. Wadkin*, 24 Beav. 327; *Sedg. Stat. Law* 223; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *Cushing v. Worrick*, 9 Gray (Mass.) 385; *Gyger's Estate*, 65 Pa. St. 311; *Hamilton v. The R. B. Hamilton*, 16 Ohio St. 43; *Caston v. Brock*, 14 S. Car. 104.

2. *Ewing v. Burnet*, 11 Pet. (U. S.) 42; *Morrill v. State*, 38 Wis. 434; 20 Am. Rep. 12; *State v. McNally*, 34 Me. 210; 56 Am. Dec. 650.

In U. S. v. *Three Railroad Cars*, 1 Abb. (U. S.) 210, it was said: "The punctuation of a statute as printed affords no very decisive means for determining its construction."

In *Caston v. Brock*, 14 S. Car. 106, *Willard, C. J.*, said: "Punctuation is the least reliable guide to the sense of a statute, but cannot properly be said to be without any force. In itself it is ordinarily insufficient to fix the sense of a statute where that is disputable."

In *Ewing v. Burnet*, 11 Pet. (U. S.) 53, *Baldwin, J.*, said: "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first take the instrument by its four corners in order to ascertain its true meaning if that is apparent on judicially inspecting the whole punctuation and not be suffered to change it."

3. *Gyger's Estate*, 65 Pa. St., 311; U. S. v. *Isham*, 17 Wall. (U. S.) 502; *Com. v. Shopp*, 2 Woodw. (Pa.) 123; *Murray v. State*, 21 Tex. App. 620; 57 Am. Rep. 623; *Allen v. Russell*, 39 Ohio St. 337; *Archer v. Ellison*, 28 S. Car. 238; *Albright v. Payne*, 43 Ohio St. 15; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768.

In *Pancoast v. Ruffin*, 1 Ohio 385, the court said: "This construction is founded upon a mere grammatical criticism, which is never received to change or control the intention of the legislature where that intention is otherwise clearly expressed. Something may depend upon the punctuation in the statute book, which may be

disregarded altogether,<sup>1</sup> and courts will correct and re-punctuate to give effect to what is plainly the legislative intent.<sup>2</sup>

2. *LEGISLATIVE JOURNALS.*—To ascertain the intention of the legislature when the terms of the statute are ambiguous, the courts may refer to the history of the bill while pending, as shown by the journals of either house.<sup>3</sup> The journals of the Senate and House of Representatives may be referred to in considering acts of Congress.<sup>4</sup> So in the construction of constitutional provisions

incorrect, and which never ought to vary the true sense."

1. *Martin v. Gleason*, 139 Mass. 187; *Cushing v. Worrick*, 9 Gray (Mass.) 382; *Randolph v. Bayue*, 44 Cal. 366; *Hamilton v. The R. B. Hamilton*, 16 Ohio St. 433; *Shridley v. State*, 23 Ohio St. 130; *Albright v. Payne*, 43 Ohio St. 15.

In *Hamilton v. The R. B. Hamilton*, 16 Ohio St. 432, it was said: "But for the punctuation as it stands, there would be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the true meaning and intention of the law makers, disregard the punctuation, or re-punctuate, if need be, to render the true meaning of the statute." This language was adopted in *Hammock v. Farmer's L. & T. Co.*, 105 U. S. 77.

2. *U. S. v. Isham*, 17 Wall. (U. S.) 496; *Pancoast v. Ruffin*, 1 Ohio 385; *Hamilton v. The R. B. Hamilton*, 16 Ohio St. 433; *Price v. Price*, 10 Ohio St. 316; *Albright v. Payne*, 43 Ohio St. 14; *Allen v. Russell*, 39 Ohio St. 337; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77.

In *U. S. v. Lacher*, 134 U. S. 624, *Fuller, C. J.*, said: "For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required."

A comma was allowed to be taken from before a word and placed after the same word, to give effect to the true purpose of the statute. *Albright v. Payne*, 43 Ohio St. 14.

In *Re Olmsted*, 17 Abb. N. Cas. (N. Y.) 320, a statute was construed as if a comma were substituted for a semi-colon.

In *State v. Payne County* (Oregon 1892), 29 Pac. Rep. 789, it was said: "As to the contention in reference to the punctuation of the statute, it is enough to say that the rule is that courts will, in the construction of statutes, for the purpose of arriving at the

real meaning and intention of the law-maker, disregard the punctuation, or re-punctuate if need be, to render clear the true meaning of the statute."

3. *Hebbert v. Purchas*, L. R., 3 P. C. 648; *Hill v. Mitchell*, 5 Ark. 608; *Wood Mowing, etc., Co. v. Caldwell*, 54 Ind. 276; *Edger v. Randolph County*, 70 Ind. 331; *Division of Howard County*, 15 Kan. 194; *Warner v. Beers*, 23 Wend. (N. Y.) 103; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Blake v. National Banks*, 23 Wall. (U. S.) 307. See also *Gardiner v. Barney*, 6 Wall. (U. S.) 511; *Matthews v. Com.*, 18 Gratt. (Va.) 939.

In *Fosdick v. Perrysburg*, 14 Ohio St. 481, it was held that the court could look into the history and progress of the bill during its pendency and passage by the general assembly, as shown by the journals of the two houses of that body, to ascertain the intention of the legislature as to the time when the law should take effect. See also *Southwalk Bank v. Com.*, 26 Pa. St. 446; *Gardner v. Barney*, 6 Wall. (U. S.) 499.

A provision that "no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors of purchasers without notice," was construed as though there were a comma after "purchasers," such being the punctuation in the original bill, as shown by the journal. *McPhail v. Gerry*, 55 Vt. 174.

But in *State v. Under-Ground Cable Co.* (N. J. 1889), 18 Atl. Rep. 581, the journals of the branches of the legislature were not allowed to be considered as evidence to show a different punctuation from that in the engrossed and printed act. In this case, however, the court said that there was no need of interpretation as the law contained nothing doubtful.

4. In *Blake v. National Banks*, 23 Wall. (U. S.) 307, the manner in which the amendatory words were introduced, as shown by the house journal,

the journals of the convention have been referred to.<sup>1</sup> But it must be said of this, as of all other secondary modes of ascertaining the legislative intention, that it is to be resorted to only when the meaning of the language of the act itself is doubtful.<sup>2</sup>

*f.* CONTEMPORANEOUS CIRCUMSTANCES AND THE HISTORY OF THE BILL, while pending before the legislature, may be considered in case of doubt.<sup>3</sup> The interpreter, in order to understand the subject-matter, scope, and object of the enactment, must ascertain what was the mischief or defect for which the law had not provided; that is, he must call to his aid all those external or historical facts which are necessary for this purpose and which led

was referred to in determining the intention of Congress; and in *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621, the journal of the House of Representatives was referred to to indicate the object had in view by that body in the passage of the particular law.

1. *People v. Purdy*, 2 Hill (N. Y.) 35; *Coutant v. People*, 11 Wend. (N. Y.) 511; *People v. New York Cent. R. Co.*, 24 N. Y. 496; *State v. Closkey*, 5 Sneed (Tenn.) 482; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

2. *Southwalk Bank v. Com.*, 26 Pa. St. 446; *Bank of Pa. v. Com.*, 19 Pa. St. 156. See, generally, on the subject of the legislative journals, *supra*, this title, *Legislative Journals*.

3. *People v. Schoonmaker*, 63 Barb. (N. Y.) 48; *Keith v. Quinney*, 1 Oregon 364; *District of Columbia v. Washington Market Co.*, 108 U. S. 243; *Fairchild v. Gwynne*, 16 Abb. Pr. (N. Y.) 23; *Mohawk Bridge Co. v. Utica, etc.*, R. Co., 6 Paige (N. Y.) 561. See also *Scott v. Guthrie*, 10 Bosw. (N. Y.) 408; *Smith v. Helmer*, 7 Barb. (N. Y.) 416; *Woods v. Mains*, 1 Greene (Iowa) 275; *Winslow v. Kimball*, 25 Me. 493; *Stout v. Grant County*, 107 Ind. 343; *Alexander v. Worthington*, 5 Md. 471; *Sibley v. Smith*, 2 Mich. 486; *U. S. v. Union Pac. R. Co.*, 91 U. S. 79; *State v. Forkner*, 70 Ind. 241; *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416; *Garland v. Montgomery County*, 87 Ala. 223; *U. S. v. Collier*, 3 Blatchf. (U. S.) 325; *State v. Nicholls*, 30 La. Ann. 980; *Martin v. Lake*, 37 La. Ann. 763; *People v. Essex County*, 70 N. Y. 228; *Tracy v. Card*, 2 Ohio St. 441; *Cincinnati Gas Light, etc., Co. v. Avondale*, 43 Ohio St. 257; *Brown v. Phillips*, 71 Wis. 239; *Holy Trinity Church v. U. S.*, 143 U. S. 457; *Miller v. Salomons*, 7 Exch. 475; *Reg. v. Most*, 7 Q. B. Div. 251; *Reg. v. Col-*

*lingwood*, 12 Q. B. 686; 64 E. C. L. 684; 14 Cox C. C. 583; *In re Wahll*, 42 Fed. Rep. 822; *Western R. Co. v. State* (Ga. 1891), 14 L. R. A. 438; *Gorham v. Bishop of Exeter*, Moore 462; *Atty. Gen'l v. Sillem*, 2 H. & C. 431; *Aldridge v. Williams*, 3 How. (U. S.) 9; *Keyport, etc., Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457; *Hunt v. Lake Shore, etc., R. Co.*, 112 Ind. 69; *Rogers v. Chicago, etc., R. Co.*, 117 Ill. 115; 1 Kent's Com. 46; *Dwarris on St. 702*; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655.

An act which authorized the court before which a road indictment was preferred to give costs, was construed as authorizing the judge of *nisi prius* to do so, partly on the ground of the well-known fact that such indictments were rarely tried by the courts in which they were, in the strict sense of the word, "preferred." *Reg. v. Pembridge*, 3 Q. B. 901; 43 E. C. L. 1028.

An ordinance of the colony of Hong-Kong, which authorized the extradition of Chinese subjects when charged with "any crime or offense against the law of China," was construed either by reference to the circumstances under which the treaty which the ordinance enforced had been made, or to the geographical relation of Hong-Kong to China, as limited to those crimes which all nations concur in prescribing. *Atty. Gen'l v. Knock-A-Sing*, L. R., 5 C. P. 179.

Certain provisions of the act of incorporation of the Union Pacific R. Co. were construed with reference to the history of the times, the national necessities to be provided for, and the general purpose of the act. *U. S. v. Union Pac. R. Co.*, 91 U. S. 72.



to the enactment.<sup>1</sup> But traditional history, however, as to the purpose of the enactment must be cautiously received.<sup>2</sup> It is only material to consider the history of a statute where the words admit of two meanings, and the inquiry is to determine which meaning was intended. The external circumstances which may be thus referred to do not justify a departure from every meaning of the language of the act.<sup>3</sup> In the interpretation of an ancient statute it is proper to ascertain the facts at the time of passage from annuals and antiquarian research.<sup>4</sup>

*g.* OPINIONS AND MOTIVES OF LEGISLATORS.—The opinions of individual legislators as to the object and effect of the statute are of little or no weight on questions of construction.<sup>5</sup> So their

1. *Hayden's Case*, 3 Rep. 7; *Gorham v. Bishop of Exeter*, Moore 462; *Atty. Gen'l v. Sillem*, 2 H. & C. 539; *Holme v. Guy*, 5 Ch. Div. 905; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; *Wearth v. Adamson*, 2 App. Cas. 743; *Tonnele v. Hall*, 4 N. Y. 140; *Fosdick v. Perrysburg*, 14 Ohio St. 481; *Keith v. Quinney*, 1 Oregon 364; *Big Black Creek Imp. Co. v. Cone*, 94 Pa. St. 450; *Taylor v. Taylor*, 10 Minn. 107; *Cearfoss v. State*, 42 Md. 408; *Browning v. Loraw*, 53 Md. 526; *Clark v. Janesville*, 10 Wis. 136; *Preston v. Browder*, 1 Wheat. (U. S.) 120; *Madison, etc., R. Co. v. Whiteneck*, 8 Ind. 240; *Green v. Graves*, 1 Dougl. (Mich.) 354; *French v. Teschemaker*, 24 Cal. 552; *Dwarris on St.* 44-6.

An act passed by the *New York* legislature in 1864, which provided for the raising of funds and payments of benefits to volunteers in the military and naval service of the *United States*, was held not to be retroactive, the intention of the lawmakers being ascertained by reference to the occasion and purpose of its enactment, and public interests to be served. *People v. Columbia County*, 43 N. Y. 130.

The occasion of the enactment of a law may be looked into in determining its character as retrospective or prospective. *People v. Columbia County*, 43 N. Y. 130; *People v. Essex County*, 70 N. Y. 237.

An act entitled "An act to secure to creditors a just division of the estates of debtors, who convey to assignees for the benefit of creditors," required the assignment to be in writing, and acknowledged before the proper officer, in order to be valid and effectual. The court in *Fairchild v. Gwynne*, 16 Abb. Pr. (N. Y.) 23, held the require-

ment of the act to be imperative, in view of the abuses intended to be prevented, and evils to be corrected.

The words, "commence at or near the city of Schenectady, and running thence on the north side of the Mohawk river," etc., was held to authorize the company, in the charter of the *Utica & Schenectady Railroad Company*, to commence its road at some point on the north side of the river near the city, or at some suitable point on the south side, at or near the city, and thence to cross the river to the north side, a doubt as to the purport of the words "at or near the city" being settled by extrinsic circumstances. *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 553.

It was held in *Rex v. Mashiter*, 6 Ad. & El. 153; 33 E. C. L. 31, that the word *inhabitants* in a charter has not in itself any definite legal meaning, but must be accepted in each case extrinsically by evidence of the usage, or by reference to the context and objects of the charter.

2. *Barker v. Esty*, 19 Vt. 131.

3. *Reg. v. Pembroke*, 3 Q. B. 901; 43 E. C. L. 1028; *Reg. v. Bishop of London*, 24 Q. B. D. 213; and cases cited in the first two notes under this sub-head.

4. *McWilliam v. Adams*, 1 Mac H. L. Cas. 120; *Montrose Peerage*, 1 Mac H. L. Cas. 401; *Clyde Nav. Trustees v. Laird*, 8 App. Cas. 673; *Smith v. Lindo*, 4 C. B. N. S. 395; 93 E. C. L. 395.

5. *Leese v. Clark*, 20 Cal. 387; *Keyport, etc., Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Taylor v. Taylor*, 10 Minn. 107; *Atty. Gen'l v. Sillem*, 2 H. & C. 521; *Dean of York's Case*, 1 Q. B. 34; *Martin v. Hemming*, 10 Ex. 476; *Cameron v.*

remarks on the passage of a statute are too uncertain to serve as a guide.<sup>1</sup> Nor may the intention of the draughtsman nor the motives of members who voted for the act be taken into consideration in its construction.<sup>2</sup>

Cameron, 2 M. & K. 289; Hemstead v. Phoenix Gas Light, etc., Co., 3 H. & C. 745; Belleville, etc., R. Co. v. Gregory, 15 Ill. 20; 58 Am. Dec. 589.

In *Cumberland County v. Boyd*, 113 Pa. St. 57, it was said: "In giving construction to a statute we cannot be controlled by the views expressed by a few members of the legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than a hundred members who gave no such expression. The declarations of some and the assumed acquiescence of others therein, cannot be adopted as a true interpretation of the statute. Keeping in mind the previous law, the supposed evil and the remedy desired, we must consider the language of the statute, and the fair and reasonable import thereof."

In *Leese v. Clark*, 20 Cal. 388, Field, C. J., said: "The respondents cite as authority for their position the opinions expressed by certain members of the Senate of the *United States*, when the act of March 3, 1851, was under discussion before that body. These opinions, say the learned counsel, show 'not only the effect, but the absolute limitation which Congress intended' the patent should possess. We do not think so; on the contrary, they only express the views entertained by individual members of one body of the national legislature. Other senators, who did not participate in the discussion of the subject, may have held different views as to the effect and operation of the patent; a majority of the Senate even may have held different views; and the general opinion of members of the House of Representatives may have differed entirely from that of Senators, both of those who spoke and of those who simply voted on the subject. It is evident that the opinions expressed by individual legislators upon the object and effect of particular provisions of an act under discussion, are entitled to very little weight in the construction of the act. The intention of the legislature must be sought in the language of the act—and the object expressed or apparent on its face—and not by the uncertain light of a legislative discussion."

In *Aldridge v. Williams*, 3 How. (U. S.) 24, Taney, C. J., said: "In expounding this law the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage; nor by the motives or reasons assigned by them for supporting or opposing amendments that are offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself, and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

1. *U. S. v. Union Pac. R. Co.*, 91 U. S. 79; *District of Columbia v. Washington Market Co.*, 3 MacArthur (D. C.) 559; *Barnes v. Mobile*, 19 Ala. 707; *Eastern R. Co. v. Railroad Com'rs*, 50 L. J. Q. B. 203; *Reg. v. Whittaker*, 2 C. & K. 636; 61 E. C. L. 635; *Gorham v. Bishop of Exeter*, 5 Exch. 630; *MacGarrahan v. Maxwell*, 28 Cal. 95. See also *Forrest v. Forrest*, 10 Barb. (N. Y.) 46.

2. *Soon Hing v. Crowley*, 113 U. S. 703; *Aldridge v. Williams*, 3 How. (U. S.) 1; *Richmond v. Henrico County*, 83 Va. 212; *Keyport, etc., Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 24; *Kountze v. Omaha*, 5 Dillon (U. S.) 443; *People v. Shepard*, 36 N. Y. 289; *Bishop Stat. Cr.*, § 76; *McMaster v. Lomax*, 2 Myl. & K. 32; *Cameron v. Cameron*, 2 Myl. & K. 289; *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589. "Testimony to explain the motives which operated upon the lawmakers or to point out the objects they had in view is wholly inadmissible." *Pagand v. State*, 5 Smed. & M. (Miss.) 497.

**Reports of Committees.**—The reports and proceedings before committees will not be considered by the courts in construing a statute. *Bank of Pa. v. Com.*, 19 Pa. St. 156; 7 Pa. St. 144; *Steele v. Midland R. Co.*, L. R., 1 Ch. 282; *Donnegal v. Layard*, 8 H. L. Cas. 460; *Atty. Gen'l v. Sillem*, 2 H. & C. 431.

And so of the reports of committees

*A fortiori*, the opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of its members in a private capacity.<sup>1</sup> Reference, however, occasionally has been made to what individual members of the legislature understood the enactment to mean, but little weight probably was attached to their opinions, and the rule may be said to be settled as above.<sup>2</sup>

*h.* USAGE AND CONTEMPORANEOUS CONSTRUCTION.—Courts, in construing or interpreting a statute, give much weight to the interpretation put upon it at the time of its enactment and since by those whose duty it has been to construe, execute, and apply it;<sup>3</sup> and especially is this true, where the statute is an ancient

appointed by Parliament. *Salkeld v. Johnson*, 2 C. B. 749; 52 E. C. L. 748; *Farley v. Bonham*, 2 J. & H. 177; *In re Dean of York*, 2 Q. B. 1; 42 E. C. L. 543; *Martin v. Hemming*, 18 Jur. 1002; *Ewart v. Williams*, 3 Drew. 21.

In *Municipality No. Two v. Morgan*, 1 La. Ann. 111, the report of a committee, which was presented and adopted with an ordinance, was regarded as a preamble showing the reasons for the ordinance.

1. *Bingham v. Winona County*, 8 Minn. 441. See also *Dash v. Van Vleck*, 7 Johns. (N. Y.) 508; 5 Am. Dec. 291; *State v. Armstrong*, 4 Minn. 335; *Ingalls v. Cole*, 47 Me. 540.

2. *Hebbert v. Perchas*, L. R., 3 C. P. 649; *Ridsdale v. Clifton*, 2 P. Div. 32; *Hedworth v. Jackson*, Hard. 318; *Mounsey v. Ismay*, 34 L. J. Exch. 56; *Drummond v. Drummond*, L. R., 2 Ch. 45; *Hudson v. Tooth*, 3 Q. B. Div. 46; *Ash v. Abdy*, 3 Swanst. 664; *Ex parte Farley*, 40 Fed. Rep. 66; *Moyer v. Gross*, 2 Pen. & W. (Pa.) 171.

Thus, *Hengham, C. J.*, said that he knew better than counsel the meaning of the statute of 2 Westminster, as he had drawn it. Year Book, 33 Edw. I, p. 31. And so in *Ash v. Abdy*, 3 Swanst. 664. Lord Nottingham said that he should know the meaning of the Statute of Frauds, as it was first introduced by him into the House of Lords. And in *Rex v. Wallace*, 5 T. R. 379, Lord Kenyon supported his construction of the Stat. of 9 Anne, ch. 20, by the argument that so accurate a lawyer as Mr. Justice Powell, who had drawn it, never would have used several words where one sufficed.

Mr. Bishop says: "How far opinions promulgated in connection with the making of a statute are to be regarded in its interpretation, is an inquiry more

easily answered on principle than on authority. Practical obscurities arise from the fact, that commonly there are two dissimilar aspects from which such opinions are to be viewed. Courts properly look into legal treatises, whose only weight consists in their citation of authorities and the learning of their authors. In like manner, they sometimes give attention to opinions of learned lawyers in the various other ways expressed. In this aspect, it is evidently proper for them to look, if they choose, into discussions by lawyers in the legislative body, the views of the draughtsman of a bill, of the revisers of statutes, and of the legislature passing an act. As authority, this sort of matter is not admissible. As opinion to persuade, it varies with the particular circumstances." Bishop on Statutory Crimes, § 76.

3. Bishop's Stat. Crimes, § 144; *Scruggs v. Brackin*, 4 Yerg. (Tenn.) 532; *Sedgwick Stat. Laws* 251; *Fischer v. Max*, 49 Mo. 404; 2d Inst. 11; *People v. Loewenthal*, 93 Ill. 191; *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658; *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20; *Com. v. Parker*, 2 Pick. (Mass.) 556; *Reg. v. Cutbush*, L. R., 2 Q. B. 379; *Reg. v. Archbishop of Canterbury*, 11 Q. B. 581; 63 E. C. L. 580; *Fall v. Hazelrigg*, 45 Ind. 576; 15 Am. Rep. 278; *Opinion of Justices*, 3 Pick. (Mass.) 517; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Chesnut v. Shane*, 16 Ohio 599; 47 Am. Dec. 387; *In re Warfield's Will*, 22 Cal. 51; 83 Am. Dec. 49.

In *Packard v. Richardson*, 17 Mass. 143; 9 Am. Dec. 123, *Parker, C. J.*, says: "A contemporaneous construction is generally the best construction of a statute. It gives the sense of the community of the terms made use of by the

one, and the construction that of cotemporaries who had special knowledge of the subject.<sup>1</sup>

If the statute has been construed by a court of last resort, such construction may be conclusive, on the principle of *stare decisis*;<sup>2</sup> or if by a re-enactment or declaratory statute the question of construction has been determined, this may be conclusive.<sup>3</sup>

But further, the meaning publicly given by contemporary or long professional usage is presumed to be the true one, even where the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed would naturally be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions.<sup>4</sup>

The contemporaneous and long-continued practice of officers required to execute, or take special cognizance of a statute, is strong evidence of its true meaning;<sup>5</sup> but, though strong, is not

legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice."

In *Cohens v. Virginia*, 6 Wheat. (U. S.) 418, Chief Justice Marshall said that, "Great weight has always been attached, and very rightly attached, to contemporaneous exposition."

1. *Clyde Nav. Trustees v. Laird*, 8 App. Cas. 673; *Catholic Cathedral v. Manning*, 72 Md. 116; *In re Breslin*, 45 Hun (N. Y.), 210; *Chesnut v. Shane*, 16 Ohio 599; 47 Am. Dec. 387; *Morgan v. Crawshaw*, L. R., 5 H. L. 304; *Mansell v. Reg.*, 8 El. & Bl. 111; 92 E. C. L. 110; *Martin v. Hunter*, 1 Wheat. (U. S.) 351; *Wanet v. Corbet*, 13 Ga. 441; *Dean v. Borchsenius*, 30 Wis. 236; *People v. May*, 3 Mich. 598; *The Anna*, 1 P. Div. 259; *Gardner v. Collins*, 2 Pet. (U. S.) 85; *Migneault v. Malo*, L. R., 4 P. C. 136; *State v. Chase*, 5 Har. & J. (Md.) 303; *Pease v. Peck*, 18 How. (U. S.) 595; *Ex parte Hardy*, 68 Ala. 303; *Moog v. Randolph*, 77 Ala. 606; *Atty. Gen'l v. Preston*, 56 Mich. 181; *Brown v. State*, 5 Colo. 496.

2. See *STARE DECISIS*, vol. 23, p. 19.

3. *Booth v. Ibbotson*, 1 Y. & J. 360; *Bank of England v. Anderson*, 3 Bing. N. Cas. 666; 32 E. C. L. 262; *Doe v. Owens*, 10 M. & W. 521; *Curlewis v. Mornington*, 7 El. & Bl. 283; 90 E. C. L. 281.

4. *Co. Litt.*, 8 b.; 2 Inst. 18, 282; *Bac.*

*Abr. Stat.* I, 5; 2 Hawk., ch. 9, § 3; *Sheppard v. Gosnold*, Vaugh. 169; *Rex v. Varlo*, Cowp. 250; *Rex v. Bewdley*, 1 P. Wms. 223; *Leigh v. Kent*, 3 T. R. 364; *Blankley v. Winstanley*, 3 T. R. 286; *Rex v. Scott*, 3 T. R. 604; *Rex v. Wallis*, 5 T. R. 380; *Kitchen v. Bartsh*, 7 East 53; *Stewart v. Lawton*, 1 Bing. 377; 8 E. C. L. 554; *Gorham v. Bishop of Exeter*, 15 Q. B. 59; 69 E. C. L. 57; *Atty. Gen'l v. Parker*, 3 Atk. 576; *Atty. Gen'l v. Forster*, 10 Ves. 338; *Dunbar v. Roxburghe*, 3 Cl. & F. 354; *Jewison v. Dyson*, 9 M. & W. 556; *Clift v. Schwabe*, 3 C. B. 469; 54 E. C. L. 468; *Rex v. Mashiter*, 6 Ad. & El. 153; 33 E. C. L. 31; *Rex v. Davie*, 6 Ad. & El. 374; 33 E. C. L. 90; *Newcastle v. Atty. Gen'l*, 12 Cl. & F. 419; *Smith v. Lindo*, 4 C. B. N. S. 395; 107 E. C. L. 113; *Reg. v. Herford*, 3 El. & El. 115; *Atty. Gen'l v. Jones*, 2 H. & C. 347; *Marshall v. Bishop of Exeter*, 13 C. B. N. S. 820; 106 E. C. L. 819; *Montrose Peerage*, 1 Macq. H. L. Cas. 401; *L. J. in The Anna*, 1 P. Div. 259; *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667; *Hebbert v. Purchas*, L. R., 3 P. C. 650; *Sherwin v. Bugbee*, 16 Vt. 439; *Graham's Appeal*, 1 Dall. (U. S.) 136; *Atty. Gen'l v. Bank of Cape Fear*, 5 Ired. Eq. (N. Car.) 71.

5. *Scanlan v. Childs*, 33 Wis. 663; *M'Keen v. Delancy*, 5 Cranch (U. S.) 22; *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 291; *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Brown v. U. S.*, 113 U. S. 568;

controlling upon the courts, and cases are not wanting, especially where the practice is not one of long standing, where courts have refused to follow such construction.<sup>1</sup>

Burrow-Giles, etc., Co. v. Sarony, 111 U. S. 53; U. S. v. Philbrick, 120 U. S. 52; U. S. v. Hill, 120 U. S. 169; U. S. v. Alabama G. S. R. Co., 142 U. S. 615; Stuart v. Laird, 1 Cranch (U. S.) 299; U. S. v. State Bank, 6 Pet. (U. S.) 29; Edwards v. Darby, 12 Wheat. (U. S.) 206; U. S. v. Moore, 95 U. S. 760; The Laura, 114 U. S. 411; Pennoyer v. McConnaughy, 140 U. S. 35; Heath v. Wallace, 138 U. S. 573; U. S. v. Johnston, 124 U. S. 236; Schultze v. U. S., 24 Ct. of Cl. 299; Hahn v. U. S., 14 Ct. of Cl. 305; Swift v. U. S., 14 Ct. of Cl. 208; U. S. v. Lytle, 5 McLean (U. S.) 9; Morrison v. Barksdale, Harp. (S. Car.) 101; Simpson v. Willard, 14 S. Car. 195; Kernion v. Hills, 1 La. Ann. 419; Westbrook v. Miller, 56 Mich. 148; Bruce v. Schuyler, 0 Ill. 221; 46 Am. Dec. 447; Mathews v. Shores, 24 Ill. 27; Kirk v. Dean, 2 Binn. (Pa.) 341; Goddard v. Gloninger, 5 Watts (Pa.) 209; French v. Cowan, 79 Me. 426; Chesnut v. Shane, 16 Ohio 607; 47 Am. Dec. 387. See also State v. Severance, 49 Mo. 401. See Franklin County v. Bunting, 111 Ind. 143; Parvin v. Wimborg, 130 Ind. 561; 30 Am. St. Rep. 254; *In re Warfield's Will*, 22 Cal. 71, 83 Am. Dec. 49; Com. v. Posey, 4 Call (Va.) 109; 2 Am. Dec. 560; Duke of Buccleuch v. Metropolitan Board of Works, 5 Exch. Div. 221; *Evanturel v. Evanturel*, L. R., 2 P. C. 462; *People v. Loewenthal*, 93 Ill. 191; *People v. Dayton*, 55 N. Y. 377; *Nelson v. Allen*, 1 Yerg. (Tenn.) 376; *Harrison v. Willis*, 7 Heisk. (Tenn.) 40; 19 Am. Rep. 640; *Solomon v. Cartersville*, 41 Ga. 157; *Howell v. State*, 71 Ga. 229; *Wellborn v. Estes*, 70 Ga. 390; U. S. v. The Recorder, 1 Blatchf. (U. S.) 223; *State v. Mayhew*, 2 Gill (Md.) 487; *Wright v. Forrestal*, 65 Wis. 341; *State v. Timme*, 54 Wis. 340; *Dean v. Borchsenius*, 30 Wis. 236; *Wetmore v. State*, 55 Ala. 198; *Johnson v. Bailou*, 28 Mich. 379; *Maloney v. Mahar*, 1 Mich. 26; *Kelly v. Multnomah County*, 18 Oregon 356; *Harrison v. Com.*, 83 Ky. 162; *Rogers v. Goodwin*, 2 Mass. 475.

1. *In re Manhattan Sav. Inst.*, 82 N. Y. 142; U. S. v. Dickson, 15 Pet. (U. S.) 161; *Pierce v. U. S.*, 1 Ct. of Cl. 270; *Albright v. Bedford County*, 106 Pa. St. 582; *Simpson v. Willard*, 14

S. Car. 195. See also *Clow v. Harper*, 3 Exch. Div. 193; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *Goldsborough v. U. S.*, Taney's Dec. (U. S.) 80; *Employers, etc., Assurance Co. v. Com'r of Insurance*, 64 Mich. 614.

In *Robertson v. Downing*, 127 U. S. 607, it is said: "A regulation of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain, but when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

In *Merritt v. Cameron*, 137 U. S. 551, it was said: "In arriving at this conclusion, we are not unmindful of the fact that defendants in error made their protest in accordance with the regulation of the treasury department in force at that time. A regulation of a department, however, cannot repeal a statute, neither is the construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration, construction of it by the treasury department has not been uniform." And see *Van Loon v. Lyons*, 61 N. Y. 22, reversing 4 Daly (N. Y.) 149, where the lower court had rested its judgment upon an established usage.

In *U. S. v. Graham*, 110 U. S. 219, it was said: "Such being the case, it matters not what the practice of the department may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation; if there were ambiguity or doubt, then such a practice begun so early and continued so long would be in the highest degree persuasive, if not absolutely controlling in its effect; but with language clear and precise and with its meaning evident, there is no room for construction, and consequently no need for anything to give it aid."

The long-continued construction of a doubtful statute by inferior courts will generally be followed by a higher court;<sup>1</sup> but where the statute is not doubtful, a prior construction by an inferior court will not be regarded;<sup>2</sup> so if prior constructions are conflicting it cannot be said there is a contemporary exposition, and the court must look to the statute itself.<sup>3</sup>

This rule of usage followed in the interpretation of a statute has been said to apply only to cases where the language is ambiguous; where it is plain and unambiguous, it is said that a practical construction in conflict with it must be corrected.<sup>4</sup> But if the legislature by its inaction has long sanctioned a certain construction, language apparently unambiguous may be given by the courts such construction, especially if the usage has been public and authoritative.<sup>5</sup> The construction of a statute in accordance with established practice will be especially followed by the courts in cases where departure from such construction would result in great mischief, or where property rights would be disturbed.<sup>6</sup>

1. *Plummer v. Plummer*, 37 Miss. 185; *The Anna*, 1 P. Div. 253.

2. *Bailey v. Rolfe*, 16 N. H. 247.

3. *Rex v. Leek Wootton*, 16 East 122.

4. *Bailey v. Rolfe*, 16 N. H. 247; *Reg. v. Archbishop of Canterbury*, 11 Q. B. 581; 63 E. C. L. 580; *Dunbar v. Roxburgh*, 3 Cl. & F. 354; *Rex v. Hogg*, 1 T. R. 728; *Gwyn v. Hardwicke*, 1 H. & N. 53; *Pachin v. Duncombe*, 1 H. & N. 856; *Ham v. Sawyer*, 38 Me. 37; *In re Manhattan Sav. Inst.*, 82 N. Y. 142; *Merritt v. Cameron*, 137 U. S. 551.

5. *Reg. v. Scaife*, 17 Q. B. 238; 79 E. C. L. 237; *Leigh v. Kent*, 3 T. R. 362; *Dyer v. Best*, L. R., 1 Exch. 152; *Clays v. Sudgrave*, 1 Salk. 33; *Smith v. Tilly*, 1 Keb. 712; *Stuart v. Laird*, 1 Cranch (U. S.) 299; *M'Keen v. Delancy*, 5 Cranch (U. S.) 22; *U. S. v. The Recorder*, 1 Blatchf. (U. S.) 223; *Harrison v. Com.*, 83 Ky. 171; *State v. Chase*, 5 Har. & J. (Md.) 303; *Graham's Appeal*, 1 Dall. (Pa.) 136; *McFerron v. Powers*, 1 S. & R. (Pa.) 105.

In *Gorham v. Bishop of Exeter*, 15 Q. B. 73; 69 E. C. L. 71, *Campbell, C. J.*, said: "Were the language of the statute, 25 Henry VIII, ch. 19, obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety to property nor liberty if it could be successfully contended that all the lawyers and statesmen have been mistaken for centuries as to the true meaning of an old act of Parliament."

In *Stuart v. Laird*, 1 Cranch (U. S.)

309, it is said: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of a most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

Where a statute organizing a criminal court authorized "two or more" of the judges to try offenses, it was construed as authorizing a single judge to try offenses, such having been the inveterate practice. *Leverson v. Reg.*, L. R., 4 Q. B. 394.

When the question arose whether a person convicted at one time of several offenses could be considered at the time of the adjudication as "in prison undergoing imprisonment," it was decided in the affirmative in consequence of the practice of the judges for many years. *Reg. v. Cutbush*, L. R., 2 Q. B. 379.

6. *M'Keen v. Delancy*, 5 Cranch (U. S.) 32; *Brown v. State*, 5 Colo. 496; *In re Warfield's Will*, 22 Cal. 51; 83 Am. Dec. 49; *Steiner v. Cox*, 4 Pa. St. 13; *Chesnut v. Shane*, 16 Ohio 603; 47 Am. Dec. 387; *Troup v. Haight*, Hopk. Ch. (N. Y.) 239; *People v. Loewenthal*, 93 Ill. 192; *State v. Mayhew*, 2 Gill (Md.) 497; *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

An ancient statute of the colony of

Where the courts have acted for a long time upon a statute without questioning its constitutionality, a strong presumption arises that it is constitutional.<sup>1</sup> But this presumption is not conclusive, for it may be declared void, notwithstanding the lapse of time.<sup>2</sup>

The practice must have been general and public; it must have been acted upon in general practice and must not be a mere speculative theory.<sup>3</sup>

As a universal law cannot have different interpretations in different localities, the construction of a general statute cannot be aided by a local or special usage, even for the locality where such usage prevails.<sup>4</sup> But words in a statute applicable to a particular place, when doubtful, may be construed by reference to the usage prevailing there.<sup>5</sup>

i. **LEGISLATIVE CONSTRUCTION.**—It is the duty of the legislature to enact laws, not to expound nor interpret them.<sup>6</sup> While

*Massachusetts* permitted proprietors of common and undivided lands to dispose of their estates. The practical construction of this statute had been that they had the power to sell any part of them to a stranger. It was held that the court would follow this construction. The court said: "Of these statutes a practical construction early and generally obtained that in the power to dispose of lands was included a power to sell and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. And although, if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words." *Rogers v. Goodwin*, 2 Mass. 477.

1. *State v. Bosworth*, 13 Vt. 401. See also *Continental Imp. Co. v. Phelps*, 47 Mich. 303.

2. *Baltimore v. State*, 15 Md. 376.

3. *Isherwood v. Oldknow*, 3 M. & S. 396; *Water v. Perry*, 6 L. & F. 73; *In*

*re Ford*, 10 Ch. Div. 370; *Feather v. Reg.*, 6 B. & S. 257; 118 E. C. L. 257.

4. *Rex v. Hogg*, 1 T. R. 728; *Bishop's Stat. Crimes*, § 101; *Rex v. Saltren*, Cald. 444; *Evans v. Myers*, 25 Pa. St. 112.

*A fortiori* is this the case when a local custom is manifestly at variance with the object of the act, as, for instance, the custom of departing from the statute of weights and measures which the legislature plainly desires to make obligatory on all and everywhere. *Noble v. Durell*, 3 T. R. 271.

5. *Love v. Hinckley*, Abb. Adm. 436. See also *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457; *Frazier v. Warfield*, 13 Md. 279.

6. *Wayman v. Southard*, 10 Wheat. (U. S.) 46; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *Reiser v. William Tell, etc., Assoc.*, 39 Pa. St. 146; *Sedgw. Stat.* 253; *Ogden v. Blackledge*, 2 Cranch (U. S.) 272; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 498; 5 Am. Dec. 291; *Salters v. Tobias*, 3 Paige (N. Y.) 338; *People v. New York*, 16 N. Y. 424; *Allen v. Mutual F. Ins. Co.*, 2 Md. 117; *Bingham v. Winona County*, 8 Minn. 441; *Ingalls v. Cole*, 47 Me. 530; *O'Connor v. Warner*, 4 W. & S. (Pa.) 223; *Calhoun v. McLendon*, 42 Ga. 405; *McCulloch v. Stone*, 64 Miss. 378.

In *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 498; 5 Am. Dec. 291, *Thompson, J.*, said: "To declare what the law is or has been is a judicial power; to declare what the law shall be is a legislative power. One of the fundamentals of all governments is that the legisla-

an expression of the legislative view as to the proper construction of a law is of no judicial force,<sup>1</sup> it is, nevertheless, entitled to some weight in the construction of doubtful language.<sup>2</sup>

Ordinarily a retrospective operation is not to be given to expository, directory, or declaratory statutes.<sup>3</sup>

A statute which betrays an erroneous conception as to the proper interpretation of a pre-existing statute does not control the courts in their interpretation of such pre-existing statute.<sup>4</sup>

tive power shall be separate from the judicial."

In *O'Conner v. Warner*, 4 W. & S. (Pa.) 223, Gibson, C. J., said: "A legislative direction to perform a judicial function in a particular way would be a direct violation of the constitution, which assigns to each organ of the government its exclusive function."

1. *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 51; *Governor v. Porter*, 5 Humph. (Tenn.) 165; *Drain Com'r v. Baxter*, 57 Mich. 127; *Baltimore Catholic Cathedral v. Manning*, 72 Md. 125; *Lambertson v. Hogan*, 2 Pa. St. 25; *Jackson v. Washington County* (Neb. 1892), 52 N. W. Rep. 169; *Bingham v. Winona County*, 8 Minn. 441; *State v. Armstrong*, 4 Minn. 335; *People v. New York*, 16 N. Y. 424; *O'Conner v. Warner*, 4 W. & S. (Pa.) 223.

2. *Rex v. Loxdale*, 1 Burr. 145; *Pike v. Megoun*, 44 Mo. 491; *Coutant v. People*, 11 Wend. (N. Y.) 511; *Dunlap v. Crawford*, 2 McCord Eq. (S. Car.) 435; *Henry v. Tilson*, 17 Vt. 479; *Koshkonong v. Burton*, 104 U. S. 678; *Drain Com'r v. Baxter*, 57 Mich. 132.

In *Lambertson v. Hogan*, 2 Pa. St. 25, Rogers, J., said: "Explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute, in which case they deserve and will receive the most respectful attention from the judicial branch of the government."

Courts will treat declaratory laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was, but beyond that they can have no binding effect, and if the judge is satisfied that the legislative construction is wrong, he is bound to disregard it. *Salts v. Tobias*, 3 Paige (N. Y.) 338.

3. *Postmaster Gen'l v. Early*, 12 Wheat. (U. S.) 148; *Stockdale v. Atlantic Ins. Co.*, 20 Wall. (U. S.) 323;

*Koshkonong v. Burton*, 104 U. S. 678; *Lambertson v. Hogan*, 2 Pa. St. 25; *Haley v. Philadelphia*, 68 Pa. St. 45; *Singer Mfg. Co. v. McCollock*, 24 Fed. Rep. 667; *Stebbins v. Pueblo County*, 4 Fed. Rep. 282; *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 50; *Dunlap v. Crawford*, 2 McCord Eq. (S. Car.) 435.

In *Dequindre v. Williams*, 31 Ind. 450, Frazer, C. J., said: "It is not ordinarily the function of the legislature to interpret statutes, nor is such interpretation binding upon the courts as to past transactions, but as to matters occurring thereafter, such legislation guides all departments of the government. If a legislative construction be even plainly contrary to the terms of the act construed, it must nevertheless be taken as a new enactment changing the old law."

Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated. *Municipality No. 1 v. Wheeler*, 10 La. Ann. 747. See generally, *infra*, this title, *Retrospective Laws*.

4. *Dore v. Gray*, 2 T. R. 358; *Ex parte Lloyd*, 1 Sim. N. S. 248; *Coverdale v. Charlton*, 4 Q. B. Div. 116; *Rolls v. St. George*, 14 Ch. Div. 785; *Reg. v. Keyn*, 2 Exch. Div. 163; *Farmers' Bank v. Hale*, 59 N. Y. 53; *Salts v. Tobias*, 3 Paige (N. Y.) 338; *Davis v. Doe*, 25 Miss. 445; *Byrd v. State*, 57 Miss. 243; 34 Am. Rep. 440; *Van Norman v. Jackson*, 45 Mich. 204.

A part of an act, which showed that the legislature assumed that a certain kind of beer might be lawfully sold without a license, could not be treated as an enactment that such beer might



But a statute may contain an interpretation clause,<sup>1</sup> although ordinarily such interpretation clause will have no bearing upon the interpretation of a subsequent statute.<sup>2</sup>

Beyond the interpretation clause just referred to, and to be distinguished from it, is the clause frequently found in codes and general revisions of statutes, and designed to affix a meaning to, or to aid in the interpretation of words and phrases used throughout the body of the statutes; as, for example, the provision that the singular shall include the plural, and *vice versa*, or that the masculine shall include the feminine.<sup>3</sup> These definitions are applicable only to the words defined, as such words are used in the statutes, and are not intended to define words as used elsewhere.<sup>4</sup>

be so sold when the law imposed a penalty on every unlicensed person who sold any beer. *Read v. Storey*, 6 H. & N. 423.

**Repeal and Re-enactment.**—A recital in a statute that a former statute had been repealed or superseded by another, is not conclusive that such a repeal has been made. *U. S. v. Clafin*, 97 U. S. 546. And where a later act attempts to amend an earlier one previously repealed by implication, the copying of parts of the earlier act into the amendment has been held not to re-enact it. *Byrd v. State*, 57 Miss. 243; 34 Am. Rep. 440. See also *Trask v. Green*, 9 Mich. 366.

**Misconception as to Jurisdiction.**—A jurisdiction will never be created by the mistaken inference of the legislature that such jurisdiction exists. *Ludington v. U. S.*, 15 Ct. of Cl. 453; *Hersom's Case*, 39 Me. 476. But see *State v. Miller*, 23 Wis. 634, where it was said that "though an unfounded assumption by the legislature that a particular jurisdiction existed might not alone be sufficient to create it, yet when the jurisdiction is assumed to exist and explicit provision made as to the method of its exercise, this carries with it, by implication, jurisdiction of the proceedings so regulated."

1. Willb. on Stat. 296; *Farmers' Bank v. Hale*, 59 N. Y. 63; *Smith v. State*, 28 Ind. 325; *Herold v. State*, 21 Neb. 53; *State v. Adams*, 51 N. H. 568; *Jones v. Surprise*, 64 N. H. 243; *People v. Soto*, 49 Cal. 70; *State v. Gilmore*, 8 Wall. (U. S.) 330; *Hill v. Mitchell*, 5 Ark. 608; *People v. Knight*, 13 Mich. 424.

2. *Allsop v. Day*, 7 H. & N. 463; *McGowan v. State*, 9 Yerg. (Tenn.) 197; *Drennan v. People*, 10 Mich. 173.

But when the legislature puts a con-

struction on an act, a subsequent cognate enactment in the same terms would *prima facie* be understood in the same sense. See *Goldsmid v. Hampton*, 5 C. B. N. S. 94; 94 E. C. L. 93; *Ward v. Beck*, 13 C. B. N. S., 668; 106 E. C. L. 666; *William v. Lear*, L. R. 7 Q. B. 285. See *supra*, this title, *In Pari Materia*.

3. *Smith v. Allen*, 31 Ark. 268; *State v. Main*, 31 Conn. 572; *Garrigus v. Parke County*, 39 Ind. 66; *Buhl v. Kenyon*, 11 Mich. 249; *Brown v. McCormick*, 28 Mich. 215; *Drennan v. People*, 10 Mich. 173; *State v. Canterbury*, 28 N. H. 195; *Westervelt v. People*, 20 Wend. (N. Y.) 416; *Hogan v. State*, 36 Wis. 226; *Foltz v. Hoge*, 54 Cal. 28; *People v. Pico*, 62 Cal. 50. See also *Reg. v. Pearce*, 5 Q. B. Div. 386; *Lindsay v. Cundy*, 1 Q. B. Div. 358; *Midland R. Co. v. Ambergate R. Co.*, 10 Hare 359.

4. *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514; *State v. Canterbury*, 28 N. H. 195.

So it has been held that the definitions and rules of construction did not affect words as used in indictments. *Jones v. Surprise*, 64 N. H. 243; *State v. Adams*, 51 N. H. 568.

In *De Pas v. Riez*, 2 La. Ann. 30, it was said that definitions incorporated in the code must be construed with reference to its positive enactments *in pari materia*, and have no meaning beyond them.

In *State v. Canterbury*, 28 N. H. 228, Bell, J., said: "A small number of definitions were introduced in the Revised Statutes for the sake of brevity, and to prevent the recurrence of several terms, which, by a forced construction, might be included in a single word; but such definitions can, in the nature

In *England*, these provisions, whether general or special, are looked upon with disfavor.<sup>1</sup> It is said that they should receive a strict construction,<sup>2</sup> and are to be resorted to only when the meaning of the words, as they stand, is not plain.<sup>3</sup> They are not allowed the effect of substituting one set of words for another, nor of defining the meaning of words under all circumstances, but merely of declaring what things or persons may be comprehended within a particular term, where the circumstances so require.<sup>4</sup>

7. Presumptions—*a.* AGAINST UNDUE EXERCISE OF POWER—

(1) *In General.*—There is a general presumption that the legislature does not intend to exceed its jurisdiction.<sup>5</sup> In the absence of an intention expressed or inferred, the presumption is that the legislature does not design its statute to operate beyond the territorial limits of its jurisdiction.<sup>6</sup> Even where the legislature in one country may properly bind its citizens in another, express

of things, have no effect, except in the construction of the statutes themselves. The meaning of language depends on popular usage, which is not and cannot, unless in a very slight degree, be affected by legislation.”

1. Wilberforce Stat. Laws 296-300; *Rex v. Cambridgeshire*, 7 Ad. & El. 480; 37 E. C. L. 147; *Lindsay v. Cundy*, 1 Q. B. Div. 358; *Dean of Ely v. Bliss*, 2 De G. M. & G. 459; *Reg. v. Pearce*, 5 Q. B. Div. 389; *Midland R. Co. v. Ambergate R. Co.*, 10 Hare 369.

In *Dean of Ely v. Bliss*, 2 De G. M. & G. 459, the Lord Chancellor said: “It has been very much doubted, and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided, for they have attempted to put a general construction on words which do not admit of such construction in the different senses in which they are introduced in the various clauses in an act of Parliament.”

In *Reg. v. Gloucestershire*, 7 Ad. & El. 480; 34 E. C. L. 147, it was said: “We cannot refrain from expressing a serious doubt whether interpretation clauses will not rather embarrass the courts in their decision than afford that assistance which they contemplate; for the principles on which they are themselves to be interpreted may become matter of controversy, and the application of them to particular cases may give rise to endless doubts.”

2. *Sedgw. Stat.* 59; *Allsop v. Day*, 7 H. & N. 463, *per* Pollock, C. P.; *Meux v. Jacobs*, L. R., 7 H. L. 481.

3. *Lindsay v. Cundy*, 1 Q. B. Div. 358; *Reg. v. Pearce*, 5 Q. B. Div. 389.

4. *Reg. v. Cambridgeshire*, 7 Ad. & El. 491; 34 E. C. L. 147; *Grant v. Ellis*, 9 M. & W. 113; *Reg. v. Kershaw*, 6 El. & Bl. 1007; *Pound v. Plumstead Board of Works*, L. R., 7 Q. B. 183; *Davis v. R. Co.*, 2 L. M. & P. 599; *Nutter v. Accrington Local Board*, 4 Q. B. Div. 375; *Worsley v. R. Co.*, 16 Q. B. 539; *Jones v. Cook*, L. R., 6 Q. B. 505; *Ex parte Ferguson*, L. R., 6 Q. B. 291.

5. CONFLICT OF LAWS, vol. 3, p. 508, *et seq.* And see that article generally upon questions involved in this section.

6. *Rose v. Himely*, 4 Cranch (U. S.) 241; *U. S. v. Palmer*, 3 Wheat. (U. S.) 629; *U. S. v. Howard*, 3 Wash. (U. S.) 344; *The Zollverein*, Swab. 96; *Cope v. Doherty*, 2 De G. & J. 614; *Rex v. Sawyer*, 2 C. & K. 101; 61 E. C. L. 100; *Madrazo v. Willes*, 3 B. & Ald. 353; *Bulkeley v. Schutz*, L. R., 3 P. C. 764; *McCarthy v. Chicago*, etc., R. Co., 18 Kan. 46; 26 Am. Rep. 742; *Merrill v. Boston*, etc., R. Co., 63 N. H. 259; *Davis v. New York*, etc., R. Co., 143 Mass. 304; 58 Am. Rep. 138; *Drain Com'r v. Baxter*, 57 Mich. 127; *Taylor v. Pennsylvania Co.*, 78 Ky. 350; 39 Am. Rep. 244; *Stanley v. Wabash*, etc., R. Co., 100 Mo. 435; *McCarthy v. Chicago*, etc., R. Co., 18 Kan. 46; 26 Am. Rep. 742; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76.

In *Ex parte Blain*, 12 Ch. Div. 522, *James, L. J.*, said that English legislation, unless the contrary was expressly enacted, or so plainly implied as to make it the duty of an English court

words are required, or distinct implication, to give the statute that effect.<sup>1</sup> Upon the same ground it will be presumed that the leg-

to give effect to an English statute, was applicable only to English subjects, or to foreigners who, by coming into the country, have made themselves during that time, subject to English jurisdiction. Brett, L. J., in the same case said: "The governing principle is that all legislation is *prima facie* territorial."

"As under the unwritten rule, and in the absence of special circumstances, the laws of a state are for the government only of persons and things within it, statutes in mere general terms will be construed as not intended to create offenses or otherwise regulate the conduct of parties beyond its territorial limits." Bishop's Statutory Crimes, § 141.

Under this principle any statute which regulates the formalities and ceremonials of marriage is in general limited in effect to the territorial jurisdiction of the legislature. *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 371; Story's Conflict of Laws, § 121. See CONFLICT OF LAWS, vol. 3, p. 598.

An English statute which prohibited the sale of liquids otherwise than by imperial measure was held not to affect a contract between British subjects for the sale of palm oil to be measured and delivered on the coast of *Africa*. *Rosseter v. Cahlman*, 8 Exch. 361. Marshall, C. J., in *Bond v. Jay*, 7 Cranch (U. S.) 350, said: "It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that courts can never be justified in putting such a construction on their words, if they admit of any other interpretation which is rational and not too much strained."

In *Farnum v. Blackstone Canal Co.*, 1 Sumn. (U. S.) 46, Story, J., said: "It cannot be presumed that a legislature authorizes any act to be done in a foreign territory when that act is beyond the reach of its proper jurisdiction or sovereignty. Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty."

In *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.) 433, where it was held that the actions given by the statutes of 1847-49 to the families of

persons killed by the wrongful act, neglect, etc., of others, could not be maintained where the injuries were inflicted without the state, Sutherland, J., says: "There is nothing in these acts which shows that they were intended to protect the lives of its citizens while out of the state—nothing to show that they were intended to extend to acts, neglects or defaults committed or suffered in another state. It must be presumed, I think, as the result of the general principle of the territorial limit of political jurisdiction, and of the force of law . . . that these statutes were intended to control the conduct of corporations, their agents, etc., and all other persons while operating or being in this state only."

In *Twitchell v. Steamboat Missouri*, 12 Mo. 412, it was decided that a statute concerning boats and vessels could not be construed so as to have extra-territorial effect. See also *Steamboat Champion v. Jantzen*, 16 Ohio 91; *Godsill v. The St. Louis*, 16 Ohio 178; *Noble v. Steamboat St. Anthony*, 12 Mo. 262.

1. Bishop's Statutory Crimes, § 141, citing *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Clementi v. Walker*, 2 B. & C. 861; 9 E. C. L. 258.

Where, however, the implication is plain that the legislature intended to bind its subjects, effect must be given to the intention. Thus, where the whole aim of an English statute was to prevent members of the royal family from marrying without the consent of the reigning sovereign, and which made null and void such marriages, it was held that as this intention would have been easily defeated if a marriage in a foreign country had not fallen within it, the statute imposed an incapacity which attached to the person and followed him all over the world. *Sussex Peerage Case*, 11 Cl. & F. 85. And this is true, though the marriage were valid according to the law of the country where it was celebrated. *Swift v. Swift*, 3 Knapp 257. See also *Brook v. Brook*, 9 H. L. 193.

This wider effect has been given even to a criminal statute where such must have been manifestly its intention. An English statute which made it a felony for "any person" to deal in slaves, or to transfer them, or equip

islature does not intend to make a futile attempt to bind future legislatures in excess of its power.<sup>1</sup>

Under the same general presumption that the legislature does not intend to exceed its jurisdiction, every statute is to be interpreted, as far as its language admits, as not violating the rules of international law, and as not being inconsistent with the comity of nations. It is only where the intention of the legislature is expressed with irresistible clearness that courts will construe its language in such manner as to lead to an infraction of the general law of nations; and in order to avoid imputing such an intention to the legislature they will adopt any other possible construction.<sup>2</sup> All general terms must be narrowed in construction to avoid it.<sup>3</sup> Statutes in terms binding persons beyond the territorial jurisdiction are, in construction, restricted, where the law of nations limits the right, as extending only to the subjects of the government of which the legislature is a part.<sup>4</sup>

vessels for their transfer, was held to apply to British subjects committing any such offenses on the coast of *Africa*, a notorious scene of the crimes which it was the object of the statute to suppress. *Reg. v. Zulueta*, 1 C. & K. 215; 47 E. C. L. 214; *Santos v. Illidge*, 6 C. B. N. S. 841; 95 E. C. L. 840. See also *Reg. v. Mount*, L. R., 6 P. C. 283.

1. In *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383, where a law provided that certain municipalities should incur no further liability "by virtue of the authority of any other law of this state," it was held that the words "other law of this state" must be understood as referring to other laws existing at the time of the passage of this law, as it was not within the power of our legislature to bind future legislatures.

So in *Casey v. Harned*, 5 Iowa 1, the word "forever" in a statute which provided that a certain place should be the county seat, "forever" was construed to mean until such seat should be changed by law. See also *Fletcher v. Peck*, 6 Cranch (U. S.) 125; *State v. Oskins*, 28 Ind. 364; *Swift v. Newport*, 7 Bush (Ky.) 37; *Files v. Fuller*, 44 Ark. 273; *Gilleland v. Schuyler*, 9 Kan. 387; *Mongeon v. People*, 55 N. Y. 613; *Wall v. State*, 23 Ind. 150.

2. *Leroux v. Brown*, 12 C. B. 801; 74 E. C. L. 800; *Murray v. The Charming Betsey*, 2 Cranch (U. S.) 118. See also *U. S. v. Fisher*, 2 Cranch (U. S.) 390; *Story on Conflict of L.*, p. 32.

3. *Le Louis*, 2 Dods. 229; *The Constitution*, 4 P. D. 39; *The Exchange v. M'Faddon*, 7 Cranch (U. S.) 116.

In *The Parliament Belge*, 5 P. D. 197, from the numerous cases there cited the principle is deduced, that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, and in view of its being a part of international law, each and every one declines to extend by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the property of any ambassador or state destined for a public use, though such sovereign ambassador or state be within its territory and subject to its jurisdiction. See *INTERNATIONAL LAW*, vol. II, p. 442.

4. *Bishop's Statutory Crimes*; *The Apollon*, 9 Wheat. (U. S.) 362.

Thus, where an English statute enacted that where any person feloniously injured abroad or at sea, died in *England*, or receiving the injury in *England*, died at sea or abroad, the offense should be dealt with in the country where the death or injury occurred, it was held that this did not authorize a trial of a foreigner who inflicted a wound at sea in a foreign ship, of which the sufferer died in *England*. *Rex v. Lewis, Dears & B.* 182. And see *Rex v. Depardo*, 1 Taunt. 26; *Rex v. De Mattos*, 7 C. & P. 458; *Nga Hoong v. Rex*, 7 Cox 489; *Rex v. Bjornsen*, 34 L. J. M. C. 180.

So it has been repeatedly held that an act of Congress which provided that any person committing robbery in

If the language of the statute is unambiguous, and the intention of the legislature is clear, although the act is in conflict with international law, whatever may be the responsibility incurred by the government to foreign powers in executing the statute, there can be no doubt that courts of justice are bound to obey and administer it.<sup>1</sup>

(2) *In Favor of Constitutionality.*—There is a presumption in favor of the constitutionality of a statute which requires, when a statute is susceptible of two constructions, one constitutional and the other not, that the former shall be adopted, even though the latter may be the more natural interpretation of the language used.<sup>2</sup>

"any vessel on the high seas should be guilty of piracy," applied only to robbery in American vessels, and not to robbery in foreign vessels, even by an American citizen. *U. S. v. Howard*, 3 Wash. (U. S.) 340; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *U. S. v. Klintock*, 5 Wheat. (U. S.) 144; *U. S. v. Kessler*, 1 Baldw. (U. S.) 15; *Reg. v. Keyn*, 2 Exch. Div. 172.

**Real Property.**—As real property is subject exclusively to the laws of the state in which it lies, an act dealing in general terms with the real estate of a bankrupt will be considered as not extending to his lands in another jurisdiction. *Selkrig v. Davies*, 2 Rose 97-281; 2 Dow. 250; *Cockerell v. Dickens*, 3 Moo. P. C. 133; *Waite v. Bingley*, 21 Ch. Div. 674; *Drayton's Appeal*, 61 Pa. St. 172. See also *Sill v. Worswick*, 1 H. Bl. 672; *Phillip v. Hunter*, 1 H. Bl. 402; *Hunter v. Potts*, 4 T. R. 182; *Freke v. Carbery*, 16 Eq. 461.

1. *The Marianna Flora*, 11 Wheat. (U. S.) 40; *The Zollverein*, Swab. 96; *The Johannes*, Swab. 188; *Le Louis*, 2 Doda. 245; *Sussex Peerage Case*, 11 Cl. & F. 85; *Leroux v. Brown*, 12 C. B. 821; 74 E. C. L. 819.

In *Lopez v. Burslem*, 4 Moo. P. C. 300, Lord Campbell said: "If a law were made, working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give effect to it."

2. *Quartlebaum v. State*, 79 Ala. 1; *Sadler v. Langham*, 34 Ala. 311; *Edwards v. Williamson*, 70 Ala. 145; *South, etc.*, Ala. R. Co. v. Morris, 65 Ala. 193; *Zeigler v. South, etc.*, Ala. R. Co., 58 Ala. 594; *French v. Teschemaker*, 24 Cal. 518; *People v. Hayne*, 83 Cal. 111; 17 Am. St. Rep. 211; *Ferguson v. Stamford*, 60 Conn. 432;

*Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Scoville v. Calhoun*, 76 Ga. 263; *Clayton v. Calhoun*, 76 Ga. 270; *Boston v. Cummins*, 16 Ga. 102; 60 Am. Rep. 717; *Cutts v. Hardee*, 38 Ga. 350; *Newland v. Marsh*, 19 Ill. 376; *Maize v. State*, 4 Ind. 342; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; *Wilkins v. State*, 113 Ind. 514; *State v. Insurance Co. of N. A.*, 115 Ind. 257; *Brown v. Buzan*, 24 Ind. 197; *Santo v. State*, 2 Iowa 165; 63 Am. Dec. 487; *State v. Davis County*, 2 Iowa 280; *Duncombe v. Prindle*, 12 Iowa 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa 221; *Morrison v. Springer*, 15 Iowa 348; *Beach v. Leahy*, 11 Kan. 28; *State v. Robinson*, 1 Kan. 25; *Millay v. White*, 86 Ky. 170; *Boisdere v. Citizens' Bank*, 9 La. 506; 29 Am. Dec. 453; *New Orleans v. Salamander Ins. Co.*, 25 La. Ann. 650; *State v. Shakespeare*, 41 La. Ann. 156; *Custer County v. Yellowstone County*, 6 Mont. 39; *Deering v. York, etc.*, R. Co., 31 Me. 172; *State v. Intoxicating Liquors*, 80 Me. 57; *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723; *Baltimore v. State*, 15 Md. 376; *Temmick v. Owings*, 70 Md. 246; *Newsom v. Cocke*, 44 Miss. 352; 7 Am. Rep. 686; *Marshall v. Grimes*, 41 Miss. 31; *Sykes v. Columbus*, 55 Miss. 143; *Inkster v. Carver*, 16 Mich. 484; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Sears v. Cottrell*, 5 Mich. 250; *Bailey v. Philadelphia, etc.*, R. Co., 4 Harr. (Del.) 389; 44 Am. Dec. 593; *Wellington Petitioner*, 16 Pick. (Mass.) 95; 26 Am. Dec. 631; *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286; *State v. Simmons Hardware Co.*, 109 Mo. 118; *State v. Pond*, 93 Mo. 606; *State v. Cape Girardeau, etc.*, R. Co., 48 Mo. 471; *State v. Able*, 65 Mo. 362; *State v.*

Addington, 77 Mo. 110; Atlantic City Water Works Co. v. Consumers' Water Co., 44 N. J. Eq. 427; Colwell v. May's Landing, etc., Co., 19 N. J. Eq. 245; McGwigan v. Wilmington, etc., R. Co., 95 N. Car. 428; McDougall v. State, 109 N. Y. 73; Kip v. Hirsch, 18 Abb. N. Cas. (N. Y.) 174; People v. Briggs, 50 N. Y. 554; People v. West, 106 N. Y. 203; 60 Am. Rep. 452; Bertholf v. O'Reilly, 74 N. Y. 509; 30 Am. Rep. 323; Clark v. Rochester, 24 Barb. (N. Y.) 471; Roosevelt v. Godard, 52 Barb. (N. Y.) 533; People v. Comstock, 78 N. Y. 356; *Ex parte* McCollum, 1 Cow. (N. Y.) 550; People v. Orange County, 17 N. Y. 241; De Walt v. Bartley, 146 Pa. St. 529; Speer v. School Directors, 50 Pa. St. 150; Craig v. First Presby. Church, 88 Pa. St. 46; 32 Am. Rep. 417; Com. v. Bennett, 16 S. & R. (Pa.) 243; Barker v. Torrey, 69 Tex. 7; Rosenberg v. Weekes, 67 Tex. 578; Galveston, etc., R. Co. v. Gross, 47 Tex. 428; Robinson v. State, 15 Tex. 311; Eyre v. Jacob, 14 Gratt. (Va.) 422; 73 Am. Dec. 367; Osburn v. Staley, 5 W. Va. 85; 13 Am. Rep. 640; Palms v. Shawano County, 61 Wis. 211; Bigelow v. West Wisconsin R. Co., 27 Wis. 478; Grenada County v. Brown, 112 U. S. 261; Cooper v. Telfair, 4 Dall. (U. S.) 14; Calder v. Bull, 3 Dall. (U. S.) 304; U. S. v. Central, etc., R. Co., 118 U. S. 235; U. S. v. Coombs, 12 Pet. (U. S.) 75; Missouri v. Kansas City, etc., R. Co., 32 Fed. Rep. 722; Singer Mfg. Co. v. McCollock, 24 Fed. Rep. 667; Rich v. Flanders, 39 N. H. 304; Dow v. Norris, 4 N. H. 17; 17 Am. Dec. 400; Sutherland v. De Leon, 1 Tex. 250; 46 Am. Dec. 100; Maize v. State, 4 Ind. 342; Stocking v. State, 7 Ind. 326.

In *Roosevelt v. Godard*, 52 Barb. (N. Y.) 545, it is said: "They are not only presumed to be constitutional, but the authority of the court to declare them void will only be resorted to in a clear case of conflict. (*Boston v. Cummins*, 6 Ga. 102; 60 Am. Dec. 717; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 416). Washington, J., says: 'It is but a decent respect due to the wisdom, integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.' (*Ogden v. Saunders*, 12

*Wheat*, (U. S.) 270). And when the constitutional validity is in controversy and the law itself may be ambiguous in its import, that construction must be given to it which will sustain its validity rather than the one which will render it inoperative and void."

In spite of the general presumption that where a statute is adopted from another state its construction there is likewise adopted, if such construction is inconsistent with the constitution of the state to which it is transplanted it will not be followed. *Bowers v. Smith*, 111 Mo. 45.

Where a statute provided that certain territory "shall constitute and be known as the county of New," and that "said county of New is hereby attached to and made a part of the county of Shawano for all county and judicial purposes until it shall appear" that the county has a population of one thousand, when it shall be organized, it was held that it did not create a county *in presenti*, but merely detached territory to become a county in the future, and, therefore, did not violate the constitution by submitting one county to the government of another. *Palms v. Shawano County*, 61 Wis. 211.

So a prospective construction will be favored where to construe it retroactively would render it unconstitutional. *New York, etc., R. Co. v. Van Horn*, 57 N. Y. 473; *Millay v. White*, 86 Ky. 170; *Newland v. Marsh*, 19 Ill. 384. See *infra*, this title, *Retroactive Statutes*.

In *Colwell v. May's Landing, etc., Co.*, 19 N. J. Eq. 245, the word "dam" in the charter of a corporation was construed to mean the pond of water itself rather than to mean in its strict sense the structure raised to obstruct the flow of water, since this latter meaning in a provision allowing the company to raise its dam, but providing no compensation for injury to others, would have violated the constitution.

In *Grenada County v. Brown*, 112 U. S. 261, it was contended that bonds subscribed by the county to a railroad were invalid, on the ground that the act of the legislature authorizing such subscription was not in conformity with the requirements of the constitution; but the court put upon the act such a construction as to make it valid, rather than adopt the construction making the act a nullity.

In *Broughton v. Pensacola*, 93 U. S.

If doubt exists as to the constitutionality of the statute, the benefit of the doubt is to be given to the law.<sup>1</sup> The doubt upon which the court is to act may arise either from an endeavor to arrive at a true interpretation of the constitution, or from a con-

266. Field, J., said: "The inhibition of the constitution, which preserves against the interference of a state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and, although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of, or escape from, liabilities, the creation of which it authorized."

The constitution of *Minnesota* requires equalization and uniformity in the imposition of taxes upon property upon a cash valuation. In *Rice County v. Citizens' Nat. Bank*, 23 Minn. 208, the court held that in the exposition of tax laws, under the state constitution, such a construction must be adopted as will avoid duplicate taxes, unless a contrary interpretation is compelled by some express provision, or necessary implication of the statute. See also *Hennepin County v. St. Paul, etc., R. Co.*, 33 Minn. 534; *St. Louis Nat. Bank v. Papin*, 4 Dill. (U. S.) 29.

In *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, Woods, J., said that when one construction of a statute would not only render that statute a breach of faith on the part of the *United States*, but an invasion of the constitution, the court is bound, if possible, so to construe the law as to lay it open to neither of these objections.

**Exercise of Doubtful Power.**—The construction of a statute which attributes to the legislature the exercise of a doubtful power, will not, in the absence of direct words, be readily adopted. *Mardre v. Felton*, Phil. (N. Car.) 279.

In *Sykes v. Columbus*, 55 Miss. 143, it is said: "It ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it. And such construction, if the words will admit of it, ought to be put on its legislation as will make it consistent with the supreme law."

<sup>1</sup> In *re Clinton Street*, 2 Brewst. (Pa.) 599; *Com. v. Butler*, 99 Pa. St.

535; *Adams v. Howe*, 14 Mass. 345; 7 Am. Dec. 216; *Burnham v. Sumner*, 50 Miss. 520; *Tate v. Bell*, 4 Yerg. (Tenn.) 206; 26 Am. Dec. 221; *State v. Intoxicating Liquors*, 80 Me. 57; *Missouri v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722; *Allen County v. Silvers*, 22 Ind. 491; *Robinson v. Schenck*, 102 Ind. 307; *Stocking v. State*, 7 Ind. 326; *Wilkins v. State*, 113 Ind. 514; *Clare v. State*, 68 Ind. 17; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; *State v. Insurance Co. of N. A.*, 115 Ind. 257; *People v. Auditor*, 3 Ill. 567; *Bunn v. People*, 45 Ill. 411; *Stewart v. Polk County*, 30 Iowa 9; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312; *Gates v. Brooks*, 59 Iowa 510; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Central Iowa R. Co. v. Wright County*, 67 Iowa 199; *Crowley v. State*, 11 Oregon 512; *Boisdere v. Citizens' Bank*, 9 La. 506; 29 Am. Dec. 453; *People v. Draper*, 15 N. Y. 543; *Miller v. Dunn*, 72 Cal. 462; 1 Am. St. Rep. 67; *Alexander v. People*, 7 Colo. 155; *Macon, etc., R. Co. v. Davis*, 13 Ga. 68; *Cotten v. Leon County*, 6 Fla. 610; *Carcy v. Giles*, 9 Ga. 253; *Smithee v. Garth*, 33 Ark. 17; *King v. Wilmington, etc., R. Co.*, 66 N. Car. 277; *State v. Moore*, 104 N. Car. 714; 17 Am. St. Rep. 694; *Eyre v. Jacob*, 14 Gratt. (Va.) 422; 73 Am. Dec. 367; *Slack v. Jacob*, 8 W. Va. 612; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *Bridges v. Shallcross*, 6 W. Va. 575.

In *Fletcher v. Peck*, 6 Cranch (U. S.) 128, Marshall, C. J., said: "The question whether a law is to be avoided for its repugnancy to the constitution, is at all times a question of much delicacy, which seldom, if ever, has been decided in the affirmative in a doubtful case." See to the same effect *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 625.

In *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, Washington, J., said: "If I could rest my opinion in favor of the constitutionality of the law, on which questions arise, on no other ground than this doubt, so felt and acknowledged, that alone, in my estimation, would be a satisfactory vindication of it."

sideration of the law after the meaning of the constitution has been judicially determined.<sup>1</sup>

A restricted construction of a statute should be adopted where one more broad would bring the statute in conflict with the constitution;<sup>2</sup> and, on the other hand, if a restricted construction would reduce the statute to a nullity, as being in contravention of the fundamental law, courts will favor a broader interpretation.<sup>3</sup>

1. See *Cooley on Const. Lim.*, p. 218; *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 72; *Sun Mut. Ins. Co. v. New York*, 5 Sandf. (N. Y.) 10; *Coutant v. People*, 11 Wend. (N. Y.) 511; *Clark v. People*, 26 Wend. (N. Y.) 599; *Ex parte McCollum*, 1 Cow. (N. Y.) 550; *People v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 138; *Baltimore v. State*, 15 Md. 376.

In *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 72, a question was raised as to the validity of a state law, it being contended that it was in contravention of the United States constitution. It was stated by Tilghman, C. J., that there being a doubt as to the meaning of that part of the constitution, the law of the state should be declared valid.

2. Opinion of Justices, 41 N. H. 553; *Cook v. Hamilton County*, 6 McLean (U. S.) 112; *People v. Board of Education*, 13 Barb. (N. Y.) 400; *Stanley v. Wabash, etc., R. Co.*, 100 Mo. 435; *Com. v. Butler*, 99 Pa. St. 535.

A statute declaring a trust shall be deemed discharged after the lapse of years, may, if necessary to sustain its constitutionality, be construed making the lapse of time *prima facie* or presumptive evidence that the trust had been discharged, and permitting this presumption to be rebutted by other evidence. *Kip v. Hirsch*, 18 Abb. N. Cas. (N. Y.) 167.

A statute provided that the driver of any vehicle, who, meeting another, shall neglect to turn to the right, should pay to the party injured by such neglect treble damages, and that "the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages." It was held that by the word "owner" in the last clause, the person in control of the vehicle, either mediately or immediately, was intended, and not necessarily the actual owner. The argument of the court was that any other construction would make the owner of the vehicle liable for the acts of the person in possession of it over whom he had no control, and

that an act which thus arbitrarily and without reason made one person liable for the acts of another would be void, as violating that article of the constitution which forbids the taking away of any person's property without due process of law; and, therefore, it was the duty of the court, in conformity with the rule of the text, to give the statute the above construction and thus sustain its validity. *Camp v. Rogers*, 44 Conn. 291.

The constitution of *West Virginia* provides that no bill shall be passed by either branch of the legislature without an affirmative vote of a majority of the members elected thereto. An act was passed by the affirmative vote of eleven senators, the body when full consisting of twenty-two members, one member having resigned after the opening of the session at which the act was passed. In *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640, the court construed the words "members elected" as referring to those who were members at the time the vote was taken, to avoid conflicting with the constitution, and to give the act the force of the law.

A provision as to officers' fees should be construed as applying only to future officers, rather than that the act should be set aside as infringing a prohibition of any law increasing fees of officers during their terms of office. *Kerrigan v. Force*, 68 N. Y. 381.

3. *Seneca County v. Allen*, 99 N. Y. 532; *Com. v. Butler*, 99 Pa. St. 535; *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 63; *Monongahela Nav. Co. v. Coons*, 6 W. & S. (Pa.) 101; *Clare v. State*, 68 Ind. 26.

In *Galveston, etc., R. Co. v. Gross*, 47 Tex. 428, the court said that the clause "any lands hereafter granted in any manner to any of said companies or corporations for any such object," might be construed as if it read "any lands granted to companies after the adoption of the pending amendment to the constitution," in view of sur-



Courts may resort to implication to sustain a statute, but not to destroy it.<sup>1</sup> A forced construction, however, will not be resorted to to sustain the constitutionality of a statute. If the language will not support any construction consistent with the constitution, it is the duty of the court to declare the statute void.<sup>2</sup>

*b.* AS TO JURISDICTION OF COURTS.—There is a presumption against an intention on the part of the legislature to oust courts of their jurisdiction, and any construction leading to such a result is to be avoided if possible.<sup>3</sup> And the jurisdiction of superior

rounding circumstances and to avoid nullifying a law.

In *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 479, where the charter of a railroad company provided that upon condemnation of land for its road commissioners should "assess the value of the land taken," the court held the words to mean that they should "award a just compensation therefor," since otherwise the constitution of the state would be violated.

A resolution of the legislature in reference to the act of incorporation of the Hartford Bridge Co. contained this clause: "The ferries by law established between the town of Hartford and East Hartford shall be discontinued, and said towns shall never thereafter be permitted to transport passengers across said river." In the case of the Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210, the court held that the resolution was to be construed as a contract on the part of the legislature, only that the then existing ferries should be discontinued, and that an act passed several years after incorporating the Union Ferry Co. was not unconstitutional, as impairing the obligation of a contract.

1. *Atlantic City Water Works Co. v. Consumers Water Works Co.*, 44 N. J. Eq. 427; *Colwell v. May's Landing, etc., Co.*, 19 N. J. Eq. 249; *People v. San Francisco, etc., R. Co.*, 35 Cal. 617; *Cooper v. Telfair*, 4 Dall. (U. S.) 14. See also *Cochran v. Van Sur- lay*, 20 Wend. (N. Y.) 381; 32 Am. Dec. 570.

2. **CONSTITUTIONAL LAW**, vol. 3, p. 670; *Atty. Gen'l v. Eau Claire*, 37 Wis. 400; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *French v. Teschemaker*, 24 Cal. 518; *People v. San Francisco, etc., R. Co.*, 35 Cal. 606; *Bailey v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 385; 44 Am. Dec. 593; also *Tabor v. Cook*, 15 Mich. 322.

For example, a statute making rail-

road companies liable for all animals killed on the tracks cannot be made constitutional by assuming the construction that the killing should be only *prima facie* evidence of liability. *Beilenberg v. Montana Union R. Co.*, 8 Mont. 271.

3. *Crisp v. Bunbury*, 8 Bing. 394; 21 E. C. L. 33; *Hartley v. Hooker*, 2 Cowp. 523; *Cates v. Knight*, 3 T. R. 442; *Albon v. Pyke*, 4 M. & G. 424; *Shipman v. Hanbest*, 4 T. R. 109; *King v. London*, 9 B. & C. 31; *Scott v. Avery*, 5 H. L. 811; *Rochdale Canal Co. v. King*, 14 Q. B. 122; 68 E. C. L. 120; *Atty. Gen'l v. Southampton*, 17 Sim. 6; *Jacobs v. Brett*, L. R., 20 Eq. 6; *Birley v. Chorlton*, 3 Bev. 499; *Smith v. Whitmore*, 2 De G. J. & S. 297; *Oram v. Brearey*, 2 Ex. Div. 348; *In re Twenty-eighth Street*, 102 Pa. St. 140; *People v. Vanderbilt*, 24 How. Pr. (N. Y.) 301; *Dick's Appeal*, 106 Pa. St. 589; *Com. v. Betts*, 76 Pa. St. 471; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 366; *White v. Meday*, 2 Edw. Ch. (N. Y.) 486; *Fidelity Trust Co. v. Gill Car. Co.*, 25 Fed. Rep. 737; *State v. St. Louis County*, 38 Mo. 402; *Tackett v. Vogler*, 85 Mo. 480.

In *Com. v. Hudson*, 11 Gray (Mass.) 64, where the question was whether a grant of a certain jurisdiction to justices of the peace affected that previously existing in the court of common pleas over the same subject, *Shaw, C. J.*, said: "Before this statute the court of common pleas had jurisdiction over this subject. Is that jurisdiction taken away? It is no answer to say that another tribunal has jurisdiction, for that is very common. It is in such case concurrent jurisdiction, whether so called in the statute or not. There must be words of limitation to take it away, either by using the word exclusive, or by repealing the former act giving jurisdiction, by which it may appear that the legislature meant not only to confer jurisdiction on justices of the

courts can be taken away only by express negative words of a statute or necessary implication.<sup>1</sup> Thus, where equitable jurisdiction is conferred upon courts at law by affirmative words, this alone will not deprive chancery of its jurisdiction in like cases.<sup>2</sup>

Acts which give justices and other inferior tribunals jurisdiction in certain cases are understood in general, when silent on the subject, as not affecting the power of control and supervision

peace, but to take away the other jurisdiction."<sup>3</sup>

A statute, conferring upon the common council of a city jurisdiction to judge of the election of its own members, does not exclude all jurisdiction of the courts in that behalf, unless the grant of power to the council is expressly, or by necessary implication exclusive. *State v. Kempf*, 69 Wis. 470.

In *People v. Vanderbilt*, 24 How. Pr. (N. Y.) 301. Ingraham, J., said: "The power to compel a removal of an obstruction does not prevent an application to the court to prohibit the erection of such obstruction before it is completed."

1. Story Eq. Juris., § 80; *Rex v. Abbott*, 2 Dougl. 553; *Albon v. Pyke*, 4 M. & G. 424; *Crisp v. Bunbury*, 8 Bing. 394; 4 T. R. 109; 21 E. C. L. 333; *Dement v. Boggess*, 13 Ala. 143; *Gould v. Hayes*, 19 Ala. 450; *Com. v. Hudson*, 11 Gray (Mass.) 65; *Tackett v. Vogler*, 85 Mo. 480; *State v. St. Louis County*, 38 Mo. 403; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Hummer v. Hummer*, 3 Greene (Iowa) 42; *Fidelity Trust Co. v. Gill Car. Co.*, 25 Fed. Rep. 737; *Barnawell v. Threadgill*, 5 Ired. Eq. (N. Car.) 86; *Com. v. McCloskey*, 2 Rawle (Pa.) 369; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Burginhofen v. Martin*, 3 Yeates (Pa.) 478; *Kline v. Wood*, 9 S. & R. (Pa.) 298; *Murfrees v. Leeper*, 1 Overt. (Tenn.) 1; *Catlin v. Wheeler*, 49 Wis. 507. In *State v. Wister*, 62 Mo. 592, it was held that where a city charter conferred jurisdiction on the municipal authorities of the city in certain cases, but did not give exclusive jurisdiction in express terms, the cognizance of those cases was not taken from those courts formerly having jurisdictions. See also *State v. Harper*, 58 Mo. 531; *March v. Com.*, 12 B. Mon. (Ky.) 25.

2. *Collins v. Blantern*, 2 Wils. 349; *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Harrington v. Du Chatel*, 1 Bro. C. C. 124; *Bromley v. Holland*, 7 Ves. 28;

*Kemp v. Pryor*, 7 Ves. 237; *East India Co. v. Boddam*, 9 Ves. 464; *Ex parte Greenway*, 6 Ves. 812; *Hartley v. Hooker*, 1 Cowp. 524; *Varet v. New York Ins. Co.*, 7 Paige (N. Y.) 560; *King v. Baldwin*, 17 Johns. (N. Y.) 384; 8 Am. Dec. 415; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *Post v. Kimberly*, 9 Johns. (N. Y.) 470; *Viele v. Hoag*, 24 Vt. 46; *Dick's Appeal*, 106 Pa. St. 589; *Wesley Church v. Moore*, 10 Pa. St. 273; *Biddle v. Moore*, 3 Pa. St. 161; *Wells v. Pierce*, 27 N. H. 503; *Barnawell v. Threadgill*, 5 Ired. Eq. (N. Car.) 88; *Smith v. Hays*, 1 Jones Eq. (N. Car.) 321; *Lambert v. Mallett*, 50 Ala. 73; *Ryan v. Boyd*, 33 Ark. 778; *Burton v. Hynson*, 14 Ark. 32; *Darst v. Phillips*, 41 Ohio St. 514; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *Cram v. Green*, 6 Ohio 429; *Force v. Elizabeth*, 27 N. J. Eq. 408; *Irick v. Black*, 17 N. J. Eq. 189; *Sweeny v. Williams*, 36 N. J. Eq. 627; *Bright v. Newland*, 4 Sneed (Tenn.) 440; *People v. Houghtaling*, 7 Cal. 348; *Heath v. Derry Bank*, 44 N. H. 174; *Phipps v. Kelly*, 12 Oregon 213; *Union Passenger R. Co. v. Baltimore*, 71 Md. 238; *Crain v. Barnes*, 1 Md. Ch. Dec. 151; 1 Story Eq., § 80; *Howell v. Moores*, 127 Ill. 68; *Waldron v. Simmons*, 28 Ala. 629; *Cannon v. McNab*, 48 Ala. 99; *Couch v. Terry*, 12 Ala. 225; *Millsaps v. Pfeiffer*, 44 Miss. 805; *Payne v. Bullard*, 23 Miss. 88; 50 Am. Dec. 74; *Mitchell v. Otey*, 23 Miss. 236; *Dobyns v. McGovern*, 15 Mo. 662; *King v. Payan*, 18 Ark. 583; *McKoin v. Cooley*, 3 Humph. (Tenn.) 559; *Catlin v. Wheeler*, 49 Wis. 507.

Upon this ground it is held that equity still gives contribution between sureties where the debt is paid, though *assumpsit* may be maintained. *Mitchell v. Sproul*, 5 J. J. Marsh. (Ky.) 264; *Couch v. Terry*, 12 Ala. 225.

The mode of proceeding to contest the validity of a will, by a bill in chancery, was held not to have been abrogated by the provision in the stat-

which the superior courts exercise over the proceedings of such tribunals.<sup>1</sup> Thus, an enactment to the effect that "no court shall intermeddle" in the cases,<sup>2</sup> or that the case shall be "heard and finally determined" below, is not to be construed as prohibiting such interference.<sup>3</sup> Although it has been said that nothing but express words can take away the jurisdiction of a superior court,<sup>4</sup> yet it has been held frequently that where the implication is necessary and irresistible that the legislature intended to oust the jurisdiction of the court, the statute must receive such a construction.<sup>5</sup>

ute regulating the jurisdiction of the probate court, authorizing the proceeding to contest a will by petition to the court of common pleas. *Raudebaugh v. Shelley*, 6 Ohio St. 307.

The statute of *New York*, in giving an action at law for a distribution of shares against executors and administrators, did not intend to abridge the power of the court of chancery over the same matters. *Decouche v. Save-tier*, 3 Johns. Ch. (N. Y.) 190; 8 Am. Dec. 478.

A statute authorizing the plea of "payment after day" at law does not oust the chancellor of his jurisdiction. *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 138.

A statute authorizing the impeachment of the consideration of specialties at law, does not prevent the chancellor from entertaining jurisdiction, providing no attempt has been made at law to impeach the consideration. *Wood v. Kendall*, 7 J. J. Marsh. (Ky.) 212.

A statute of *Alabama*, authorizing an action at law on a lost note, does not deprive the chancery court of its jurisdiction in such case. *Crawford v. Childress*, 1 Ala. 482.

A statute authorizing a defendant to impeach the consideration of a bond by special plea, does not impair the jurisdiction of the courts of equity. *Case v. Fishback*, 10 B. Mon. (Ky.) 40.

**Lost Notes.**—The various statutes authorizing the pursuit of a remedy in the courts of law in the case of lost notes, are held not to interfere in the slightest degree with the jurisdiction in equity. *Story Eq. Juris.*, § 81; *Walmsley v. Child*, 11 Ves. 341; *Pat-ton v. Campbell*, 70 Ill. 72; *Crawford v. Childress*, 1 Ala. 482; *New Orleans, etc., R. Co. v. Mississippi College*, 47 Miss. 562; *Bohart v. Chamberlain*, 99 Mo. 622; *Force v. Elizabeth*, 27 N. J. Eq. 408; *Mitchell v. Chancellor*, 14 W. Va. 22; *Hickman v. Painter*, 11 W. Va. 386. Also *Hardeman v. Battersby*,

53 Ga. 36, where warehousemen's receipts for cotton were lost.

1. *Jacobs v. Brett*, L. R., 20 Eq. 1; *Hawes v. Paveley*, 1 C. P. Div. 418; *Bridge v. Branch*, 1 C. P. Div. 633; *Oram v. Brearey*, 2 Exch. Div. 346; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Com. v. M'Closkey*, 2 Rawle (Pa.) 369; *Burginhofen v. Martin*, 3 Yeates (Pa.) 478. See also *Walker v. Wynne*, 3 Verg. (Tenn.) 62; *Wakefield v. State*, 5 Ind. 195; *O'Brian v. State*, 12 Ind. 369.

In *Com. v. M'Closkey*, 2 Rawle (Pa.) 369, it was held that though an act of incorporation constituted certain commissioners judges of elections, and gave them full power and authority to set aside the same and order a new election, as the law might require, yet the superintending jurisdiction of the supreme court was not thereby ousted.

2. *Rex v. Moseley*, 2 Burr. 1011.

3. *Rex v. Plowright*, 2 Mod. 99; 2 Hawks P. C., ch. 27, § 23.

4. *Rex v. Abbot*, Dougl. 553.

5. *Cates v. Knight*, 3 T. R. 442; *Shipman v. Hanbest*, 4 T. R. 116; *Jacobs v. Brett*, L. R., 20 Eq. 6; *Oram v. Brearey*, 2 Exch. Div. 348; *Crisp v. Bunbury*, 8 Bing. 394; 21 E. C. L. 333; *Marshall v. Nicholls*, 18 Q. B. 882; 83 E. C. L. 882; *Boyfield v. Porter*, 13 East 200; *Ex parte Payne*, 5 D. & L. 679; *Armitage v. Walker*, 2 K. & J. 211; *Reeves v. White*, 17 Q. B. 995; 79 E. C. L. 994; *Wright v. Monarch Bldg. Soc.*, 5 Ch. Div. 726; *Huckle v. Wilson*, 2 C. P. Div. 410. See also *Rex v. Fell*, 1 B. & Ad. 380; 20 E. C. L. 403; *Great Northern, etc., Fishing Co. v. Edgekill*, 11 Q. B. Div. 225; *Hancock County v. Bank of Findley*, 32 Ohio St. 194, where statute creates offense and prescribes the remedy. See also *Dodson v. Scroggs*, 47 Mo. 285; *Pearce v. Calhoun*, 59 Mo. 271.

Where a clause enacts that it "shall, and may be lawful for justices of the peace to hear and determine offenses

The creation of a new jurisdiction is not to be presumed, in the absence of adequate language.<sup>1</sup> Effect, however, must of course be given to the intention, where a statute without conferring jurisdiction in express terms does so by plain and necessary implication.<sup>2</sup>

against the act that subjects the offender to penalties not amounting to fifty pounds," with a power to the justices to mitigate the penalties; the same act directing that all penalties which amount to fifty pounds or more shall be sued for in his majesty's court at Westminster, it was held that by necessary implication the courts above were ousted of their jurisdiction in the case of penalties not amounting to fifty pounds. *Cates v. Knight*, 3 T. R. 442.

In *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386, it was held that a *Massachusetts* statute vesting in railroad commissioners the powers and duties of commissioners appointed by the supreme judicial court under a former statute, took away the jurisdiction of that court, and of commissioners appointed by it over proceedings pending before those commissioners at the time of its passage. *Gray, J.*, in delivering the opinion, said: "Even the jurisdiction of a superior court may be ousted by necessary implication, as well as by express words."

Following the rules of the common law a statute will not be construed, unless express words require, to confer jurisdiction on courts established under another power; as, if it is a statute of the *United States*, to give authority to state tribunals. *Bishop on Statutory Crimes*, § 142; *Houston v. Moore*, 5 Wheat. (U. S.) 42; *In re Bruni*, 1 Barb. (N. Y.) 187.

1. *Warwick v. White*, Bunb. 106; *Kite's Case*, 1 B. & C. 107; 8 E. C. L. 44; *Rex v. Baines*, 2 Ld. Raym. 1269; *Reg. v. Cotton*, 1 El. & El. 203; 10 E. C. L. 202; *Ex parte Story*, 3 Q. B. Div. 166; *Pierce v. Hopper*, 1 Stra. 260; *James v. South Western R. Co.*, L. R., 7 Ex. 296; *Streat v. Rothschild*, 12 Daly (N. Y.) 95; *In re Contested Election*, 111 Pa. St. 235; *Druse v. Horter*, 57 Wis. 644; *Hersom's Case*, 39 Me. 476.

In *Pitman v. Flint*, 10 Pick. (Mass.) 506, it is said: "A mere failure of justice would not be a sufficient ground for construing statutes against their clear meaning so as to give a court jurisdiction."

An act providing that compensation should be made to all who should sus-

tain damage in carrying out certain works, enacted that "in case of dispute as to the amount" it should be settled by arbitration. It was held not to authorize a reference to arbitration where the liability to make any compensation was in dispute, but must be confined strictly to cases where the amount only was in dispute. *Rex v. Metropolitan Com'rs of Sewers*, 1 El. & Bl. 694; 72 E. C. L. 694. Compare *Bradby v. Board of Health*, 4 El. & Bl. 1014; 82 E. C. L. 1014; *Reg. v. Burslem*, 1 El. & El. 1077; 10 E. C. L. 1077.

**Extension of Jurisdiction.**—Nor will a construction be adopted which enlarges the jurisdiction of courts, in the absence of express words or necessary implication. *Ex parte Story*, 3 Q. B. Div. 166; *Kite's Case*, 1 B. & C. 107; 8 E. C. L. 44; *Thomas v. Adams*, 2 Port. (Ala.) 188; *Grove School Inspectors v. Peoria*, 20 Ill. 532; *Kertler v. State*, 4 Green (Iowa) 293; *Thompson v. Cox*, 8 Jones (N. Car.) 311; *Lad Daffin v. State*, 11 Tex. App. 76; *Druse v. Horter*, 57 Wis. 644; *Pringle v. Carter*, 1 Hill (S. Car.) 53.

2. *The Alina*, 5 Exch. Div. 227; *Everard v. Kendall*, L. R., 5 C. P. 428; *Simpson v. Blues*, L. R., 7 C. P. 290; *Gunnestad v. Price*, L. R., 10 Exch. 65; *Gaudet v. Brown*, L. R., 5 P. C. 134. See also *Smith v. Brown*, L. R., 6 Q. B. 729; *The Dowse*, L. R., 3 Ad. & El. 135; *Allen v. Garbutt*, 6 Q. B. Div. 165; *Wood v. Tallman*, 1 N. J. L. 153.

A statute provided that any person who exposes in a public place, where animals are commonly exposed for sale, any animal affected with a contagious or infectious disease, shall be deemed guilty of an offense against the act, unless he shows to the satisfaction of the justice before whom he is charged, etc. It was held in *Cullen v. Trimble*, L. R., 7 Q. B. 416, that jurisdiction was impliedly given to justices summarily to convict and impose a penalty on a person guilty of an offense under this act. See also where jurisdiction was conferred on justice by implication, *Johnson v. Colam*, L. R., 10 Q. B. 544; *Rex v. St. James*, 2 Ad. & El. 241; 29 E. C. L. 79.

c. AGAINST UNNECESSARY CHANGE OF LAW.—The presumption is that the legislature does not intend to change or modify the law beyond what it explicitly declares, either in express terms, or by unmistakable implication;<sup>1</sup> for it is not to be supposed that the legislature will overturn an established principle of law without expressing such intention with irresistible clearness.<sup>2</sup>

In *State v. Miller*, 23 Wis. 634, Paine, J. said: "Even though an unfounded assumption by the legislature that a particular jurisdiction existed, might not alone be sufficient to create it, yet where the jurisdiction is assumed to exist, an explicit provision made as to its form and mode of exercise, the authority to proceed in that form and mode carries with it, by necessary implication, jurisdiction of the proceedings."

1. 1 Kent's Com. 464; Dwarris 695; *River Wear Com'r v. Adamson*, 1 Q. B. Div. 554; *Graham v. Van Wyck*, 14 Barb. (N. Y.) 531; *Minet v. Leman*, 20 Beav. 278; *In re Peerless*, 1 Q. B. 153; 41 E. C. L. 480; *Arthur v. Bokenham*, 11 Mod. 150; *Manuel v. Manuel*, 13 Ohio St. 458; *Wilbur v. Crane*, 13 Pick. (Mass.) 290; *Osgood v. Breed*, 12 Mass. 530; *Day v. Allender*, 22 Md. 527; *Heiskell v. Baltimore*, 65 Md. 125; *Sullivan v. La Crosse, etc.*, *Packet Co.*, 10 Minn. 386; *Hollman v. Bennet*, 44 Miss. 323; *Lee v. Forman*, 3 Metc. (Ky.) 114; *State v. Norton*, 23 N. J. L. 33; *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557; *McGinnis v. State*, 9 Humph. (Tenn.) 46; 49 Am. Dec. 697; *Cadwallader v. Harris*, 76 Ill. 372; *White v. Wager*, 32 Barb. (N. Y.) 250; 25 N. Y. 328; *Howe v. Peckham*, 6 How. Pr. (N. Y.) 230; *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 6; *Bertles v. Nunan*, 92 N. Y. 197; 44 Am. Rep. 361; *People v. Palmer*, 109 N. Y. 110; 4 Am. St. Rep. 423; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Fitzgerald v. Quann*, 109 N. Y. 444; *Huber v. Reily*, 53 Pa. St. 112.

In *Keech v. Baltimore, etc.*, R. Co., 17 Md. 32, Bartol, J., said: "It is a cardinal rule of interpretation that statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced."

A statute which authorized "any" or the "nearest" justice of the peace to try certain cases, would not authorize a justice to try any of the cases outside the terminal limits of his own jurisdiction. *In re Peerless*, 1 Q. B. 153; 41 E. C. L. 480. See also *Rex v. Fylingdales*, 7 B. & C. 438; 14 E. C. L. 76; *Reg. v. Cheltenham*, 1 Q. B. 467; 41 E. C. L. 628; *Bonhams Case*, 8 Rep. 118a; *Rex v. Sainsbury*, 4 T. R. 456.

An act which authorized a distress does not authorize the seizure of goods *in custodia legis*. *Washer v. Elliott*, 1 C. P. D. 169.

An act which directs the election of officers should be understood as authorizing it only on a lawful day and not on a Sunday. *Rex v. Butler*, 1 W. Bl. 649.

An act provided that "any married female may take, convey and devise real or personal property." It was held that married infants were not within the meaning of the statute. The law was not to be altered to that extent. *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692.

An act giving an adopted child the right to inherit, was held not intended to change in any respect the law relating to collateral inheritance tax, from which only lineal descendants were exempted. *Com. v. Nancrede*, 32 Pa. St. 389.

In *River Wear Com'rs v. Adamson*, 1 Q. B. Div. 546, 2 App. Cas. 743, it was laid down as an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act and as not altering the general principles of the law.

2. *U. S. v. Fisher*, 2 Cranch (U. S.) 358; *Horton v. Mobile School Com'r*, 43 Ala. 604; *Harwood v. Lowell*, 4 Cush. (Mass.) 313.

**Revised Statutes.**—In the revision of statutes, which have been settled by clear adjudications, a mere change of phraseology will not be construed as a change of law, unless the change is such as to show positively an intention to alter it. *Hughes v. Farrar*, 45 Me.

*d.* AGAINST UNREASON, INCONVENIENCE, INJUSTICE, ABSURDITY, AND INEFFECTIVENESS.—In order to arrive at the true legislative intent in construing a doubtful statute, that construction should be adopted which is most conformable to reason and justice; the legislature will not be presumed to have intended that which is against reason.<sup>1</sup> But where the language of the statute

72; *Yates' Case*, 4 Johns. (N. Y.) 359; *In re Brown*, 21 Wend. (N. Y.) 316; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Burnham v. Stevens*, 33 N. H. 247; *Croswell v. Crane*, 7 Barb. (N. Y.) 191; *People v. Deming*, 1 Hilt. (N. Y.) 271; *Hoffman v. Delihanty*, 13 Abb. Pr. (N. Y.) 388; *Overfield v. Sutton*, 1 Metc. (Ky.) 621; *Conger v. Barker*, 11 Ohio St. 1; *Ennis v. Crump*, 6 Tex. 34. See also *Hugo v. Miller* (Minn. 1892), 52 N. W. Rep. 381; and *infra*, this title, *Same Language and Change of Language*. And see *Gulf, etc., R. Co. v. Fort Worth, etc., R. Co.*, 68 Tex. 98, where it was declared that when the legislature revises the statutes of a state after a particular statute has been construed, and re-enacts substantially the same provisions of this statute, the presumption is that the legislature intended the same construction to be continued. So to the same effect are, *Gardener v. Woodyear*, 1 Ohio 176; *Swazey v. Blackman*, 8 Ohio 20; *Ash v. Ash*, 9 Ohio St. 383, 387; *Tyler v. Winslow*, 15 Ohio St. 368; *Williams v. State*, 35 Ohio St. 175; *State v. Jackson*, 36 Ohio St. 286; *State v. Shelby County*, 36 Ohio St. 326; *State v. Vanderbilt*, 37 Ohio St. 640; *Bishop's Written Laws*, § 98.

And in *Virginia* the rule is established, in reference to a new code, that the old law is not altered by it unless the intention to alter it plainly appears. *Parramore v. Taylor*, 11 Gratt. (Va.) 220.

1. Co. Litt. 97 a; Puff. L. N., b. 5, ch. 12, § 8; *Reg. v. Brackenridge*, L. R., 1 C. C. 133; *Ex parte O'Loughlin*, L. R., 6 Ch. 406; *Rex v. Sussex*, 7 T. R. 107; *In re Lewis*, 1 Q. B. Div. 725; *Tottenham Local Board v. Rowell*, 1 Exch. Div. 514; *Pike v. Nicholas*, L. R., 5 Ch. 251; *Dixon v. Caledonian, etc., R. Co.*, 5 App. Cas. 827; *Birmingham v. Shaw*, 10 Q. B. 868; 59 E. C. L. 867; *In re Williams*, 2 E. & B. 84; 75 E. C. L. 83; *Reg. v. Kingston*, El. Bl. & El. 256; 96 E. C. L. 255; *Rex v. Higginson*, 2 B. & S. 471; *Ex parte May*, 2 B. & S. 426; 110 E. C. L. 424; *Reg. v. Linford*, 7 El. & Bl. 950; 90 E. C. L.

949; *Rex v. Finnis*, 28 L. J. M. C. 201; *Rex v. Eastern Counties R. Co.*, 5 E. & B. 974; 85 E. C. L. 974; *Rex v. Croker*, Cowp. 30; *Pickering v. Marsh*, 43 L. J. M. C. 143; *Chapman v. Robinson*, 1 El. & El. 25; 102 E. C. L. 24; *Thompson v. Gibson*, 8 M. & W. 288; *Page v. Pearce*, 8 M. & W. 677; *Rex v. Yorkshire*, 1 Dougl. 192; *Rex v. Dorsetshire*, 15 East 200; *Rex v. Essex*, 1 B. & A. 210; *Reg. v. Thackwell*, 4 B. & C. 62; 10 E. C. L. 277; *Reg. v. Chichester*, 29 L. J. Q. B. 23; *Hollis v. Marshall*, 2 H. & N. 575; *Graves' Case*, L. R., 4 Q. B. 715; *Boyce v. Higgins*, 14 C. B. 1; 78 E. C. L. 1; *Ex parte Learoyd*, 10 Ch. Div. 5; *Ex parte Thoday*, 2 Ch. Div. 229; *Verdin v. Uray*, 2 Q. B. Div. 608; *Rochfort v. Atherley*, 1 Exch. Div. 511; *In re Shaftoe's Charity*, 3 App. Cas. 872; *Rex v. Middlesex*, 6 M. & S. 279; 23 E. C. L. 223; *Reg. v. Sevenoaks*, 7 Q. B. 136; 53 E. C. L. 136; *Reg. v. Sussex*, 4 B. & S. 966; 116 E. C. L. 964; *Reg. v. Trafford*, 15 Q. B. 200; 69 E. C. L. 200; *Reg. v. Watts*, 7 Ad. & El. 461; 34 E. C. L. 146; *Reg. v. West Riding*, El. Bl. & El. 713; 96 E. C. L. 711. See also *Rex v. Middlesex*, 3 B. & Ad. 938; *Rex v. Toole*, 1 M. & R. 728; *Wood v. Heath*, 4 M. & G. 918; 43 E. C. L. 473; *Beckman v. Drake*, 2 H. L. 579; *Chatterton v. Cave*, 2 C. P. Div. 42; *Bradbury v. Hotten*, L. R., 8 Exch. 1; *Planche v. Braham*, 4 Bing. N. Cas. 17; 33 E. C. L. 269; *D'Almaine v. Boosey*, 1 Y. & C. 301; *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 208; *Bridge v. Branch*, 1 C. P. Div. 633; *Ex parte Watton*, 17 Ch. Div. 746; *Gibson v. Jenney*, 15 Mass. 205; *Stanwood v. Peirce*, 7 Mass. 458; *Wales v. Stetson*, 2 Mass. 146; 3 Am. Dec. 39; *Church v. Crocker*, 3 Mass. 17, 21; *Com. v. Cambridge*, 20 Pick. (Mass.) 272; *Com. v. Bailey*, 13 Allen (Mass.) 545; *Richards v. Dagget*, 4 Mass. 537; *Eaton v. Green*, 22 Pick. (Mass.) 526; *Ryegate v. Wardsboro*, 30 Vt. 746; *McFarland v. Stone*, 17 Vt. 173; 44 Am. Dec. 325; *Moravian Seminary v. Atwood*, 50 Ga. 382; *Allen v. Savannah*, 9 Ga. 286; *Haney v. State*, 34 Ark. 263;

is plain and unambiguous, it is not allowable to go outside for rules of interpretation; the intention must be followed as expressed in the statute.<sup>1</sup>

Buckner v. Real Estate Bank, 5 Ark. 536; State v. De Gress, 53 Tex. 387; Robinson v. Varnell, 16 Tex. 382; McLelland v. Shaw, 15 Tex. 319; Kephart v. Farmers', etc., Bank, 4 Mich. 602; Van Fleet v. Van Fleet, 49 Mich. 610; People v. Burns, 5 Mich. 114; Mulls v. Scott, 99 U. S. 25; *Ex parte* Crow Dog, 109 U. S. 556; U. S. v. The Hunter, Pet. (C. C.) 10; Klinginsmith v. Nole, 3 P. & W. (Pa.) 119; Downey v. Ferry, 2 Watts (Pa.) 304; Com. v. Lentz, 106 Pa. St. 643; Welch v. Kline, 57 Pa. St. 432; Clohessy v. Roedelheim, 99 Pa. St. 56; Grant v. Hickcox, 64 Pa. St. 334; Stewart v. Keemle, 4 S. & R. (Pa.) 72; McCloskey v. McConnell, 9 Watts (Pa.) 17; Seymour v. Hubert, 83 Pa. St. 346; Philadelphia v. Edwards, 78 Pa. St. 62; Swift's Appeal, 111 Pa. St. 516; Douglass v. Com., 108 Pa. St. 559; Com. v. Mitchell, 82 Pa. St. 343; Findley v. Pittsburgh, 82 Pa. St. 351; Kelly Tp. v. Union Tp., 5 W. & S. (Pa.) 535; Nicholas v. Phelps, 15 Pa. St. 36; Halderman v. Young, 107 Pa. St. 324; Wolcott v. Pond, 19 Conn. 597; Whedon v. Champlin, 59 Barb. (N. Y.) 61; Cleveland, etc., Tel. Co. v. Board Fire Com'rs, 55 Barb. (N. Y.) 288; People v. Fay, 3 Lans. (N. Y.) 398; Varick v. Briggs, 6 Paige (N. Y.) 323; Smith v. People, 47 N. Y. 330; Samuels v. Com., 10 Bush (Ky.) 491; Chase v. Divinal, 7 Me. 134; Wells v. Somerset, etc., R. Co., 47 Me. 345; Coy v. Coy, 15 Minn. 119; Bell v. Jones, 10 Md. 322; Associates of Jersey Co. v. Davison, 29 N. J. L. 415; State v. Clark, 29 N. J. L. 96; Easley v. Whipple, 57 Wis. 485; Haseltine v. Hewitt, 61 Wis. 121; Gelkey v. Cook, 60 Wis. 133; Learned v. Corley, 43 Miss. 687; Perry County v. Jefferson County, 94 Ill. 214; People v. Admire, 39 Ill. 251; Foley v. Bourg, 10 La. Ann. 129; Storms v. Stevens, 104 Ind. 46; Jeffersonville v. Weems, 5 Ind. 547; Sawyer v. State, 45 Ohio St. 343; State v. Hayes, 81 Mo. 574; Fusz v. Spaunhorst, 67 Mo. 256; Potter v. Douglas County, 87 Mo. 239.

A statute which exempted one swine from attachment and execution was held to apply to the animal when killed. The court, by Parker, C. J., said: "What could have been intended but the sustenance of the poor family

by this exemption? To give the strict construction contended for on the part of the defendant would be to convert an intended benefit into an injury; for the swine would be protected until it became fit for food, and then be at the mercy of the creditor. It is said that statutes made in derogation of the common law are to be construed strictly. This is true; but they are also to be construed sensibly and with a view to the object aimed at by the legislature." Gibson v. Jenney, 15 Mass. 205.

Bacon gives the following rules: "Interpretation to be given to the language used to express the intention should be such as to make the provision of the statute consistent with reason." 9 Bac. Abr. *Statutes* (I) 1. "No statute shall be construed in such a manner as to be inconvenient or against reason." 9 Bac. Abr. *Statutes* (I) 10.

In Varick v. Briggs, 6 Paige (N. Y.) 323, the court by Walworth, C., said: "In construing statutes, however, it is not reasonable to presume that the legislature intended to violate a settled principle of natural justice or to destroy a vested title to property. Courts, however, in construing statutes, will always endeavor to give such an interpretation to the language used as to make it consistent with reason and justice."

Again, in Neenan v. Smith, 50 Mo. 525, it was said that in construing a statute, reference must be had to its object, and it will not be presumed that the legislature intended to authorize a proceeding unreasonable in itself, unless the intention is indicated in express terms.

1. Woodward v. Watts, 2 El. & Bl. 458; 75 E. C. L. 457; Johnson v. Hudson River R. Co., 49 N. Y. 456; Flint River Steamboat Co. v. Foster, 5 Ga. 194; 48 Am. Dec. 248; Collins v. Carman, 5 Md. 503; Sturges v. Crowninshield, 4 Wheat. (U. S.) 202; McCluskey v. Cromwell, 11 N. Y. 593; Blake v. Heyward, Bailey Eq. (S. Car.) 211.

In Woodward v. Watts, 2 El. & Bl. 457; 75 E. C. L. 457, the court, by Crompton, J., said: "We are here in effect to apply the last part of what has been called the 'golden rule' to this statute, and say that, though the grammatical sense of the words disqualifies the defendant, yet that is such

*Against Inconvenience.*—There is a presumption against a legislative intent to establish a rule of action which would be attended with inconvenience;<sup>1</sup> and where the language of a statute is ambiguous and admits of more than one construction, one of which leads to great inconvenience, the court may, with a view to avoid such inconvenience, adopt some other construction;<sup>2</sup> yet

an absurdity that the grammatical sense must be modified to avoid it. I cannot apply that to this case. I have great doubt as to what the legislature may have intended; and I do not know that, if this case had been present to their minds, they would have thought this a fit qualification. But supposing I knew what the legislature meant, and that it was not what the words in their grammatical sense mean, still we must go further, and find some words that may express their real intention; for I do not understand the rule of construction to go so far as to authorize us, where the legislature have enacted something to lead us to an absurdity, to repeal that enactment and make another for them, if there are no words to express that intention."

Under a statute which had changed the common law and given to the husband the power to defeat his widow's right of dower by his will, unless she chose to renounce it by her express dissent, the language of the statute being broad enough to comprehend every widow and making no exception in favor of one who is *non compos mentis*, it was contended that it could apply only to a widow of sound mind, since a widow who is insane possesses no discretion and is incapable of expressing her dissent. But the court, by Eccleston, J., said: "The ill effects of an opposite theory have been eloquently portrayed, and particularly the fear of subjecting an unfortunate wife to the danger of being but poorly provided for by a wealthy, but unfeeling, husband, and leaving her remediless. It would be very proper that the supposed evil or hardship should exert an influence in giving construction to a statute, where its language is ambiguous or doubtful, but when plain and explicit, care should be taken not to allow such considerations to exert an undue influence." *Collins v. Carman*, 5 Md. 503.

1. *U. S. v. Fisher*, 2 Cranch (U. S.) 386; *Baltimore v. Root*, 8 Md. 95; *Langdon v. Potter*, 3 Mass. 221; *Ayers v. Knox*, 7 Mass. 310; *Com. v. Slack*, 19 Pick. (Mass.) 306; *Putnam v. Long-*

*ley*, 11 Pick. (Mass.) 490; *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415; *Water Comr's v. Hudson*, 13 N. J. Eq. 420; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 444; 18 Am. Dec. 104; *Kerlin v. Bull*, 1 Dall. (Pa.) 178; *Bulkley v. Eckert*, 3 Pa. St. 368; 45 Am. Dec. 650; *Smith v. People*, 47 N. Y. 336; *People v. Canal Comr's*, 4 Ill. 153; *Gatty v. Fry*, 2 Exch. Div. 265; *Rex v. Beeston*, 3 T. R. 594; *Patten v. Rhymmer*, 3 El. & El. 1; *Corbet v. Haigh*, 5 C. P. Div. 50; *Iles v. West Ham, etc., Committee*, 8 Q. B. Div. 69; *Whistler v. Forster*, 14 C. B. N. S. 248; 108 E. C. L. 246; *Austin v. Bunyard*, 6 B. & S. 687; 118 E. C. L. 685.

A *Massachusetts* statute enacted that the pilotage in the harbor of Boston should be formed into two divisions, outward and inward, and imposed a penalty of \$50 on any person commissioned as a pilot, who undertook to bring in or carry out of said harbor any vessel drawing nine feet of water, except in his own particular branch. It was sought to recover this penalty from a pilot for undertaking to carry out of the harbor the U. S. frigate "Chesapeake," he being commissioned as a pilot for the inward division and not for the outward division. It was held that this statute did not extend to one who pilots a public vessel of war of the United States—the inconveniences of subjecting a public vessel to local laws respecting pilotage being too manifest to need enumeration. *Ayers v. Knox*, 7 Mass. 306.

In *Gatty v. Fry*, 2 Exch. Div. 267, it was held that under the Stamp Act of 1870, the question of the sufficiency of the stamp on a document, and thereby its admissibility in evidence, was to be determined by looking at the instrument itself alone; a contrary conclusion would have introduced the great inconvenience of stopping the trial and holding a collateral inquiry, before the judge could determine whether the stamp was sufficient.

2. *Reg. v. Tonbridge*, 13 Q. B. Div. 342; *Carolina Sav. Bank v. Evans*, 28 S. Car. 521.



where the terms are clear and explicit and admit of but one construction, the court is not at liberty to supplement any real or supposed defect in the statute in order to avoid inconvenience, inasmuch as that is exclusively within the province of the legislative department.<sup>1</sup>

*Against Injustice.*—And in conformity with the foregoing principles, wherever a statute is capable of two constructions, one of which would work manifest injustice and the other would work no injustice, it is the duty of the court to adopt the latter,<sup>2</sup> as it can scarcely be presumed that an injustice was within the legislative intent.<sup>3</sup> But it is not within the province of the court to

1. *Rex v. Beeston*, 3 T. R. 594; *Biffin v. Yorke*, 5 M. & G. 436; 44 E. C. L. 232; *Carolina Sav. Bank v. Evans*, 28 S. Car. 521; *Dudley v. Reynolds*, 1 Kan. 285; *Jackson v. Lewis*, 17 Johns. (N. Y.) 475; *Hyatt v. Taylor*, 42 N. Y. 262; *Ludewig v. Pariser*, 4 Abb. N. Cas. (N. Y.) 246; *People v. New York Cent. R. Co.*, 13 N. Y. 78; *Thaxter v. Jones*, 4 Mass. 574; *Putnam v. Longley*, 11 Pick. (Mass.) 480; *Bidwell v. Whitaker*, 1 Mich. 479; *Douglass v. Essex County*, 38 N. J. L. 216.

2. *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 208; *River Wear Com'rs v. Adamson*, 2 App. Cas. 743; *Plumstead Board of Works v. Spackman*, 13 Q. B. Div. 878; *Smith v. Great Western R. Co.*, 3 App. Cas. 165; *Reg. v. Monck*, 2 Q. B. Div. 555; *Moore v. Given*, 39 Ohio St. 661; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 248; *Richards v. Dagget*, 4 Mass. 534; *Wassell v. Tunnah*, 25 Ark. 101; *Johnson v. Bush*, 3 Barb. Ch. (N. Y.) 238; *Lombard v. Young Men's Library Assoc. Fund*, 73 Ga. 322; *Murray v. Gibson*, 15 How. (U. S.) 421; *Ham v. M'Claws*, 1 Bay (S. Car.) 98; *Chandler v. Lee*, 1 Idaho N. S. 349.

Where the inhabitants of a school district voted for an assessment for the purpose of a school building, and before the assessment had been levied, they were formed by the town into another district, it was held that they were not liable to be assessed for the money so voted, as otherwise a great injustice might be done them, if the district to which they belonged then should pass a vote for the same purpose, or if the town should further divide them into another district. *Richards v. Dagget*, 4 Mass. 534.

Where a statute, containing regulations for preventing collisions at sea, provided that any ship which infringed the regulations should be deemed to

be in fault, unless the circumstances of the case made such departure necessary, was held not to apply to a vessel which had violated the regulations by not having up any side lights where this neglect could not possibly have contributed to the accident. *The Englishman*, 3 P. D. 18.

An act which required that Chinese coming to this country should obtain the permission of, and be identified as being entitled to come by, the Chinese government, and in each case such identity to be evidenced by a certificate issued under the authority of that government, would not apply to a Chinese merchant who had been domiciled in this country for seventeen years past and doing a large business here, and who had gone back to China for the purpose of visiting his relatives, always with the intention of returning to this country. Chief Justice Fuller, delivering the opinion of the court, said: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew v. United States*, 144 U. S. 47.

3. *Ex parte Corbett*, 14 Ch. Div. 129; *Reg. v. Morris*, L. R., C. C. 90; *Wright v. London Omnibus Co.*, 2 Q. B. Div. 271; *Hunt v. Lake Shore, etc., R. Co.*, 112 Ind. 69; *Smith v. Moore*, 90 Ind. 305; *Bradley v. People*, 8 Colo. 599; *Harris v. Haynes*, 30 Mich. 140; *McLelland v. Shaw*, 15 Tex. 319.

Congress passed an act in 1850 for the relief of a number of our citizens who had been captured by the Mexican army in 1842, and carried by them prisoners into their country. It was held that this could not possibly embrace all those persons who might have been temporarily detained or under arrest during the brief stay of the Mexican

add provisions not found in the statute, for the purpose of preventing an apparent hardship.<sup>1</sup>

It has been said that injustice, to be of weight in the construction of a statute, must be a manifest injustice, so that it must have been present to the minds of those who were passing the statute.<sup>2</sup>

*Against Absurdity.*—There is a strong presumption against absurdity in a statutory provision; it being unreasonable to suppose that the legislature intended their own stultification. So, when the language of an act is susceptible of two senses, that sense will be adopted which will not lead to absurd consequences.<sup>3</sup>

army in San Antonio, and who were immediately released upon their retreat from that place, as it could not be supposed that the legislature intended to place them upon the same footing with those who had endured the hardships of imprisonment in *Mexico*. Such a construction would be contrary to all sense of justice and a reflection upon the legislature. *McLelland v. Shaw*, 15 Tex. 319.

And so the provisions of an act "requiring one month's notice to be served before instituting any proceeding against the 'Metropolitan Board of Works' or any district board, in respect to anything done or intended to be done under their parliamentary power," did not apply to, or affect the rights of, a man who sought to restrain the defendants, by injunction, from running their sewer into a brook which ran by his residence, since to have required him to wait for a month before instituting any proceedings might have subjected him to irreparable damages, which could not possibly have been within the intention of the legislature. *Atty. Gen'l v. Hackney Local Board*, L. R., 20 Eq. Cas. 626.

Section 12 N. Y. Act 1848 (Laws 1848, ch. 40) requires an annual report to be made by every corporation organized thereunder, and in case of failure in this respect makes the trustees jointly and severally liable "for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." This language is broad enough to include debts due from the corporation to the individual trustees, nevertheless it could not be thought that it was the intention of the legislature to enable trustees, by means of their own neglect, to create a personal liability against their fellow trustees for their own claims against the corporation; such a supposition would be not only a reproach upon the

statute, but upon the legislature which enacted it. *Briggs v. Easterly*, 62 Barb. (N. Y.) 60.

And in accordance with the same principles of natural justice and equity, a statute which required every railroad corporation to erect and maintain fences along its line of road, and enacted that "so long as such fences shall not be made and when not in good repair, such railroad corporation shall be liable for the damages which shall be done by the agent or engines of such corporation, to cattle, horses, etc., thereon," could not be construed to apply to every case where the fences were out of repair at the time of the injury, as if some malicious person in the night should throw down the fence and allow the owner's cattle to escape from his fields upon the railroad track and be killed; or where the fences should be swept down by a hurricane and before the company had time to rebuild them the cattle along the line of the road should escape upon it and be killed; but only to cases where the corporation was guilty of some neglect in its duty; the court being unwilling to impute to the legislature so unjust and unreasonable an intent as a contrary construction would hold. *Murray v. New York Cent. R. Co.*, 3 Abb. App. Dec. (N. Y.) 342.

1. *Cheyenne County v. Bent County*, 15 Colo. 326; *Cooke v. School District*, 12 Colo. 458. In this last case, it is said: "The courts cannot extend the provisions of law enacted for an entirely different purpose, and having no such object in view, to apply to a case in order to furnish the relief demanded, for that would be no less than usurpation. When courts undertake to make laws for 'hard cases' they pass out of their proper sphere." See *supra*, this title, *Literal Construction*.

2. *Reg. v. Monck*, 2 Q. B. Div. 555.

3. *Grey v. Pearson*, 6 H. L. Cas. 61;

*River Wear Com'rs v. Adamson*, 2 App. Cas. 743; *Ex parte Walton*, 17 Ch. Div. 752; *Woodward v. Watts*, 2 El. & Bl. 452; 75 E. C. L. 452; U. S. v. Fisher, 2 Cranch (U. S.) 400; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 202; *Oates v. First Nat. Bank*, 100 U. S. 239; *Holy Trinity Church v. U. S.*, 143 U. S. 457; *People v. Davenport*, 91 N. Y. 574; *Alvord v. Lent*, 23 Mich. 372; *Sprowle v. Lawrence*, 33 Ala. 674; *Perry County v. Jefferson County*, 94 Ill. 214; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 102 Pa. St. 197; *Jeffersonville v. Weems*, 5 Ind. 547.

By an absurdity is meant that which is to be regarded as morally impossible, which is contrary to reason, or, in other words, which could not be attributed to men in their right senses. *Potter v. Douglas County*, 87 Mo. 239.

Section 8 of the *Massachusetts Stat.* 1796, enacts that the master of a vessel may refuse the assistance of the pilot, although he should come on board the vessel and offer to pilot her. But in such case, the pilot shall be entitled to half the pilotage fees and shall have his action therefor against the master. And by the 12th section of the same statute, a remedy is given to the pilot against the hull, tackle, etc., of any ship he may have piloted if his fees have not been paid. It was held that this statute applied only to merchant vessels and not to ships of war of the *United States*. And the court said: "Now it cannot be supposed that the legislature meant to subject the commander of a frigate to such an action, when upon common principles of law such commander would not be personally liable for any service done to his vessel; the government and not the agent being accountable for such service. And it would be absurd to suppose that the legislature had the power, or if it had, would have exercised it, to detain ships of war of the *United States* engaged, as they possibly might be, in expeditions of importance to the government." *Ayers v. Knox*, 7 Mass. 306.

The first section of *Massachusetts Sts.* 1814, ch. 175, provides that, "If any person not being authorized by the board of health or the selectmen of any town in this commonwealth, shall knowingly and willfully dig up, remove or carry away, or aid, or assist in digging up, removing or carrying away, any human body, or the remains thereof, such person shall be imprisoned, etc. This provision taken strictly,

would make it necessary, in order to sustain an indictment, to aver and prove that the board of health or selectmen of no town in the commonwealth had given license to do the act complained of. The consequence would be, as oral testimony alone can be admitted on criminal trials of facts provable by witnesses, that the officers of every town to the number of three or four hundred must be summoned and give their personal attendance in the court where such transaction is pending; such an interpretation would lead to an absurdity. It was therefore held sufficient to aver that the defendant was not authorized by the selectmen of the town where the body had been buried. *Com. v. Loring*, 8 Pick. (Mass.) 369.

"Immediate."—Section 5, art. 29, ch. 29, Gen. Sts. of *Kentucky*, makes the carrying of concealed weapons lawful "when the person has reasonable ground to believe his person, or the person of some of his family, or his property, is in immediate danger from violence or crime." Section 17, ch. 21, of the Gen. Sts. of that state provides "that all words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such meaning." The court held that the word "immediate" was not a technical word, and that to give it its common and approved meaning, which is "instant, present, without the intervention of time," would lead to these absurd consequences: One who leaves his home to go to a place where it is probable or even certain that he will meet his adversary whom he has reasonable ground to believe will attempt to take his life whenever opportunity is presented, cannot, at the moment of leaving his home, or at any time before he comes into the presence of his enemy, be said to be in immediate danger in the sense in which that phrase is ordinarily used. . . . And therefore such a person could not lawfully carry concealed weapons while going from his home to the place of anticipated meeting, but must go unarmed, or with his arms exposed to view, until, meeting his enemy, he is in present danger; and then, and then only, he may lawfully conceal them, and when again out of his enemy's presence he can no

The common sense of man approves the judgment that the Bolognian law, which enacted that "whoever drew blood in the streets should be punished with the utmost severity," did not extend to a surgeon who opened the veins of a person who fell down in the street in a fit.<sup>1</sup> The same common sense accepts the ruling that the Stat. of 1 Edw. II, which enacted that a "prisoner who breaks prison shall be guilty of a felony," did not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burned."<sup>2</sup> And a like common sense sanctions the ruling that an act which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.<sup>3</sup>

Where, however, that which is directed to be done is within the sphere of legislation, and the terms employed are clear and explicit, and susceptible of but one interpretation, the consequences thereof, if absurd, can only be avoided by a change of the law itself, to be effected by legislative and not by judicial action.<sup>4</sup>

*Against Ineffectiveness.*—There is a presumption that the legislature intended that every word and clause in a statute should be of some force and effect; accordingly, courts will, if the language will reasonably permit, so construe a statute that the whole

longer lawfully carry them concealed. It was therefore adjudged that when a person has reasonable ground to believe that his person, or the person of some member of his family, will be in immediate danger of violence or crime at the hands of another whenever that person is present, then he may lawfully carry concealed arms whenever and wherever he has reasonable ground to apprehend that he will encounter such person, and be exposed to the apprehended danger. *Bailey v. Com.*, 11 Bush (Ky.) 688.

"*Willfully.*"—In *State v. Clark*, 29 N. J. L. 96, the act under consideration made it a misdemeanor to "willfully" break down a fence in the possession of another person. The defendant was indicted under that statute. The defense was that the act of breaking down the fence, though willful, was in the exercise of a legal right to go upon his own land. The trial court rejected the testimony offered to sustain the defense, and the supreme court held that this ruling was error. In its opinion the court used this language: "The act of 1855 in terms makes the willful opening, breaking down, or injuring of any fence belonging to or in the possession of another person a misdemeanor. In what sense is the term 'willful' used?

In common parlance, 'willful' is used in the sense of intentional as distinguished from accidental or involuntary. Whatever one does intentionally he does willfully. Is it used in that sense in this act? Did the legislature intend to make the intentional opening of a fence for the purpose of going upon the land of another indictable if done by permission, or for a lawful purpose? . . . We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed."

1. 1 Co. Lit. 18, 19, and note (10); 1 Bl. Com. 60.

2. Plowden 10.

3. *U. S. v. Kirby*, 7 Wall. (U.S.) 482.

4. *Bosley v. Mattingly*, 14 B. Mon. (Ky.) 72; *Douglass v. Essex County*, 38 N. J. L. 214. In this latter case it was said that it is not the province of courts to supervise legislation and keep it within the bounds of common sense

may stand and be effective.<sup>1</sup> To this end words have been supplied, or rejected, their collocation altered, and wrong dates and figures corrected.<sup>2</sup> But if the language is precise and unambiguous, a construction not supported by it will not be adopted, although the consequence will be to defeat partially or wholly the purposes of the act.<sup>3</sup>

c. AS TO INCLUDING THE GOVERNMENT.—The government is not bound by a statute unless named therein. Laws are *prima facie* presumed to be made for subjects only, and the government will not be presumed to be binding itself by them unless this intention affirmatively appears. In *England*, the crown is not reached except by express words or by necessary implication in any case where it would be ousted of any existing prerogative or interest.<sup>4</sup> And so in the *United States* the states and national government are not bound by a general statutory provision whereby any of their prerogatives, rights, titles, or interests will

and propriety. See also *supra*, this title, *Literal Construction*; *infra*, *Grammatical Construction*.

1. *The Emily v. The Caroline*, 9 Wheat. (U. S.) 381; *Cook v. Hamilton County*, 6 McLean (U. S.) 112; *In re New York, etc., Bridge*, 72 N. Y. 527; *People v. McGloin*, 91 N. Y. 241; *People v. Matsell*, 94 N. Y. 179; *Nichols v. Halliday*, 27 Wis. 406; *State v. Stinson*, 17 Me. 154; *State v. Blair*, 32 Ind. 313; *Simmons v. California Powder Wks.*, 7 Colo. 285; *Chapman v. State*, 16 Tex. App. 76.

In *Ogden v. Strong*, 2 Paine (U. S.) 584, it was said that in the construction of a statute, every part of it must be viewed in connection with the whole so as to make all the parts harmonize if practicable, and give a sensible and intelligible effect to each. Nor should it be presumed that the legislature meant that any part of the statute should be without meaning or without force and effect.

Blackstone gives this illustration: "If land be vested in the king and his heirs by act of Parliament, saving the right of A, and A has at that time a lease of it for three years; here A shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon." 1 Bl. Com. 88. See *supra*, this title, *Literal Construction*.

2. See *infra*, this title, *Exceptional Construction*, where the subject is discussed at length, with a large collection of cases and many illustrations.

3. "Our decision," said Lord Tenter-

den, in *Rex v. Barham*, 8 B. & C. 99, 15 E. C. L. 157, "may in this particular case operate to defeat the object of the act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." See *supra*, this title, *Literal Construction*.

4. Broom's *Legal Maxims*, p. 72; *Jenk. Cent.* 307; *Willion v. Berkeley*, *Plowd.* 236; *Atty. Gen'l v. Donaldson*, 10 M. & W. 117; *Atty. Gen'l v. Allgood*, *Parker* 3; *Bacon's Abr.*, tit. *Prerogative*, E 5 (c); *Co. Litt.* 43b; *Chitty's Prerogative* 382; *Ayscough's Case*, *Cro. Car.* 526; *De Bode v. Reg.*, 13 Q. B. 373; 66 E. C. L. 371; *Doe v. Archbishop of York*, 14 Q. B. 81; 68 E. C. L. 81; *Ledsam v. Russell*, 1 H. L. Cas. 687; *Rex v. Allen*, 15 East 333; *Huggins v. Bambridge*, *Willes* 241; *Rex v. Wright*, 1 Ad. & El. 437; 28 E. C. L. 117; *Magdalen College Case*, 11 Rep. 74; *R. v. Touchin*, 2 Ld. Raym. 1066; *Feather v. Reg.*, 6 B. & S. 257; 118 E. C. L. 257; *Dixon v. London Small Arms Co.*, 1 App. Cas. 632; *Tobin v. Reg.*, 32 L. J. 216.

It is to be presumed that the legislature does not intend to deprive the crown of any prerogative right of property unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the crown, it is construed so as to exclude that effect.

be impaired, unless by express words or irresistible implication.<sup>1</sup> Thus, the Statutes of Limitation are no bar to claims by

Bacon's Abr., tit. *Prerogative* E 5; Cook's Case, Show. 208.

1. Bishop's Statutory Crimes, § 103; Sedg. on Const. of Statute 337 (2d ed.); Water Com'rs v. Hudson, 13 N. J. Eq. 420; Warren R. Co. v. State, 29 N. J. L. 353; Morris, etc., R. Co. v. Newark, 10 N. J. Eq. 352; Greenwich v. Easton, etc., R. Co., 24 N. J. Eq. 217; Bennett v. McWhorter, 2 W. Va. 441; Dollar Sav. Bank v. U. S., 19 Wall. (U. S.) 277; U. S. v. Hewes, Crabbe (U. S.) 307; U. S. v. Greene, 4 Mason (U. S.) 427; U. S. v. Hoar, 2 Mason (U. S.) 314; Gilman v. Sheboygan, 2 Black (U. S.) 510; U. S. v. Shaw, 39 Fed. Rep. 433; U. S. v. Williams, 5 McLean (U. S.) 133; U. S. v. Davis, 3 McLean (U. S.) 483; People v. Herkimer, 4 Cow. (N. Y.) 345; 15 Am. Dec. 379; People v. Rossiter, 4 Cow. (N. Y.) 143; Com. v. Johnson, 6 Pa. St. 136; Com. v. Hutchinson, 10 Pa. St. 466; Jones v. Tatham, 20 Pa. St. 398; Com. v. Baldwin, 1 Watts (Pa.) 54; 26 Am. Dec. 33; Swearingen v. U. S., 11 Gill & J. (Md.) 373; State v. Milburn, 9 Gill (Md.) 105; State v. Bank of Md., 6 Gill & J. (Md.) 216; 26 Am. Dec. 561; Doe v. Deavors, 11 Ga. 79; State v. Garland, 7 Ired. (N. Car.) 50; Cole v. White, 32 Ark. 45; Josselyn v. Stone, 28 Miss. 753.

In *State v. Kinne*, 41 N. H. 241, it is said that, "The state here, like the crown in *England*, is not bound by a provision of a general statute which affects its prerogatives, rights, or interests, unless expressly named." In that case it was held that under a general provision of the statute that costs shall follow the event of every action or petition unless otherwise directed by law or by the court, no costs could be recovered against the state. See also *Reg. v. Beadle*, 7 El. & Bl. 492; 90 E. C. L. 490.

**Discharge in Bankruptcy.**—"A discharge in bankruptcy under a statute which authorizes the government to prove its demands against the bankrupt, and declares the discharge to be a release 'from all debts, claims, liabilities, and demands which were or might have been proved' and 'a full and complete bar to all suits brought on any such debts, claims, liabilities or demands,' is of no avail against a suit by the government." Bishop on Statutory Crimes, § 103, citing *U. S. v. Herron*, 20 Wall.

(U. S.) 251. See also *Ex parte Russell*, 19 Ves. 165; *Ex parte Postmaster Gen'l*, 10 Ch. Div. 595; *Public Schools v. Trenton*, 30 N. J. Eq. 667; *U. S. v. Wilson*, 8 Wheat. (U. S.) 253; *Glenn v. Humphreys*, 4 Wash. (U. S.) 424; *People v. Rossiter*, 4 Cow. (N. Y.) 143; *People v. Herkimer*, 4 Cow. (N. Y.) 345; 15 Am. Dec. 379; *Com. v. Hutchinson*, 10 Pa. St. 466.

**Eminent Domain.**—It has been held that acts authorizing a corporation generally to take lands for the purpose for which it is incorporated, do not give the power of taking lands already used for a public purpose, unless such power is given by express terms or by necessary inferences. *In re Cuxfield Board*, 19 Beav. 153; *Reg. v. McCann*, L. R., 3 Q. B. 677; *Com. v. Erie*, etc., R. Co., 27 Pa. St. 339; 67 Am. Dec. 471; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *State v. Montclair R. Co.*, 35 N. J. L. 328; *Com. v. Boston*, etc., R. Co., 3 Cush. (Mass.) 25; *Boston Water Power Co. v. Boston*, etc., R. Co., 23 Pick. (Mass.) 360; *Little Miami*, etc., R. Co. v. Dayton, 23 Ohio St. 510. See also *Com. v. Stevens*, 10 Pick. (Mass.) 248; *Com. v. Coombs*, 2 Mass. 492.

A railroad corporation, with only general powers to locate its road and take lands for it, may cross a public highway, upon the ground that it is presumed the legislature so intended from the necessity of things. *Starr v. Camden*, etc., R. Co., 24 N. J. L. 592.

**Counties—Municipalities.**—In *Cole v. White County*, 32 Ark. 51, it is said: "It is a well settled rule that in the construction of statutes declaring or affecting rights and interests, general words do not include the state or affect its rights, unless it be especially named, or it be clear by necessary implication that the state was intended to be included;" and in that case it was held that "Counties which are component and essential parts of a state and the necessary agencies of its government, embodiments of the public, are no more embraced in the general words of the statute than the state itself." Mr. Bishop says, however, that, "The reasons of the rule that in the construction of statutes general words do not bind the state would seem not in general to extend it to municipal corporations."

the government, unless the government is included by express words.<sup>1</sup>

It is said that the aforesaid presumption does not apply when the act is made for the public good, advancement of learning, religion and justice, relief of the poor, prevention of fraud, or suppression of injury and wrong.<sup>2</sup> But it is probably more accurate to say that the government is not excluded from the operation of a statute where neither its prerogative rights nor property are in question.<sup>3</sup>

1. *Lambert v. Taylor*, 4 B. & C. 138; 10 E. C. L. 293; *Lindsay v. Miller*, 6 Pet. (U. S.) 666; *People v. Gilbert*, 18 Johns. (N. Y.) 227, note; *Com. v. Johnson*, 6 Pa. St. 136.

2. *Bishop's Statutory Crimes*, § 103; *Chit. Prer.* 382; *Case of Ecclesiastical Persons*, 5 Rep. 144; *Lord Berkeley's Case Plowd.* 246; *Magdalen College Case*, 11 Rep. 70b & 73a; *Rex v. Wright*, 1 Ad. & El. 436; 28 E. C. L. 117; *Mildmay's Case*, 6 Rep. 48; *Rex v. Archbishop of Armage, Stra.* 516; *Doe v. Deavors*, 11 Ga. 79; *Com. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 25; *Atty. Gen'l v. Newman*, 1 Price 438; *Martin v. State*, 24 Tex. 61. See also *Green v. U. S.*, 9 Wall. (U. S.) 655.

In *Atty. Gen'l v. Radloff*, 10 Exch. 84. *Pollock, C. B.*, said: "The crown is not bound with reference to matters affecting its property or person, but is bound with respect to the practice in the administration of justice."

In *Doe v. Deavors*, 11 Ga. 79, it was decided that the state was bound by acts exempting certain articles of personal property from levy and sale for debts, so that they could not be seized and sold under execution for taxes. The court said: "In our judgment, the state falls within the operation of a public law, passed for the benefit of the poor, and the state falls within the policy of our own legislation upon this subject-matter." See also *State v. Pitts*, 51 Mo. 133; *State v. Geddis*, 44 Iowa 537; *Hume v. Gossett*, 43 Ill. 297; *Loomis v. Gerson*, 62 Ill. 11.

3. For a number of old English statutes which were held to apply to the crown, although the crown was not expressly named therein, see *Bacon's Abr. tit. Prerogative E* 5.

Statutes establishing general rules of procedure in civil actions have been held to bind the government. *Green v. U. S.*, 9 Wall. (U. S.) 655; *Fink v. O'Neil*, 106 U. S. 272.

An English statute which was passed for the better administration of justice,

and which enacted that writs of error upon judgments given in any of the superior courts should be returned to the exchequer chamber, was held to apply to a judgment on an indictment; although the crown was not named or referred to in the act, no prerogative was affected by this construction. *Rex v. Wright*, 1 Ad. & El. 434; 28 E. C. L. 117.

When a state steps down into the arena of common business in concert or in competition with her citizens, she goes divested of her sovereignty, and the reason for the maxim *nullum tempus occurrit regi* no longer applies. *Cal-loway v. Cossart*, 45 Ark. 81.

In *Com. v. Garrigues*, 28 Pa. St. 12; 70 Am. Dec. 103, it was held that the commonwealth was bound by a statute made to prevent tortious usurpations, and to regulate and preserve the right of all elections. It was said: "But it is argued that the commonwealth is not bound by the statute. It is true that the general rule in *England* is that the king is not bound by a statute if he be not named in it. But this rule has many exceptions. All statutes made to suppress wrong, to take away fraud, to prevent the decay of religion, to prevent tortious usurpations, or to secure to electors the right to make free election, are excepted out of this rule in *England*, and bind the king, although he be not named. 5 *Coke's Rep.* 14b; *Dwarris on Statutes*, 27, 28. The act of 1854 comes within the spirit of several of these exceptions. In addition to this, the subject-matter, being one in which the commonwealth is the chief party in interest, plainly indicates an intention to bind the state. If this were not the construction, the statute would be almost inoperative."

In *U. S. v. Knight*, 14 Pet. (U. S.) 315, it was said: "Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits,

*f.* AS TO GRAMMATICAL CONSTRUCTION.—It is an elementary rule in the construction of statutes that phrases and sentences are to be construed according to the rules of grammar, the presumption being that they were used by the law makers according to their grammatical import.<sup>1</sup> This rule of construction, however, must give way to the manifest intention of the legislature, and grammatical sense and structure of the sentences will not be adhered to if inconsistent with declared purpose, or if to do so would involve inconsistency or absurdity.<sup>2</sup>

does not divest the public of any right, does not violate any principle of public policy, but on the contrary makes provision in accordance with the policy of the government, as enacted by many acts of previous legislation, to conform to state laws in giving persons imprisoned until their execution the privilege of jail limits, we shall best carry into effect the legislative intent by construing the executions at the suit of the *United States* to be embraced within the act of 1828."

1. Bacon's *Abr. Statutes* I, 2; MacDougall *v.* Paterson, 11 C. B. 755; 73 E. C. L. 755; Mattison *v.* Hart, 14 C. B. 385; 78 E. C. L. 383; Christopherson *v.* Lotinga, 15 C. B. N. S. 809; 109 E. C. L. 808; Everett *v.* Wells, 2 M. & G. 269; Smith *v.* Bell, 10 M. & W. 378; Becke *v.* Smith, 2 M. & W. 195; Warburton *v.* Loveland, 1 H. & B. 648; Richards *v.* McBride, 8 Q. B. Div. 119; Cull *v.* Austin, L. R., 7 C. P. 234; Waugh *v.* Middleton, 8 Exch. 356; Dame's Appeal, 62 Pa. St. 422; Newell *v.* People, 7 N. Y. 97.

2. Eyston *v.* Studd, 2 Plowd. 463; Reg. *v.* Frost, 9 C. & P. 129; 38 E. C. L. 70; Atty. Gen'l *v.* Lockwood, 9 M. & W. 378; Miller *v.* Salomon, 7 Exch. 475; Becke *v.* Smith, 2 M. & W. 195; Wright *v.* Williams, 1 M. & W. 199; Hollingworth *v.* Palmer, 2 Exch. 267; *Ex parte* Rashleigh, 2 Ch. Div. 13; Abel *v.* Lee, L. R., 6 C. P. 371; Brown *v.* Barry, 3 Dall. (U. S.) 365; Jackson *v.* Topping, 1 Wend. (N. Y.) 388; 19 Am. Dec. 515; People *v.* Gates, 56 N. Y. 387; Fisher *v.* Connard, 100 Pa. St. 69; Gyger's Estate, 65 Pa. St. 311; People *v.* Hill, 3 Utah 334; George *v.* Board of Education, 33 Ga. 344.

In Warburton *v.* Loveland 1 H. & B. 648, it was said: "It is a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any

expressed intention or any declared purpose of the statute, or if it would involve any absurdity, repugnancy or inconsistency in its change of provisions, the grammatical sense must then be modified, extended or abridged, so far as to avoid such inconsistencies, but no further."

In Mattison *v.* Hart, 14 C. B. 385; 78 E. C. L. 383, Jarvis, C. J., said: "It is a golden rule of construction to give to words used by a legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute that injustice and absurdity will result from so construing them."

In Abel *v.* Lee, L. R., 6 C. P. 371, Willes, J., said: "No doubt the general rule is that the language of an act is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy or injustice."

An act provided that "any person acting in contravention of this section shall forfeit all fish taken by him, and any net used by him in taking the same." In Ruther *v.* Harris, 1 Exch. Div. 97, it was held that the purpose of the act should not be defeated by adhering to the grammatical construction of the sentence; and the court construed the words "used by him in taking the same" to mean "used for the purpose of taking the same," where defendant had fished but caught nothing.

In Kelly *v.* McGuire, 15 Ark. 588, it was said: "It would be unsafe to construe a statute according to mere grammatical rules or to rely on the punctuation as any material aid in ascertaining the true meaning. Neither bad grammar nor bad English will vitiate a statute any more than a deed."

In Fisher *v.* Connard, 100 Pa. St. 69, Paxson, J., said: "The grammatical construction of a statute is one mode of interpretation, but it is not the only mode



Neither bad grammar nor bad English will defeat the operation of a statute.<sup>1</sup> In accordance with strict grammatical construction, qualifying words and phrases should be confined to their next antecedent, in the absence of punctuation showing a different intent.<sup>2</sup> This rule is frequently of no effect, and indeed is so often disregarded that the contrary might seem to be established; but, whatever be the rule, it is subservient to the real purpose of the statute; and qualifying words and phrases may be extended to all the parts of the sentence,<sup>3</sup> and even to words in other sec-

and it is not always the true mode. We may assume that the draughtsman understood the rules of grammar, but it is not always safe to do so." And declaring the construction of a statute in question, said, "and if this makes good law, the grammatical construction is not so important."

In *Gyger's Estate*, 65 Pa. St. 312, Sharswood, J., said: "It is better always to adhere to a plain, common-sense interpretation of the words of a statute than to apply to them refined and technical rules of grammatical construction."

**Improper Tense.**—A different tense may be adopted than that used in a statute when the real intention of the legislature calls for it, as in *Maysville, etc., R. Co. v. Herrick*, 13 Bush (Ky.) 123. Where a statute provided that "a married woman who *shall* come to this commonwealth without her husband," etc., it was held that the effect of the statute must not be confined by grammatical construction; but it being the purpose of the statute to extend the rights given there to those who had come as well as to those who should come, it should be so construed as to give it that effect.

An act provided that "25,000 acres of land shall be allowed for and given to Major General Nathaniel Greene." In *Rutherford v. Greene*, 2 Wheat. (U. S.) 196, it was held that the land was given by force of that act—that the words were words of absolute donation, and the gift not dependent upon future legislation.

1. *Kelly v. McGuire*, 15 Ark. 588; *Garrigus v. Parke County*, 39 Ind. 76; *Murray v. State*, 21 Tex. App. 620; 57 Am. Rep. 623.

2. *Dwarris on Stat.* 590, 591; *Steinland v. Hopkins*, 9 M. & W. 178; *Cushing v. Worrick*, 9 Gray (Mass.) 385; *State v. Jernigan*, 3 Murphy (N. Car.) 18; *State v. Brown*, 3 Hiesk. (Tenn.) 1; *Gyger's Estate*, 65 Pa. St. 311; *State v. Conklin*, 34 Wis. 25. See also *Fowler*

*v. Tuttle*, 24 N. H. 22; *Fisher v. Connard*, 100 Pa. St. 63; *Waters v. Campbell*, 4 Sawy. (U. S.) 121.

A statute making provision for the adoption of a statute by a city or town, required that it should be adopted "at a legal meeting of the city council of the city or the inhabitants of the town, called for that purpose." In *Quinn v. Lowell Electric Light Corp.*, 140 Mass. 106, it was held that the clause "called for that purpose" applied to the meeting of the inhabitants only; but this decision was upon the ground of the purpose of the statute rather than upon any grammatical rule.

A statute authorized the town or city to appropriate money for suitable buildings or rooms, and for the foundation of a library, a sum not exceeding one dollar for each of its ratable polls. In *Dearborn v. Brookline*, 97 Mass. 469, it was held that the words "not exceeding" did not necessarily qualify or limit the entire clause; but in this case also the question was settled upon consideration of the intention of the legislature, rather than upon the grammatical structure of the sentence.

A statute provided that "The annual meeting for election of officers shall be held on the first Sunday of July in each year, and the monthly meeting shall be held on the first Tuesday of each month at half past seven o'clock p. m." It was held that the real purpose of the act was to define the hour of the monthly meeting only. *State v. Conklin*, 34 Wis. 21.

3. *Ebys Appeal*, 70 Pa. St. 311; *Coxson v. Doland*, 2 Daly (N. Y.) 66; *Hart v. Kennedy*, 15 Abb. Pr. (N. Y.) 290; *Gyger's Estate*, 65 Pa. St. 311; *Dearborn v. Brookline*, 97 Mass. 470.

In *State v. Jernigan*, 3 Murphy (N. Car.) 18, Taylor, C. J., said: "The rule of grammar that words shall be referred to the next antecedent, has been adopted and enforced in the law from an early period, and has had a

tions to effectuate the legislative intention, which is the true end of all rules of construction.<sup>1</sup>

"Or" and "And."—The disjunctive particle "or" and the conjunction "and" should not be treated as interchangeable, and are not to be substituted the one for the other, except when it is apparent that they are used indifferently. Where it is clear that they have been so used, and the intention of the legislature requires them to be so construed, courts will not hesitate to interpret "and" as meaning "or," and *vice versa*.<sup>2</sup>

*g.* SAME LANGUAGE AND CHANGE OF LANGUAGE.<sup>3</sup>—When an act or part thereof which has received a judicial interpretation is re-enacted in the same terms, or where words used in a statute have a definite and well-known meaning in law, that construction or that meaning must be considered to have the sanction of the legislature unless the contrary appears.<sup>4</sup>

direct influence upon the decisions of many cases. But much to the credit of the sages of the law, it has uniformly been received and practiced upon with its proper limit and qualification so as to fulfill the intention of the legislature in civil matters, to ascertain the design of parties in private contracts, and to furnish a rational exposition of every instrument, public or private, that called for the judgment of the court."

The act establishing the metropolitan police provided that "no person holding office under this act shall be liable to military or jury duty, nor to arrest on civil process, or the service of subpoenas from civil courts, whilst actually on duty." In *Hart v. Kennedy*, 14 Abb. Pr. (N. Y.) 432, it was held that this provision should be read as meaning, "nor whilst actually on duty to arrest on civil process, or to service of subpoenas from civil courts."

**General Words and Expressions.**—It seems to be the rule in construction that general words and expressions at the end of a sentence qualify the whole. *Dwarris on Statutes*, 704; *Rex v. Shipton*, 8 B. & C. 94; 15 E. C. L. 155; *Great Western R. Co. v. Swindon*, etc., R. Co., 9 App. Cas. 808.

In *Coxson v. Doland*, 2 Daly (N. Y.) 68, Daly, J., said: "The grammatical rule, which is also the legal rule in construing statutes, is that where general words occur at the end of a sentence they refer to and qualify the whole. While if they are in the middle of the sentence and sensibly apply to a particular branch of it they are not to be extended to that which follows." *Citing Rex v. Shipton*, 8 B. & C. 94; 15 E. C. L. 155; *Dwarris on Stats.* 704.

1. *U. S. v. Babbit*, 1 Black (U. S.) 55; *State v. Forney*, 21 Neb. 226; *State v. Zanesville*, etc., *Turnpike Co.*, 16 Ohio St. 320; *Matthews v. Com.*, 18 Gratt. (Va.) 989.

2. See *AND*, vol. 1, p. 569; *OR*, vol. 17, p. 218. See also *McConky v. Alexandria County*, 56 Cal. 83; *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759; *Com. v. Griffin*, 105 Mass. 185; *State v. Pool*, 74 N. Car. 402; *State v. Custer*, 65 N. Car. 339; *Bollin v. Shiner*, 12 Pa. St. 205; *Barker v. Esty*, 19 Vt. 131.

3. See also *infra*, this title, *Adopted Statutes, Context*.

4. *Mansell v. Reg.*, 8 El. & Bl. 93; 92 E. C. L. 92; *Ex parte Campbell*, L. R., 5 Ch. 706; *Williams v. Lear*, L. R., 7 Q. B. 285; *Ex parte Thorne*, 3 Ch. Div. 458; *Ex parte Attwater*, 5 Ch. Div. 30; *Greaves v. Tofield*, 14 Ch. Div. 571; *Bustros v. White*, 1 Q. B. Div. 425; *Dale's Case*, 6 Q. B. Div. 453; *Barlow v. Teal*, 15 Q. B. Div. 403; *Clark v. Wallond*, 52 L. J. Q. B. 322; *The Abbotsford*, 98 U. S. 440; *U. S. v. Mooney*, 116 U. S. 104; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *U. S. v. Wilson*, *Baldw.* (U. S.) 95; *The Devonshire*, 13 Fed. Rep. 39; *Duramus v. Harrison*, 26 Ala. 326; *Ex parte Banks*, 28 Ala. 28; *Anthony v. State*, 29 Ala. 27; *Glass v. State*, 30 Ala. 531; *Bank of Mobile v. Meagher*, 33 Ala. 622; *O'Byrnes v. State*, 51 Ala. 25; *Ex parte Roundtree*, 51 Ala. 42; *Ex parte Matthews*, 52 Ala. 51; *Woolsey v. Cade*, 54 Ala. 378; 25 Am. Rep. 711; *Huddleston v. Askey*, 56 Ala. 218; *Posey v. Pressley*, 60 Ala. 243; *Morrison v. Stevenson*, 69 Ala. 448; *Snider v. Burks*, 84 Ala. 57; *McKenzie v. State*, 11 Ark. 594; *People v. Webb*, 38

Cal. 467; *In re Baker*, 55 Cal. 303; *Eck v. Hoffman*, 55 Cal. 502; *Harvey v. Travellers' Ins. Co.* (Colo. 1893), 32 Pac. Rep. 935; *State v. Swope*, 7 Ind. 91; *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222; *County Seat of Linn County*, 15 Kan. 500; *State v. Brewer*, 22 La. Ann. 273; *Myrick v. Hasey*, 27 Me. 9; 46 Am. Dec. 583; *Cota v. Ross*, 66 Me. 161; *Tuxbury's Appeal*, 67 Me. 269; *State v. Cumberland County*, 78 Me. 103; *McKee v. McKee*, 17 Md. 352; *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 413; *Com. v. Hartnett*, 3 Gray (Mass.) 451; *Grace v. McElroy*, 1 Allen (Mass.) 566; *Cronan v. Cotting*, 104 Mass. 248; 6 Am. Rep. 232; *Low v. Blanchard*, 116 Mass. 274; *Collins v. Wilhoit*, 35 Mo. App. 585; *Gould v. Wise*, 18 Nev. 253; *Tomson v. Ward*, 1 N. H. 12; *Moore v. Bunker*, 29 N. H. 420; *Frink v. Pond*, 46 N. H. 126; *Murphy's Case*, 23 N. J. L. 180; *Perkins v. Smith*, 116 N. Y. 441; *Hakes v. Peck*, 30 How. Pr. (N. Y.) 104; *Adams v. Turrentine*, 8 Ired. (N. Car.) 147; *Bridgers v. Taylor*, 102 N. Car. 86; *Gray v. Askew*, 3 Ohio 480; *Turney v. Yeoman*, 14 Ohio 218; *Grogan v. Garrison*, 27 Ohio St. 63; *Bulkley v. Stephens*, 29 Ohio St. 622; *State v. Jackson*, 36 Ohio St. 286; *Gonder v. Estabrook*, 33 Pa. St. 375; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Evans v. Ross*, 10 Pa. St. 235; *Apple v. Apple*, 1 Head (Tenn.) 352; *Munson v. Hallowell*, 26 Tex. 484; 84 Am. Dec. 582; *Timmins v. Bonner*, 58 Tex. 558; *Sanders v. Bridges*, 67 Tex. 94; *Hussey v. Moser*, 70 Tex. 44; *Harrington v. Smith*, 28 Wis. 43.

If an act of Parliament uses the same language which was used in a former act of Parliament referring to the same subject and passed for the same purpose and for the same object, the safe and well-known rule of construction is to assume that the legislature in using well-known words upon which there have been well known decisions, used those words in the sense which the decisions have attached to them. *Greaves v. Tofield*, 14 Ch. Div. 571; *Clark v. Wallond*, 52 L. J., Q. B. 323.

Where words have been long used in a technical sense and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to the particular statute in which they are used, the rule of construction requires the words used in such statute to be construed accord-

ing to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. *Ruckmaboye v. Lulloobhoy Mattichand*, 8 Moore P. C. 4.

When words are used in a statute which, when used in reference to the same subject, have obtained a fixed and definite meaning at common law, the inference is that they were intended to be used in their common-law sense. *Ex parte Vincent*, 26 Ala. 145; 62 Am. Dec. 714. See also *infra*, this title, *Technical Terms*.

**Code.**—The re-enactment, in a code, of provisions substantially the same as those contained in former statutes, is the legislative adoption of a known and judicial construction. *Duramus v. Harrison*, 26 Ala. 326; *Ex parte Banks*, 28 Ala. 28; *Anthony v. State*, 29 Ala. 27; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Huddleston v. Askey*, 56 Ala. 218; *Posey v. Pressley*, 60 Ala. 243; *Morrison v. Stevenson*, 69 Ala. 448; *Snider v. Burks*, 84 Ala. 57; *Potter v. State*, 92 Ala. 40.

**English and French Texts.**—In construing those parts of the *Louisiana Code* which re-enact provisions originally enacted in both French and English, both texts may be taken into consideration to aid in ascertaining their meaning as parts of one law; and obscurities or ambiguities in the English text may be often cleared up by referring to the greater precision of the French text; although, if the two texts cannot be reconciled, the English must prevail. *Hudson v. Grieve*, 1 Mart. (La.) 143; *State v. Dupuy*, 2 Mart. (La.) 177; *Breedlove v. Turner*, 9 Mart. (La.) 353; *Chretien v. Theard*, 2 Mart. N. S. (La.) 582; *Borel v. Borel*, 3 La. 30; *Durnford v. Clark*, 2 La. 128; *State v. Moore*, 8 Rob. (La.) 518; *State v. Mix*, 8 Rob. (La.) 549; *State v. Ellis*, 12 La. Ann. 390; *State v. Judge of Eighth Dist. Ct.*, 22 La. Ann. 581; *Lafourche Parish v. Terrebonne Parish*, 34 La. Ann. 1233. See also *Viterbo v. Friedlander*, 120 U. S. 707.

**Constitution.**—When a constitutional provision has received a settled judicial construction and is afterwards incorporated into a new or revised constitution, it must be presumed to have been retained with the knowledge of that construction; and the courts will, therefore, feel bound to adhere to that construction. *Ex parte Roundtree*, 51 Ala. 42.

In the amendment, re-enactment, or revision of a statute a mere change of phraseology works no change in the established interpretation thereof, unless it clearly appears that such was the intention of the legislature.<sup>1</sup> Nor will the omission of a material

**Punctuation.**—A semicolon was used in a certain section of a code. This section was divided into two members by the construction of the court. The code was afterwards revised and the semicolon retained. It was held that its retention and use indicated the legislative adoption of the prior judicial construction placed on the statute. *Potter v. State*, 92 Ala. 39.

1. *Cates v. Knight*, 3 T. R. 442; *Reg. v. Ingham*, 5 B. & S. 271; 117 E. C. L. 269; *Reg. v. Buttle*, L. R., 1 C. C. 251; *Hadley v. Perks*, L. R., 1 Q. B. 457; *Hudson v. Midland R. Co.*, L. R., 4 Q. B. 370; *Skinner v. Usher*, L. R., 7 Q. B. 427; *Mitchell v. Simpson*, 25 Q. B. Div. 189; *McDonald v. Hovey*, 110 U. S. 619; *Taylor v. Bowker*, 111 U. S. 110; *Bradley v. State*, 69 Ala. 318; *Hyatt v. Allen*, 54 Cal. 356; *State v. Smith*, 46 Iowa 672; *Overfield v. Sutton*, 1 Metc. (Ky.) 621; *Allen v. Ramsey*, 1 Metc. (Ky.) 635; *Hughes v. Farrar*, 45 Me. 72; *Sheffield v. Lovering*, 12 Mass. 492; *Woodward v. Spurr*, 138 Mass. 593; *Hittinger v. Boston*, 139 Mass. 19; *Wright v. Dressel*, 140 Mass. 149; *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388; *Burwell v. Tullis*, 12 Minn. 572; *Gaston v. Merriam*, 33 Minn. 279; *Hugo v. Miller* (Minn. 1892), 52 N. W. Rep. 381; *Dawson v. Dawson*, 23 Mo. App. 173; *Stump v. Hornback*, 94 Mo. 33; *Crowell v. Clough*, 23 N. H. 209; *Sloan v. Bryant*, 28 N. H. 71; *Mooers v. Bunker*, 29 N. H. 420; *Burnham v. Stevens*, 33 N. H. 247; *Murphy's Case*, 23 N. J. L. 192; *State v. Hale*, 25 N. J. L. 328; *Taylor v. Delancy*, 2 Cal. Cas. (N. Y.) 151; *Yates' Case*, 4 Johns. (N. Y.) 359; *Goodell v. Jackson*, 20 Johns. (N. Y.) 722; 11 Am. Dec. 351; *In re Brown*, 21 Wend. (N. Y.) 316; *Douglas v. Howland*, 24 Wend. (N. Y.) 47; *Theriat v. Hart*, 2 Hill (N. Y.) 380; *Gaffney v. Colville*, 6 Hill (N. Y.) 574; *Parmelee v. Thompson*, 7 Hill (N. Y.) 79; *Humbert v. Protestant Episcopal Church*, 1 Edw. Ch. (N. Y.) 312; *Dunham v. Waterman*, 17 N. Y. 13; 72 Am. Dec. 406; *Hall v. Western Transp. Co.*, 34 N. Y. 286; *Elwood v. Klock*, 13 Barb. (N. Y.) 55; *Douglas v. Douglas*, 5 Hun (N. Y.) 144; *Hoffman v. Delihanty*, 13 Abb. Pr. (N. Y.) 391; *Orser's Estate*, 4 Civ. Pro. Rep. (N. Y.) 134;

*Du Bois v. Brown*, 1 Dem. (N. Y.) 317; *Dominick v. Michael*, 4 Sandf. (N. Y.) 408; *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.) 102; 8 How. Pr. (N. Y.) 143; *People v. Deming*, 1 Hilt. (N. Y.) 274; *Coxson v. Doland*, 2 Daly (N. Y.) 67; *Gardener v. Woodyear*, 1 Ohio 176; *Swazey v. Blackman*, 8 Ohio 20; *Ash v. Ash*, 9 Ohio St. 387; *Conger v. Barker*, 11 Ohio St. 13; *Boley v. Ohio L. Ins., etc., Co.*, 12 Ohio St. 144; *Tyler v. Winslow*, 15 Ohio St. 368; *Dutoit v. Doyle*, 16 Ohio St. 405; *Marienthal v. Mosler*, 16 Ohio St. 569; *Williams v. State*, 35 Ohio St. 177; *State v. Shelby County*, 36 Ohio St. 330; *State v. Vanderbilt*, 37 Ohio St. 640; *Allen v. Russell*, 39 Ohio St. 337; *State v. Stockley*, 45 Ohio St. 308; *Chambers v. Carson*, 2 Whart. (Pa.) 9; *Com. v. Rainey*, 4 W. & S. (Pa.) 186; *McMicken v. Com.*, 58 Pa. St. 213; *Ennis v. Crump*, 5 Tex. 34; *Clark v. Powell*, 62 Vt. 442; *Whitcomb v. Davenport*, 63 Vt. 656; *Winterfield v. Strauss*, 24 Wis. 394.

In dealing with the statute which professes merely to repeal a former statute of limited operation and to re-enact its provisions in an amended form, it is not necessary to presume the intention to extend the operation of those provisions to classes of persons not previously subject to them. *Brown v. McLachlan*, L. R. 4 P. C. 550.

Where laws antecedent to their revision were settled either by clear expression in the statutes or adjudications on them, a mere change of phraseology shall not be deemed or construed to be a change of the law, unless such phraseology plainly shows an intention in the legislature to work a change. *Taylor v. Delancey*, 2 Cal. Cas. (N. Y.) 151.

Act of 1818 required the defendant in a judgment by confession to make a "particular" statement and specification of "the nature and consideration" of the debt or demand, and where the demand arose on a note, bond, or other specialty, the "origin and consideration" of the same was required to be "particularly set forth." Section 383, subd. 2, of the Code of Procedure requires the defendant to "state concisely the facts out of which it (the money due or to become due) arose, and to show

word in the amendment, re-enactment, or revision of a statute change the law, unless such be the evident intent of the legislature.<sup>1</sup> But a deliberate or material change of expression must be taken *prima facie* to import a change of intention.<sup>2</sup> And where

that the sum confessed therefor is justly due or to become due." It was held that the provision of the code did not change the law. *Dunham v. Waterman*, 17 N. Y. 13; 72 Am. Dec. 406.

Several statutes provided that the widow of an intestate in the absence of children of the intestate "shall be entitled to the whole residue of the personal property after the debts, funeral charges, and other incidental expenses shall have been paid." These statutes were revised, and the revision provided that, in a like case, "the widow shall be entitled to all the personal estate as next of kin, which shall be subject to distribution upon settlement of the estate." It was held that the former rule as to the time when the widow's right to her share of the personal property accrued, was not changed by the revision. *Conger v. Barker*, 11 Ohio St. 14.

"Upon a revision of statutes a different interpretation is not to be given to them without some substantial change of phraseology; some change other than what may have been necessary to abbreviate the former law." *McDonald v. Hovey*, 110 U. S. 619.

Before the courts may pronounce a change in the law in an amendment, revision, or re-enactment of statutes, such intent must be evident, and language must be employed which is not susceptible of any other just construction. *Bradley v. State*, 69 Ala. 318.

The change in the phraseology of a statute made by means of a general revision of the entire body of law, cannot be regarded as so clearly indicative of a special design and purpose on the part of the legislature as when the change is made by direct amendment. *Hugo v. Miller* (Minn. 1892), 52 N. W. Rep. 381.

1. *Horn v. Ion*, 4 B. & Ad. 78; 24 E. C. L. 28; *Bond v. Rosling*, 1 B. & S. 371; 101 E. C. L. 369; per Byles, J., in *Tidey v. Mollett*, 16 C. B. N. S. 298; 111 E. C. L. 296; *McCalmont v. Rankin*, 2 De G. M. & G. 418; *Parker v. Taswell*, 2 De G. & J. 559; *Liverpool Borough Bank v. Turner*, 2 De G. F. & J. 508; *Reg. v. Hulme*, L. R., 5 Q. B. 379; *In re Wood*, L. R., 7 Ch. 306; *In re Wright*, 3 Ch. Div. 78; *Ford v. Ford*, 143 Mass. 578; *State v. Sparrow*, 89 Mich. 269; *Gaston v. Merriam*, 33

Minn. 279; *Croswell v. Crane*, 7 Barb. (N. Y.) 195; *Douglas v. Douglas*, 5 Hun (N. Y.) 145; *Painesville, etc., R. Co. v. King*, 17 Ohio St. 543; *State v. Shelby County*, 36 Ohio St. 330; *Whitcomb v. Davenport*, 63 Vt. 656.

Where a statute requiring witnesses before an election commission to answer incriminating questions and indemnifying them from prosecution for the offense confessed, provided the commissioners certified that the witnesses had truly answered the questions, the law was held not to be changed by a later statute which failed to require the answers to be true. *Reg. v. Hulme*, L. R., 5 Q. B. 377.

Where a bankruptcy law making an assignment by a debtor of all his property an act of bankruptcy, omitted the words "with intent to defeat or delay his creditors," contained in former acts, no alteration was held to be made in the law. *In re Wood*, L. R., 7 Ch. 302.

Where a later act permitting divorce on the ground of desertion omitted the words "without the consent of the party deserted," which were contained in an earlier act on the subject, it was held that the law was not changed; the omitted words being implied in the phrase "deserted." *Ford v. Ford*, 143 Mass. 578.

2. *Rex v. Great Bolton*, 8 B. & C., 71 15 E. C. L. 154; *St. Losky v. Green*, 9 C. B. N. S. 375; 99 E. C. L. 375; *Ricket v. Metropolitan R. Co.*, L. R., 2 H. L. 207; *Reg. v. Bullock*, L. R., 1 C. C. 117; *Lawrence v. King*, L. R., 3 Q. B. 348; *Reg. v. Price*, L. R., 6 Q. B. 416; *Dickenson v. Fletcher*, L. R., 9 C. P. 8; *U. S. v. Bashaw*, 1 C. C. A. 653; *Lehman v. Robinson*, 59 Ala. 240; *Heinssen v. State* (Colo.), 29 Am. & Eng. Corp. Cas. 532; *Mechanics', etc., Bank v. Versailles Woollen Co.*, 59 Conn. 347; *Parkinson v. State*, 14 Md. 191; 74 Am. Dec. 522; *Com. v. Messenger*, 4 Mass. 462; *Rutland v. Mendon*, 1 Pick. (Mass.) 156; *State v. Hale*, 25 N. J. L. 328; *James v. Patten*, 6 N. Y. 9; 55 Am. Dec. 376; *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.) 102; 8 How. Pr. (N. Y.) 143; *Bloom v. Richards*, 2 Ohio St. 403; *Rich v. Keyser*, 54 Pa. St. 89.

Where a statute conferred powers, in

the omission of material words plainly indicates an intent to change the law, effect must be given to such intent.<sup>1</sup>

*h.* AGAINST REPEAL BY IMPLICATION.—See *infra*, this title, *Repeal*.

*i.* AGAINST RETROACTION.—See *infra*, this title, *Retrospective Laws*.

**8. Strict, Liberal, and Exceptional Construction**—*a.* STRICT CONSTRUCTION—(1) *Definition*.—Strict construction, as applied to statutes, means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace cases or acts not clearly described by such words and to bring them within the prohibition or penalty of such statutes. It does not mean that words shall be so restricted as not to have their full meaning, but that everything shall be excluded from the operation of statutes so construed which does not clearly come within the meaning of the language used.<sup>2</sup>

language substantially identical, on the tax assessor and tax collector, in reference to assessments previously overlooked or withheld, and a change was subsequently made in the language of the statute by which the powers were conferred on these officers in special sections and in changed and varying language, it was held that a change of law was intended. *Lehman v. Robinson*, 59 Ala. 240.

If one of two statutes using distinct language, imposes a penalty under certain circumstances, and the other does not, it is always an argument that the legislature did not intend to impose a penalty in the latter case, for where they did so intend they plainly said so. *Dickenson v. Fletcher*, L. R., 9 C. P. 8.

In *Reg. v. Price*, L. R., 6 Q. B. 416; *Cockburn, C. J.*, said that when the legislature in legislating *in pari materia* and substituting certain provisions in an act for those which existed in an earlier one, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive.

1. *West v. Francis*, 5 B. & Ald. 737; 7 E. C. L. 247; *Reg. v. Llangian*, 4 B. & S. 249; 116 E. C. L. 247; *Wills v. Russell*, 100 U. S. 621; *Broaddus v. Broaddus*, 10 Bush (Ky.) 299; *Buck v. Spofford*, 31 Me. 36; *Pingree v. Snell*, 42 Me. 53; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Blackburn v. Walpole*, 9 Pick. (Mass.) 104; *State v. Clark*, 57 Mo. 25; *Young v. Dake*, 5 N. Y. 465; 55 Am. Dec. 356; *Lyon v. Smith*, 11 Barb. (N. Y.) 126; *Bloom v. Richards*, 2 Ohio St. 403; *Poe v. State*, 85 Tenn. 499.

When a statute is revised and parts are omitted in the revision, those parts are not to be revived by construction. *Pingree v. Snell*, 42 Me. 53; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Lyon v. Smith*, 11 Barb. (N. Y.) 126.

Among the provisions of the Statute of Frauds, as revised by the *New York* legislature, was one relating to the manner of creating an estate or interest in land, and of assigning it, etc.; another prescribed the requisites of a valid contract for the sale of lands or any interest in lands; and both by way of exception left "leases for a term not exceeding one year" and "contracts for the leasing for a period not longer than one year" unaffected by the formalities and requisites therein prescribed, but omitted the words "from the making thereof" which were found in the statute before revision. It was held that the legislature intended to dispense entirely with the qualifications which the latter words would seem to import. *Young v. Dake*, 5 N. Y. 467; 55 Am. Dec. 356, *overruling* *Crosswell v. Crane*, 7 Barb. (N. Y.) 191.

2. *Rawson v. State*, 19 Conn. 299; *Daggett v. State*, 4 Conn. 61; 10 Am. Dec. 100; *State v. Powers*, 36 Conn. 77; *Melody v. Reab*, 4 Mass. 471; *State v. Graham*, 38 Ark. 519; *Watervliet Turnpike Co. v. McKean*, 6 Hill (N. Y.) 616; *Austin v. State*, 71 Ga. 595; *Jordt v. State*, 31 Tex. 571; 98 Am. Dec. 550; *Bettis v. Taylor*, 8 Port. (Ala.) 564; *Andrews v. U. S.*, 2 Story (U. S.) 202; *U. S. v. Bassett*, 2 Story (U. S.) 389; *Schooner Enterprise*, 1 Paine (U. S.) 32; *U. S. v. Sheldon*, 2

(2) *Penal Statutes.*—It is a well-settled rule of law that penal statutes are to be construed strictly;<sup>1</sup> but the cases reveal con-

Wheat. (U. S.) 199; U. S. v. Ellis, 51 Fed. Rep. 808; Nicholson v. Fields, 31 L. J. Exch. 235; 7 H. & N. 817.

In U. S. v. Gooding, 12 Wheat. (U. S.) 460, which was an indictment under the slave trade act of April 20th, 1818, Story, J., said: "This is a penal act and is to be strictly construed; that is, with no intendment or extension beyond the import of the words used."

In Schooner Enterprise, 1 Paine (U. S.) 32, Livingston, J., said: "While it is said that penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offenses other than those which are specially and clearly described and provided for. The court is not, therefore, as the appellant supposes, precluded from inquiring into the intention of the legislature. However clearly the law be expressed, this must ever, more or less, be a matter of inquiry. The court is not, however, permitted to arrive at this intention by mere conjecture, but it is collected from the object which the legislature had in view and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government."

In State v. Powers, 36 Conn. 77, Park, J., said: "The letter of remedial statutes may be extended to include cases clearly within the mischief the statute was intended to remedy, unless such construction does violence to the language used. But a consideration of the old law, the mischief and the remedy, are not enough to bring cases within the purview of penal statutes. They must be expressly included by the words of the statute. This is all the difference between a liberal and a strict construction of a statute. A case may come within the one unless the language excludes it, while it is excluded by the other unless the language includes it."

1 Bac. Abr., vol. 9, Stat. (I) 9; 1 Bl. Com. 88; Rex v. Harvey, 1 Wils. 164; Fletcher v. Lord Sondes, 3 Bing. 580; Jenkinson v. Thomas, 4 T. R. 665; Martin v. Ford, 5 T. R. 101; Cone v. Bowles, 1 Salk. 205; Warne v. Varley, 6 T. R. 443; Rex v. Handy, 6 T. R. 286; Graff v. Evans, 8 Q. B. Div. 377; Walton v. State, 62 Ala. 197; Huffman v.

State, 29 Ala. 40; Crosby v. Hawthorn, 25 Ala. 221; Grooms v. Hannon, 59 Ala. 510; Brooks v. State, 88 Ala. 122; State v. Graham, 38 Ark. 519; Anthony v. Manlove, 53 Ark. 423; Brooks v. Western Union Tel. Co., 56 Ark. 224; Ex parte McNulty, 77 Cal. 164; 11 Am. St. Rep. 257; Brooks v. People, 14 Colo. 413; Holland v. State, 34 Ga. 455; Atlanta v. White, 33 Ga. 229; U. S. v. Athens Armory, 35 Ga. 344; Southwestern R. Co. v. Cohen, 49 Ga. 627; Renfroe v. Colquitt, 74 Ga. 619; State v. Lovell, 23 Iowa 304; Hanks v. Brown, 79 Iowa 560; People v. Peacock, 98 Ill. 172; Woolverton v. Taylor, 132 Ill. 197; 22 Am. St. Rep. 521; Hankins v. People, 106 Ill. 628; Steel v. State, 26 Ind. 82; State v. Coffing, 3 Ind. App. 304; Western Union Tel. Co. v. Steele, 108 Ind. 163; Sondheim v. Gilbert, 117 Ind. 71; 10 Am. St. Rep. 23; Simms v. Bean, 10 La. Ann. 346; State v. Whetstone, 13 La. Ann. 376; State v. McCrystol, 43 La. Ann. 907; State v. Glaudi, 43 La. Ann. 914; Pierce's Case, 16 Me. 255; State v. Archer, 73 Md. 44; Com. v. Loring, 8 Pick. (Mass.) 373; Com. v. Fisher, 17 Mass. 49; Shaw v. Clark, 49 Mich. 384; 43 Am. Dec. 474; Van Buren v. Wylie, 56 Mich. 501; People v. Gadway, 61 Mich. 285; 1 Am. St. Rep. 578; State v. Walsh, 43 Minn. 444; 42 Am. & Eng. R. Cas. 623; Merrill v. Mechior, 30 Miss. 516; Foote v. Vanzandt, 34 Miss. 40; Haynie v. State, 32 Miss. 400; State v. Williams, 35 Mo. App. 541; Pacific v. Seifert, 79 Mo. 210; Lair v. Killmer, 25 N. J. L. 522; Wilson v. Wentworth, 25 N. H. 247; Hintermister v. First Nat. Bank, 64 N. Y. 212; Dewey v. Goodenough, 56 Barb. (N. Y.) 54; Foster v. Rhoads, 19 Johns. (N. Y.) 191; In re Baker, 29 How. Pr. (N. Y.) 485; People v. Masonic Guild, etc., Ben. Assoc. (Supreme Ct.), 18 N. Y. Supp. 806; Hines v. Wilmington R. Co., 95 N. Car. 434; Hall v. State, 20 Ohio 7; Ramsey v. Toy, 10 Ohio 493; Horner v. State, 1 Oregon 267; Mayor v. Davis, 6 W. & S. (Pa.) 269; Gallagher v. Neal, 3 P. & W. (Pa.) 183; Warner v. Com., 1 Pa. St. 154; 44 Am. Dec. 114; Bucher v. Com., 103 Pa. St. 528; State v. Solomons, 3 Hill (S. Car.) 96; State v. Wilcox, 3 Yerg. (Tenn.) 278; Randolph v. State, 9 Tex. 521; Smith v. State, 17 Tex. 191; U. S. v. Hall, 6

siderable variety in the degree of strictness insisted upon by the courts.<sup>1</sup>

It is the object of the construction of penal, as of all other statutes, to ascertain the true legislative intent; and while the courts will not, on the one hand, apply such statutes to cases

Cranch (U. S.) 171; U. S. v. Sheldon, 2 Wheat. (U. S.) 119; U. S. v. Starr, Hempst. (U. S.) 469; U. S. v. 1412 Gallons Distilled Spirits, 10 Blatchf. (U. S.) 428; U. S. v. Clayton, 2 Dill. (U. S.) 219; Schooner Enterprise, 1 Paine (U. S.) 32; Andrews v. U. S., 2 Story (U. S.) 202; Whitney v. Emmett, Baldw. (U. S.) 303; U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; U. S. v. Moulton, 5 Mason (U. S.) 537; American Fur Co. v. U. S., 2 Pet. (U. S.) 367; Schooner Harriet, 1 Story (U. S.) 251; U. S. v. Hartwell, 6 Wall. (U. S.) 385; Schooner Industry, 1 Gall. (U. S.) 114; U. S. v. Lacher, 134 U. S. 624; U. S. v. Huggett, 40 Fed. Rep. 636; *In re* McDonough, 49 Fed. Rep. 360; U. S. v. Garretson, 42 Fed. Rep. 22; U. S. v. Ellis, 51 Fed. Rep. 808.

1. In 1 Bl. Com. 88, it is said that the offense of stealing one horse was held not to be within the statute 1 Edw. VI, ch. 12, providing that those who were convicted of stealing horses should be deprived of the benefit of clergy. The annotator (Judge Cooley) remarks: "It would be universally conceded at the present day that any such decision would be unsound, and, indeed, absurd. It would be in the face of the cardinal rule of statutory construction, that the manifest intent of the legislature shall prevail. When the plural term is used, the single instance is comprehended unless a different intent is manifest." *Citing* Hassel's Case, Leach, Cro. Cas. 1. But in *Jordt v. State*, 31 Tex. 571, it was held that proof of the theft of a gelding would not sustain an indictment for stealing a horse. The court said: "The appellant in this case was indicted for stealing a horse. The proof showed that the property taken was a gelding, an animal which may be, like all eunuchs, of no sex. The criminal code provides that where words in the masculine gender are used in the penal statutes of the state, they shall include the feminine also. This does not come within the category of that general provision, for a gelding is neither the one nor the other."

In the old *English* decisions, the rigid strictness indicated by the case

referred to by Blackstone is not always maintained. The statute of Marlebridge, ch. 24, against committing waste, although penal, was construed liberally. *Hammond v. Webb*, 10 Mod. 282.

It was held that an offender who had been guilty of arson was not entitled to benefit of clergy, notwithstanding it was not expressly taken away by any statute. *Powtler's Case*, 11 Coke 34.

Statute 25 Eliz. 3, made it treason for a servant to kill his master. A servant who had killed his master's wife was adjudged guilty of treason under the statute. *Strange v. Croker*, Plowd. 16.

Statutes 7 Hen. VII, ch. 1, & 3 Hen. VIII, ch. 1, declared it felony for a soldier to depart from his captain without license. It was held that a soldier who had so departed from one to whom he had been delivered to be brought to the seaside was guilty of felony. *Soldier's Case*, Cro. Car. 71.

So also, it was held that if the extending of a penal statute by an equitable construction were more advantageous than prejudicial to the majority of the people, it might, by the rules of law, be so extended. *Platt v. Sheriffs of London*, Plowd. 36; 10 Mod. 117.

But where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election, it was held no offense within 2 Geo. II, ch. 24, § 7, although within the mischief to be remedied. *Huntingtower v. Gardiner*, 1 B. & C. 297; 8 E. C. L. 128.

It was made penal, by 14 & 15 Vict., ch. 105, § 3, to "personate any person entitled to vote." It was held that one who personated a dead man who would, if living, have been entitled to vote, could not be convicted under the statute. *Whitely v. Chappell*, L. R., 4 Q. B. 147.

An act declaring it larceny for the bailee to convert to his own use property delivered to him to be "carried for hire" does not include one to whom property is delivered for storage. *State v. Stoller*, 38 Iowa 321.

So 24 & 25 Vict., ch. 96, providing for the punishment of those who misappro-



which are not within the obvious meaning of the language employed by the legislature, even though they be within the mischief intended to be remedied,<sup>1</sup> they will not, on the other hand, apply the rule of strict construction with such technicality as to defeat the purpose of ascertaining the true meaning and intent.<sup>2</sup>

private property intrusted to them "for safe custody," does not include an agent entrusted with money for investment on mortgage. *Reg. v. Newman*, 8 Q. B. Div. 706.

And where an attorney had raised a loan for his client on mortgage, and misappropriated a portion of the money before delivering it to the mortgagor, it was held that no offense had been committed under the statute. 24 & 25 Vict., ch. 96; *Reg. v. Cooper*, L. R., 2 C. C. 123.

1. *Crosby v. Hawthorn*, 25 Ala. 221; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Hanks v. Brown*, 79 Iowa 560; *State v. Coffing*, 3 Ind. App. 304; *Com. v. Loring*, 8 Pick. (Mass.) 370; *Reed v. Davis*, 8 Pick. (Mass.) 514; *State v. Finch*, 37 Minn. 433; *State v. Walsh*, 43 Minn. 444; 42 Am. & Eng. R. Cas. 623; *Ex parte Kohler*, 74 Cal. 38; *Butler v. Ricker*, 6 Me. 268; *U. S. v. Huggett*, 40 Fed. Rep. 636; *U. S. v. Garretson*, 42 Fed. Rep. 22; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76; *Connolly v. People*, 42 Ill. App. 36; *State v. Indiana, etc.*, R. Co. (Ind. 1892), 32 N. E. Rep. 817; *Daggett v. State*, 4 Conn. 61; 10 Am. Dec. 100.

In *State v. Finch*, 37 Minn. 433, the court said: "Before conduct, hitherto innocent, can be adjudged to have been criminal, the legislature must have defined the crime, and the act in question must clearly appear to be within the prohibitions or requirements of the statute, that being reasonably construed for the purpose of arriving at the legislative intention as it has been declared. It is not enough that the case may be within the apparent reason and policy of the legislation upon the subject, if the legislature has omitted to include it within the terms of its enactments. What the legislature has from inadvertence or otherwise omitted to include within the express provisions of a penal law, reasonably construed, the courts cannot supply."

In *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76, Marshall, C. J., said: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the

tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

2. *U. S. v. Hartwell*, 6 Wall. (U. S.) 395; *U. S. v. Lacher*, 134 U. S. 624; *State v. McCrystol*, 43 La. Ann. 907; *State v. Glaudi*, 43 La. Ann. 914; *State v. Archer*, 73 Md. 44; *Indianapolis v.*

The rule under consideration applies not only to statutes relating to criminal offenses, but also to all statutes which impose, as punishment, any penalties, pecuniary or otherwise, or forfeitures of money or other property or of vested rights, or provide for the recovery of damages beyond just compensation to the party injured, whether such penalties, forfeitures, or damages are to be enforced and recovered at the suit of the state or a private individual.<sup>1</sup>

Huegele, 115 Ind. 581; *State v. Godfrey*, 97 N. Car. 507.

In *U. S. v. Hartwell*, 6 Wall. (U. S.) 395, Swayne, J., said: "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes, in the fullest manner, the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

In *State v. McCrystal*, 43 La. Ann.

907, the court said: "We admit the cardinal rule that penal statutes are to be strictly construed and are not to be extended to cases not included within the clear and obvious import of their language; but this rule is not to be applied with such unreasonable and technical strictness as to defeat the very purpose of all rules of construction, which is to ascertain the true meaning and intent of the statute. We are not to invent doubts or magnify quibbles, but are diligently to seek the legislative intent, as expressed in the words of the statute, aided by all other rules of interpretation, and when satisfied beyond all reasonable doubt of what that intent really is, it is our duty to apply and enforce it."

1. *Henderson v. Sherborne*, 2 M. & W. 236; *Nicholson v. Fields*, 7 H. & N. 810; *Fletcher v. Hudson*, 51 L. J. Q. B. 48; *Gorton v. Champneys*, 1 Bing. 287; *Grooms v. Hannon*, 59 Ala. 510; *Brooks v. Western Union Tel. Co.*, 56 Ark. 224; *White v. Steam Tug Mary Ann*, 6 Cal. 462; *Ex parte Kohler*, 74 Cal. 38; *Renfro v. Colquitt*, 74 Ga. 618; *Hanks v. Brown*, 79 Iowa 560; *Ordway v. Central Nat. Bank*, 47 Md. 217; *Palmer v. York Bank*, 18 Me. 166; 36 Am. Dec. 710; *Abbott v. Wood*, 22 Me. 541; *Cumberland, etc., Canal Corp v. Hitchings*, 57 Me. 146; *Cole v. Groves*, 134 Mass. 471; *Read v. Stewart*, 129 Mass. 407; *Reed v. Northfield*, 13 Pick. (Mass.) 96; 23 Am. Dec. 662; *Reed v. Davis*, 8 Pick. (Mass.) 513; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; *Breitung v. Lindauer*, 37 Mich. 217; *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *St. Louis v. Goebel*, 32 Mo. 295; *Maxwell v. Rives*, 11 Nev. 213; *Aechternacht v. Watmough*, 8 W. & S. (Pa.) 162; *Marston v. Tryon*, 108 Pa. St. 270; *Titusville's Appeal*, 108 Pa. St. 600; *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Bayard v. Smith*, 17 Wend. (N. Y.) 88; *Merchants' Bank v. Bliss*, 13 Abb. Pr. (N. Y.) 225; 21 How. Pr. (N. Y.) 365; *Sickles v. Sharp*, 13 Johns. (N. Y.) 497; *Allen v. Stevens*,

It has been held that statutes which are both penal and remedial are to be construed strictly, in so far as they inflict punishment upon offenders, but that in their remedial features they are to be liberally and beneficially construed.<sup>1</sup> But the courts do not

29 N. J. L. 509; Camden, etc., R. Co. v. Briggs, 22 N. J. L. 623; Shotwell v. Demman, 1 N. J. L. 174; Allaire v. Howell Works Co., 14 N. J. L. 21; Stone v. Lannon, 6 Wis. 497; Cohn v. Neeves, 40 Wis. 393; Schooner Bolina, 1 Gall. (U. S.) 75; Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29.

A statute imposing penalties on railroad companies for discriminations in freight rates is penal within the rule. Hines v. Wilmington, etc., R. Co., 95 N. Car. 434. So also is a statute prescribing a forfeiture for usury.

In Coble v. Schoffner, 75 N. Car. 42, the court said: "There is no question but that a statute prescribing a forfeiture of all interest is a penal statute, and is to be construed strictly. It cannot be construed by implication, or otherwise than by the express letter. It cannot be extended, by even an equitable construction, beyond the plain import of its language." Citing Smithwick v. Williams, 8 Ired. (N. Car.) 268; State v. Knight, 2 Hayw. (N. Car.) 267.

A statute authorizing a judgment for double damages is penal within the rule, and its repeal after verdict and before judgment takes away the right to such recovery. Bay City, etc., R. Co. v. Austin, 21 Mich. 390.

A statute imposing a penalty on an officer who shall demand and take excessive fees is penal. Aechternacht v. Watmough, 8 W. & S. (Pa.) 162, correcting a *dictum* to the contrary in Jackson v. Purdue, 3 P. & W. (Pa.) 523.

A statute imposing interest at 12 per cent. on overdue taxes is penal, and such interest can be collected only from the date of notice and demand. Com. v. Standard Oil Co., 101 Pa. St. 119; citing Easton Bank v. Com., 10 Pa. St. 451.

A statute authorizing the recovery of a penalty for failure to satisfy a judgment of record, after payment thereof, within a certain time after a request to do so, is penal, and a request made to the attorney of record is not sufficient. It must be shown that a personal request was made to the judgment creditor. Marston v. Tryon, 108 Pa. St. 270.

A statute authorizing a third person to recover from the winner treble the amount of money won at gambling is

penal within the rule. Cole v. Groves, 134 Mass. 471.

A statute authorizing the recovery of treble damages for the conversion of logs or lumber is penal and must be construed strictly. Cohn v. Neeves, 40 Wis. 393.

So also a statute making void gambling contracts, cannot be so extended as to work a forfeiture of rights acquired by contracts not within the letter of the statute. Hanks v. Brown, 79 Iowa 560.

An act authorizing the recovery of a penalty for leaving open a swinging gate across a private or by-road is penal and should be construed strictly. Allen v. Stevens, 29 N. J. L. 509.

An act imposing a penalty on a telegraph company for refusing to "transmit over its wires to localities on its line" any message tendered for transmission, is penal, and will not be construed to impose a penalty for refusing to deliver a message after it has been transmitted. Brooks v. Western Union Tel. Co., 56 Ark. 224.

An act authorizing the recovery of a penalty from a mortgagee for a failure or refusal to satisfy a mortgage after payment of the amount secured thereby, is penal, and it was held that it did not authorize the institution of a suit against the assignee of the mortgagee. Grooms v. Hannon, 59 Ala. 510, citing Fairley v. Davis, 6 Ala. 375; Russell v. Irby, 14 Ala. 131; Jones v. Brooks, 30 Ala. 588; Connolly v. Alabama, etc., Rivers R. Co., 29 Ala. 373.

Statutes which require formalities in the making and execution of contracts on pain of invalidity, are in a sense penal, and should be construed strictly so as to give to contracting parties as much freedom as is consistent with the positive provisions of the law. See FRAUDS, STATUTE OF, vol. 8, p. 657, *et seq.*

1. Gorton v. Champneys, 1 Bing. 301; Short v. Hubbard, 2 Bing. 349; 9 E. C. L. 429; 2 Bing. 445; 9 E. C. L. 474; Bones v. Booth, 2 W. Bl. 1226; Cumming v. Fryer, Dudley (Ga.) 182.

In Short v. Hubbard, 2 Bing. 349; 9 E. C. L. 429, Best, C. J., said: "The twenty-third section of 11 Geo. II, is remedial, and we are authorized by the rules for construing statutes in putting

always adhere strictly to this rule. Many remedial statutes have been construed liberally throughout, notwithstanding the imposition of penalties for their violation, on the ground that their primary object was redress and not punishment.<sup>1</sup>

It has been held that penal laws should not be extended to new things which were not in being at the time of their passage, nor to offenses created and defined by subsequent statutes.<sup>2</sup> But

upon it a liberal construction. The twenty-second section is penal, and according to the same rules it has been construed strictly as appears from the cases to which we have been referred. But there is no impropriety in putting a strict construction on a penal clause and a liberal construction on a remedial clause in the same act of Parliament. This has been done on the statutes which make it felony to burn houses and other property, and give those who suffer from the felony a remedy against the hundred."

In 1 Bl. Com, p. 88, it is said: "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."

In *Gorton v. Champneys*, 1 Bing. 287, 301, Park, J., quoted the language of Blackstone with approval and applied it to the case at bar.

1. *Carey v. Giles*, 9 Ga. 253; *Ellis v. Whitlock*, 10 Mo. 781; *Sickles v. Sharp*, 13 Johns. (N. Y.) 497; *Gray v. Bennett*, 3 Met. (Mass.) 522; *Reed v. Northfield*, 13 Pick. (Mass.) 94; 23 Am. Dec. 662; *Stanley v. Wharton*, 9 Price 301; *Taylor v. U. S.*, 3 How. (U. S.) 197.

In *Gray v. Bennett*, 3 Met. (Mass.) 522, which was a bill in equity brought by the assignee of an insolvent debtor to recover treble the amount of usurious interest paid by the insolvent to the defendant, the statute authorizing such recovery was held remedial and entitled to liberal construction. The court, after reviewing the history of such legislation in *Massachusetts*, said: "Admitting, then, as the fact was, that the original statutes were clearly penal, the present law while it is penal to some extent in its consequences is in fact so modified that it may be said to be

adopted into the family of remedial statutes, and though a brother of the half blood is nevertheless entitled to its share of the inheritance, or, in other words, has the like privilege of a liberal construction with those statutes which are wholly remedial. . . . Stanley v. Wharton, 9 Price 301, was an action of debt founded upon the statute of 11 Geo. II, ch. 19, against the defendant for assisting a tenant of the plaintiff in fraudulently removing property from demised premises to prevent the plaintiff from distraining them for arrears of rent, for which injury, double the value of the goods removed is given by the statute. . . . The court held that the statute was purely and entirely remedial, providing for giving double the value for the aggravation of the injury done to the landlord by the wrongful removal and concealment of the property; and this also where the action was not against the tenant. In a case arising in this commonwealth, *Reed v. Northfield*, 13 Pick. (Mass.) 94; 23 Am. Dec. 662, which was an action on the statute 1786, ch. 81, to recover double damages for an injury to the plaintiff caused by a defect in a highway, the court in giving judgment say: 'We think the action is purely remedial and has none of the characteristics of a penal transaction. All damages for the neglect or breach of duty operate to a certain extent as punishment, but the distinction is that it is prosecuted for the purpose of punishment and to deter others from offending in like manner. Here the plaintiff set out the liability of the town to repair and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use and in form and substance the suit calls for indemnity.'" See *infra*, this title, *Liberal Construction*.

2. *Reg. v. Smith*, L. R., 1 C. C. 266; *Fost. Cr. L.*, p. 373; *Wells v. Porter*, 3 Scott 141; 2 Bing. N. Cas. 722; 29 E. C. L. 469; *Oakley v. Rigby*, 2 Bing. N. Cas. 732; 3 Scott 194; 29 E. C. L. 469;

if the new thing or new offense is a species of a genus which was known to the common law, or was the subject of former legislation, it may come within the punitive sanctions of the common law or former statute law.<sup>1</sup>

*Elsworth v. Cole*, 2 M. & W. 31; *Robson v. Fallows*, 4 Scott 43; 3 Bing. N. Cas. 392; 32 E. C. L. 173; *Hewitt v. Price*, 5 Scott N. R. 229; 4 M. & G. 355; 43 E. C. L. 188; *Williams v. Tyre*, 18 Beav. 366; *Com. v. Wells*, 110 Pa. St. 463; *Com. v. Howe*, 144 Mass. 144.

In *Reg. v. Smith*, L. R., 1 C. C. 266, it appeared that statute 24 and 25 Vict., ch. 96, § 91, enacted that whosoever should receive any chattel, the stealing or taking whereof should amount to felony, either at common law or by virtue of that act, knowing the same to have been feloniously stolen or taken, should be guilty of felony. 31 and 32 Vict., ch. 116, § 1, enacts that if any person being a member of any co-partnership, shall steal or embezzle any money or goods of or belonging to such co-partnership, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership. It was held not an offense under the former act to receive goods stolen from a firm by one of the co-partners knowing them to have been stolen, although the stealing is made a felony by the latter act. *Bovill, C. J.*, in delivering the opinion of the court, after referring to the rule against extending penal enactments by construction, said: "This latter rule may be illustrated by reference to the Stat. 31 Eliz., ch. 12, § 5, which took away clergy from an accessory in horse stealing, upon which it was held that the enactment extended only to such persons as were in judgment of law accessories at the time the act was made; viz., accessories at common law, and not to such as were made accessories by subsequent statute; and, therefore, a person knowingly receiving a stolen horse, though made an accessory by subsequent statutes, was held not to be ousted of clergy by the statute of Eliz. Fost. Crown Law, p. 372. Upon these grounds, we think the statute 24 and 25 Vict., ch. 96, § 91, cannot be extended by construction so as to include a receiver of property stolen by a partner so as to make such receiver liable in the discretion of the court to the graver punishment of fourteen years' penal servitude thereby imposed, as the prisoner would

be, if this conviction were sustained, a circumstance which makes the authorities cited from Foster specially applicable."

The stock jobbing act declared void all such contracts in "any public or joint stock or other public securities whatsoever." It was held not to apply to foreign securities which were not dealt in at the time of its enactment. *Wells v. Porter*, 3 Scott 141; 2 Bing. N. Cas. 722; 29 E. C. L. 469; *Oakley v. Rigby*, 2 Bing. N. Cas. 732; 3 Scott 194; 29 E. C. L. 469; *Elsworth v. Cole*, 2 M. & W. 31; *Robson v. Fallows*, 4 Scott 43; 3 Bing. N. Cas. 392; 32 E. C. L. 173; *Morgan v. Pebrer*, 4 Scott 230; 3 Bing. N. Cas. 457; 32 E. C. L. 202. Or to contracts for the sale of railway shares which were not in existence at the time of its enactment. *Hewitt v. Price*, 5 Scott N. R. 229; 4 M. & G. 355; 43 E. C. L. 188; *Williams v. Tyre*, 18 Beav. 366; 18 Jur. 442.

In *Com. v. Howe*, 144 Mass. 144, it was held that a wager upon the result of a primary election was not a penal offense within the provisions of the acts of March 24, 1817, and July 2, 1839, on the ground that these acts being penal in their nature would not be extended to primary elections which did not exist at the time of the passage of the same.

In *Com. v. Howe*, 144 Mass. 144, it is held that Public Statutes, ch. 7, § 57, providing for the punishment of any one who should at any national, state, or municipal election knowingly cast more than one ballot at one time of balloting, did not apply to ballots given at a municipal election of the state upon the question of granting licenses for the sale of intoxicating liquors.

1. *Collier v. Worth*, 1 Exch. Div. 464; *Reg. v. Cottle*, 16 Q. B. 412; *Milton v. Faversham*, 10 B. & S. 548; *Atty. Gen'l v. Lockwood*, 9 M. & W. 378; *Atty. Gen'l v. Saggars*, 1 Price 182; *Gambart v. Ball*, 14 C. B. N. S. 306; 108 E. C. L. 305; *Graves v. Ashford*, L. R., 2 C. P. 410; *Taylor v. Goodwin*, 4 Q. B. Div. 228; *Parkyn v. Priest*, 7 Q. B. Div. 313.

In *Reg. v. Smith*, L. R., 1 C. C. 266, *Bovill, C. J.*, said: "The subject of extending statutes by inference to include

Where the penal clause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even where there is a manifest omission or oversight on the part of the legislature.<sup>1</sup>

cases not originally contemplated is one which has given rise to several decisions, the leading characteristic of which is that the earlier statute deals with a genus within which a new species is brought by a subsequent act. Thus, choses in action were not originally within 13 Eliz., ch. 5, against fraudulent conveyance; that statute being applicable only to property which could be taken in execution. *Sims v. Thomas*, 12 Ad. & El. 536; 40 E. C. L. 117. But as to the choses in action made subject to execution by 1 & 2 Vict., ch. 110, there can be no doubt that by the conjoint operation of that act and the 13 Eliz., ch. 5, such choses in action having become by new enactment a species of the genus property subject to execution, did, without any express exactment to that effect in the latter statute, become subject to the operation of the former act. *Norcutt v. Dodd*, Cr. & Ph. 100; *Barrack v. McCulloch*, 3 K. & J. 110."

In *Gambart v. Ball*, 14 C. B. N. S. 306; 108 E. C. L. 305, and *Graves v. Ashford*, L. R., 2 C. P. 410, it was held that the piracy of a picture or engraving by the process of photography was within the statutes of 8 Geo. II, ch. 13, 7 Geo. III, ch. 38, and 17 Geo. III, ch. 57, for the protection of artists and engravers, although the art of photography was not known at the time of their enactment.

In *Collier v. Worth*, 1 Exch. Div. 464, it appears that by a local act of 1822, no person was allowed to sell fish within the town of R., except in the market place thereof, and that any person offending against this provision should forfeit a sum of money. In 1876, the respondent sold fish on M. street, which was then a main thoroughfare of the town of R., but in 1822 was a green field. It was held that the word town as used in the act meant the collection of buildings from time to time called the town of R., and that the respondent had been guilty of an offense against the act.

In *Taylor v. Goodwin*, 4 Q. B. Div. 228, an information had been preferred by a police inspector against the appellant for furiously driving a carriage on

the highway. It appeared that the appellant had been riding a bicycle on the highway at a furious pace on the occasion in question. It was held that a bicycle was a carriage within the provision of an act preventing such driving.

And in *Parkyn v. Priest*, 7 Q. B. Div. 313, the appellant was the inventor and owner of a tricycle on which he rode on the highway. He was arrested for a violation of the act regulating the operation of locomotives on the highway. It appeared that there was a contrivance by which the tricycle might be propelled by steam. It was held that the tricycle was a locomotive within the meaning of the act, although it had not been invented at the passage of the act.

1. *Coe v. Lawrence*, 1 El. & Bl. 516; 72 E. C. L. 516; *Thomas v. Stephenson*, 2 El. & Bl. 108; 75 E. C. L. 107; *Underhill v. Longridge*, 29 L. J. M. C. 65; *Ex parte National Mercantile Bank*, 15 Ch. Div. 42; *Broadhead v. Holdsworth*, 2 Exch. Div. 321; *Southwestern R. Co. v. Cohen*, 49 Ga. 627; *Brooks v. State*, 88 Ala. 122; *U. S. v. Ten Cases of Shawls*, 2 Paine (U. S.) 162.

In *Thomas v. Stephenson*, 2 El. & Bl. 108; 75 E. C. L. 107, it appeared that under Statute 5 & 6 Wm. IV, ch. 63, § 28, an inspector is authorized at all reasonable times to enter any shop, and there to examine all weights and measures, steelyards, or other weighing machines, and "if, upon examination, it shall appear that the said weights and measures are light or otherwise unjust, the same shall be seized and forfeited, and the person or persons in whose possession the same shall be found, shall, upon conviction, forfeit a sum not exceeding £10." It was held that under this provision the inspector was not given authority to seize any weighing machine, although found to be unjust, but only weights and measures.

In *Broadhead v. Holdsworth*, 2 Ex. Div. 321, it appears that the Vaccination Act of 1871, § 7, provides that every certificate of a child being unfit for or insusceptible of successful vaccination shall be transmitted to the vaccination officer under a penalty on failure to do so. It was held that a parent

(3) *In Derogation of Common Right.*—All statutes which encroach on the personal or property rights of the individual are to be construed strictly.<sup>1</sup> In this class are embraced all statutes which work a forfeiture or confiscation of the private property of a particular person or of a particular class of persons,<sup>2</sup> and acts

who had a certificate that the child had already had smallpox and who had failed to forward it to the vaccination officer was not liable under the statute. In *Southwestern R. Co. v. Cohen*, 49 Ga. 627, it was held that a statute providing for the inspection of weights and measures, and providing penalties against those who sold by weights not inspected and marked, did not apply to those who bought by such weights.

In *Brooks v. State*, 88 Ala. 122, it appears that the penal clause of the statute regulating the practice of medicine in the state of *Alabama*, is much less comprehensive than the civil provisions in the act regulating such practice, and it was held that the penalties provided by the statute could not be imposed upon any who were not clearly within the provisions of the penal clause.

But in *Williams v. Evans*, 1 Exch. Div. 277, it appears that the Highway Act, 5 & 2 Wm. VI, ch. 50, provides that any person who, riding a horse or beast or driving any sort of carriage, shall ride or drive the same furiously so as to injure the life or limb of any passenger, every person so offending, being convicted of such offense before any two justices of the peace, shall for every such offense forfeit any sum not exceeding £5, in case such *driver* shall not be the owner of such wagon, cart, or other carriage, and in case the offender be the owner of such wagon, cart, or other carriage, then any sum not exceeding £10. The appellant was convicted by justices, of furiously riding on the back of a horse along the highway, and the penalty of one pound was imposed. It was held that although the word "rider" was not mentioned in the penal clause of the section, the justices had jurisdiction to convict the appellant, and the respondent was entitled to the judgment of the court.

1. *Wells v. London*, etc., R. Co., 5 Ch. Div. 126; *In re Lundy Granite Co.*, L. R., 6 Ch. 462; *Ex parte Jones*, 10 Ch. App. 663; *Ex parte Shell*, 4 Ch. Div. 789; *Randolph v. Milman*, L. R., 4 C. P. 107; *Green v. Reg.*, 1 App. Cas. 513; *Harrod v. Worship*, 1 B. & S. 381;

101 E. C. L. 380; *Yarmouth v. Simmons*, 10 Ch. Div. 518; *Hughes v. Chester*, etc., R. Co., 21 L. J. Ch. 97; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68; *Richardson v. Emswiler*, 14 La. Ann. 668; *Pelham v. Steamboat Messenger*, 16 La. Ann. 99; *Webb v. Baird*, 6 Ind. 13; *Doe v. Avaline*, 8 Ind. 6; *Indianapolis*, etc., R. Co. v. *Kinney*, 8 Ind. 402; *Gunter v. Leckey*, 30 Ala. 591; *Pinkham v. Dorothy*, 55 Me. 135; *Mitchell v. Rockland*, 45 Me. 496; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Savannah v. Hartridge*, 8 Ga. 23; *Young v. McKenzie*, 3 Ga. 40; *Rothgerber v. Dupuy*, 64 Ill. 452; *Walker v. Chicago*, 56 Ill. 277; *McAfee v. Southern R. Co.*, 36 Miss. 669; *Smith v. Spooner*, 3 Pick. (Mass.) 229; *Sewell v. Jones*, 9 Pick. (Mass.) 412; *Com. v. Tewksbury*, 11 Met. (Mass.) 55; *Coolidge v. Williams*, 4 Mass. 140; *Melody v. Reab*, 4 Mass. 473; *Danvers v. Boston*, 10 Pick. (Mass.) 513; *Billerica v. Chelmsford*, 10 Mass. 394; *Monson v. Chester*, 22 Pick. (Mass.) 385; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Port-wardens v. Cartwright*, 4 Sandf. (N. Y.) 236; *Marsh v. Nelson*, 101 Pa. St. 51; *Stewart v. Com.*, 10 Watts (Pa.) 307; *Morris v. Balderston*, 2 Brewst. (Pa.) 459; *McGlade's Appeal*, 99 Pa. St. 338; *Palaiet v. Snyder*, 106 Pa. St. 227; *Brady v. Northwestern Ins. Co.*, 11 Mich. 451; *Harrison v. Leach*, 4 W. Va. 383; *Harrison v. Smith*, 4 W. Va. 97; *Pendleton v. Barton*, 4 W. Va. 496; *Coleman v. Hart*, 37 Wis. 180; *Strong v. Birchard*, 5 Conn. 357; *Chalker v. Chalker*, 1 Conn. 79; 6 Am. Dec. 206; *Johnson v. Stanley*, 1 Root (Conn.) 245.

2. *Russell v. Transylvania University*, 1 Wheat. (U. S.) 432; *U. S. v. Athens Armory*, 35 Ga. 344; 2 Abb. (U. S.) 129; *Wells v. London*, etc., R. Co., L. R., 5 Ch. Div. 126; *In re Lundy Granite Co.*, L. R., 6 Ch. 467; *Ex parte Jones*, 10 Ch. App. 665; *Randolph v. Milman*, L. R., 4 C. P. 107; *Ex parte Shell*, 4 Ch. Div. 789; *Polk v. The J. W. French*, 5 Hughes (U. S.) 429; *U. S. v. La Coste*, 2 Mason (U. S.) 129. In *Wells v. London*, etc., R. Co., 5

which authorize the impressment of private property for public use in case of pestilence or war.<sup>1</sup>

Ch. Div. 126, an act of Parliament obtained by the company reciting that it was expedient that the rights of way in respect to certain footways which crossed the railway on the level should be extinguished, and enacting that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6 and 7 on the deposited plan should be extinguished, no provision for compensation being made, was before the court for construction. The right of way in question was marked "roadway and footway." It was held that the act extinguishing the rights to a footway would not include also that of a roadway. Bramwell, J. A., said: "I agree that we ought to construe this act of Parliament according to the fair meaning of the words even supposing the true construction of the act does an injustice to the party. But we may well approach the construction of an act of Parliament of this kind in the belief that it was not intended to confiscate a private right, for this would be a simple case of confiscation, and we are not to suppose that this was intended by the legislature or sought for by the railway company. The statute recites that it is expedient that the rights of way therein mentioned should be extinguished, but it certainly is not expedient that a private right should be taken away without making compensation."

In *Ex parte Jones*, 10 Ch. App. 663, it appears that a creditor sued out a writ of *feri facias* and delivered it to the sheriff. Earlier in the same day the debtor filed a petition for liquidation or composition, and obtained an injunction restraining the proceedings in the execution. At the first meeting of the creditors a resolution was passed to accept the composition. The injunction was subsequently dissolved by the chief judge, and on appeal his decision was affirmed. James, L. J., said: "I am of opinion that the decision of the chief judge was quite right. In order to take away a legal right from anybody, it is necessary to show express words in the act, or clear implication. In this case, the respondents have by due process of law obtained a security on all the goods which the sheriff could seize. That was their legal right and they have it still, unless it can be shown to have been taken away

from them. If the petition had resulted in a bankruptcy or a liquidation, no doubt their right would have been lost, because the goods would have been not the goods of the debtor, but the goods of the trustee. But in a composition the goods of the debtor do not cease to be his goods, that is of the essence of the composition."

In *Ex parte Sheil*, 4 Ch. Div. 789, an act of 1865, the Partnership Law Amendment Act, was before the court. The act provided that advances of money by way of loans to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking or render him responsible as such, but that in the event of any such trader as aforesaid being adjudged bankrupt, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal or the profits or interest payable in respect to such loan until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied. It appeared that a loan was made to a trader at a rate of interest varying with the profits of his business, but the amount of the loan with interest was secured by a mortgage to the lender on the stock and good will of the trader's business. The trader became bankrupt, and it was sought to avoid the mortgage under the act above referred to. It was held that the enforcement of a mortgage lien was not a collection of the debt within the meaning of the statute, and that to deprive the mortgagee of this right would be a confiscation of property which would not be presumed, from the language of the act, to be authorized.

In *Steamboat Ohio v. Stunt*, 10 Ohio St. 582, it was held that a statute which authorized the seizure of one man's property for the payment of another's obligation must be construed strictly on the ground that such procedure was practically a confiscation.

1. In *Pinkham v. Dorothy*, 55 Me. 135, it was held that the right to im-



Statutes which prescribe the manner in which persons shall use their private property,<sup>1</sup> or restrict and regulate the disposition thereof,<sup>2</sup> are against common right, and must be construed strictly.

Statutes passed in the exercise of the police power of the state, restricting and regulating property rights<sup>3</sup> or the pursuit of use-

press property to be used for the taking care of persons infected with sickness dangerous to the public health could only be exercised when expressly granted.

In *White v. Ivey*, 34 Ga. 186, it was held that authority to impress private property to be used for a hospital in time of war may not be exercised unless expressly granted by legislative enactment.

1. *Morris v. Balderston*, 2 Brewst. (Pa.) 459; *Steil v. Sunderland*, 6 H. & N. 796; *Port-wardens v. Cartwright*, 4 Sandf. (N. Y.) 236; *Tyack v. Brumley*, 1 Barb. Ch. (N. Y.) 519. In *Morris v. Balderston*, 2 Brewst. (Pa.) 459, it was held that a statute which provided that no lot of the width of sixteen feet or less should be incumbered with more than four and one-half inches of a brick party wall, would not be construed to include a lot sixteen feet and one-half inch in width.

*Port-wardens v. Cartwright*, 4 Sandf. (N. Y.) 236, was a suit instituted by the master and port-wardens of the port of *New York* against the defendants to recover a penalty alleged to have been incurred under an act of the legislature conferring upon the port-wardens of the city the exclusive power to make surveys of vessels deemed unfit to proceed to sea, and to judge of the repairs which might be necessary for the safety of such vessels on their intended voyage. It appeared that the defendants had put into port with a vessel in a damaged condition, and, before proceeding with the voyage, had employed a private person to examine and make survey of the vessel and determine the necessary repairs. It was held no offense within the statute. *Paine, J.*, in his concurring opinion, said: "I acquiesce in the opinion of the court in this case and in the reasons upon which it is founded. Those reasons I understand to be that the statute upon which the plaintiffs sue is against common right, and is, therefore, to be construed strictly; and that the plaintiffs have not made out such a state of facts as entitled them to sue upon it."

2. *Richardson v. Emswiler*, 14 La. Ann. 668; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *McGlade's Appeal*, 99 Pa. St. 338; *Palairot v. Snyder*, 106 Pa. St. 227. In *McGlade's Appeal*, 99 Pa. St. 338, it was held that a gift for charitable purposes made within one month of the decease of the donor was not within the statute providing that no estate, real or personal, should thereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will attested by two credible and at the time disinterested witnesses at least one calendar month before the decease of the testator or alienor, and that all dispositions of property contrary thereto should be void and go to the residuary legatee or next of kin. In *Sewall v. Jones*, 9 Pick. (Mass.) 412, it was held that an act imposing a duty on sales by auction did not extend to leases by auction.

3. *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Com. v. Tewksbury*, 11 Met. (Mass.) 55; *Com. v. Sylvester*, 13 Allen (Mass.) 247; *Austin v. Murray*, 16 Pick. (Mass.) 121; *Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694; *Louisville v. Webster*, 108 Ill. 414; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *Waynehamer v. People*, 13 N. Y. 378; *Port-wardens v. Cartwright*, 4 Sandf. (N. Y.) 236; *Walker v. Board of Public Works*, 16 Ohio 540; *Stewart v. Com.*, 10 Watts (Pa.) 306; *McGlade's Appeal*, 99 Pa. St. 338; *State v. Gilman*, 33 W. Va. 146; *Munn v. Illinois*, 94 U. S. 113; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 137; *Mugler v. Kansas*, 123 U. S. 661; *Slaughter House Cases*, 16 Wall. (U. S.) 36.

In *Booth v. State*, 4 Conn. 65, it appears that a building, erected originally for a meeting-house and subsequently used for a joiner's shop, was extensively repaired and converted into a dwelling house. It was held that such repairs

ful occupations and callings<sup>1</sup> are to be construed strictly; as are also statutes in derogation of the personal rights of individuals.<sup>2</sup>

(4) *In Derogation of Common Law.*—Where a statute is inconsistent with the common law, the statute will prevail and the com-

and alterations did not constitute the erection of a dwelling house within the statute to secure the city of New Haven from damage by fire.

And in *Tuttle v. State*, 4 Conn. 68, it appeared that a building was removed and extensively repaired, and an addition made thereto the same width, height, and slope of roof as the original. It was held that these acts did not constitute the erection of a building within the statute to secure the city of New Haven from damage by fire.

In *Stewart v. Com.*, 10 Watts (Pa.) 306, which was an indictment charging the defendant with the erection of a wooden building within the city of Pittsburgh contrary to the ordinance, the jury found that he had erected a building composed partly of brick and partly of wood. It was held that the erection of such a building was not an offense within the ordinance.

But in *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188, an ordinance prohibiting the erection of wooden buildings in the city of Bangor within certain limits was construed liberally; it being held that a removal of a wooden building to the inhabited district, or even from one part of such district to another, was within the meaning of the term erection used in the ordinance.

1. In *Carberry v. People*, 30 Ill. App. 506, it was held that an act requiring pharmacists to register and pay a fee, was in derogation of common right and must be strictly construed. And where a pharmacist who was entitled to registration paid his fee, he was entitled to proceed in his business until the expiration of the year, and could not be held liable in a criminal prosecution because of the delay of the board of pharmacists in issuing a certificate.

In *Gunter v. Leckey*, 30 Ala. 591, it was held that an act requiring a license to sell could not be extended to trading and bartering.

2. *Pelham v. Steamboat Messenger*, 16 La. Ann. 99; *Smith v. Spooner*, 3 Pick. (Mass.) 229; *Ash v. Abdy*, 3 Swanst. 664; *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Harrison v. Leach*, 4 W. Va. 383; *Harrison v. Smith*, 4 W. Va. 97; *Pendleton v. Barton*, 4 W. Va. 496; *Coleman v. Hart*, 37 Wis. 180; *Sprague*

*v. Birdsall*, 2 Cow. (N. Y.) 419; *Webb v. Baird*, 6 Ind. 13.

In *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419, it appears that the act to incorporate the Cayuga Bridge Company provides that it shall not be lawful for any person to cross the lake within three miles of the bridge without paying toll. It was held that embarking upon one side of the lake six miles from the bridge and crossing in such a direction as to leave the lake within sixty rods of the bridge on the other side, is not such crossing within the miles as was contemplated by the act. The act further provided that any person might pass with his own boat within three miles. It was held that any one might cross in his sleigh on the ice within the provisions of this proviso and according to the general intent of the act, which is that all persons who are compelled to resort to others to assist them in passing should cross the bridge.

In *Harrison v. Leach*, 4 W. Va. 383, it was held that the act requiring a test oath by suitors is in derogation of common right, and that a party who sought to avail himself of the provisions of the act ought to be held to state a case with the utmost precision, such as would be required in a plea in abatement, that is, certainty to a certain extent in every particular.

In *Webb v. Baird*, 6 Ind. 13, it was held that a statute requiring an attorney at law or other person to render gratuitous services in civil cases was against common right and would not be extended by construction so as to include criminal offenses.

In *Coleman v. Hart*, 37 Wis. 180, it was held that a law prohibiting a county treasurer or a county clerk or any of their deputies from purchasing directly or indirectly property sold for taxes at any tax sale, or to purchase any tax certificate or tax deed held by the county, except for and in behalf of the county, must be construed strictly, and would not prohibit the county treasurer or his deputy from purchasing a tax certificate from any other party than the county and having a deed issued to him thereon.

In *Smith v. Spooner*, 3 Pick. (Mass.) 229, it was held that an act avoiding

mon law must give way; but this will result only from the express language of the statute or from necessary implication; for it is a well-established rule of construction that statutes in derogation of the common law are to be construed strictly.<sup>1</sup>

every gift, bargain, sale, or transfer of any real or personal estate made by a spendthrift after the complaint of the selectmen to the judge of probate and the order of notice thereon in case a guardian was afterwards appointed to the spendthrift, did not apply to promissory notes. But see *Manson v. Felton*, 13 Pick. (Mass.) 206, where it is held that a spendthrift under guardianship is not competent to make a valid contract for the payment of money.

1. Sedgw. 271, note; *Brown v. Barry*, 3 Dall. (U. S.) 365; *McCool v. Smith*, 1 Black (U. S.) 459; *Newell v. Wheeler*, 48 N. Y. 488; *Burnside v. Whitney*, 21 N. Y. 148; *McCluskey v. Cromwell*, 11 N. Y. 601; *Sharpe v. Speir*, 4 Hill (N. Y.) 76; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.) 107; *Striker v. Kelly*, 2 Den. (N. Y.) 323; *Doughty v. Hope*, 3 Den. (N. Y.) 249; *Sherwood v. Reade*, 7 Hill (N. Y.) 431; *Sharpe v. Johnson*, 4 Hill (N. Y.) 92; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Graham v. Van Wyck*, 14 Barb. (N. Y.) 532; *Bertles v. Nunan*, 92 N. Y. 157; 44 Am. Rep. 361; *Bussing v. Bushnell*, 6 Hill (N. Y.) 382; *Rue v. Alter*, 5 Den. (N. Y.) 119; *Millered v. Lake Ontario, etc.*, R., 9 How. Pr. (N. Y.) 238; *Manhattan Co. v. Laimbeer*, 108 N. Y. 578; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540; *Lord v. Parker*, 3 Allen (Mass.) 127; *Melody v. Reab*, 4 Mass. 471; *Wilbur v. Crane*, 13 Pick. (Mass.) 284; *Gibson v. Jenney*, 15 Mass. 205; *Howes v. Newcomb*, 146 Mass. 76; *Haas v. Shaw*, 91 Ind. 384; *Taylor v. Garnett*, 110 Ind. 287; *Barnett v. Harshbarger*, 105 Ind. 410; *Cadwallader v. Harris*, 76 Ill. 370; *Schuyler County v. Mercer*, 9 Ill. 20; *Brown v. Fifield*, 4 Mich. 322; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Ésterley's Appeal*, 54 Pa. St. 192; *McMullen v. McCreary*, 54 Pa. St. 230; *Dyson v. West*, 1 Har. & J. (Md.) 567; *State v. Lash*, 16 N. J. L. 380; 32 Am. Dec. 397; *Bailey v. Bryan*, 3 Jones (N. Car.) 357; 67 Am. Dec. 246; *Lock v. Miller*, 3 Stew. & P. (Ala.) 13; *Gunter v. Leckey*, 30 Ala. 591; *Hotelling v. Cronise*, 2 Cal. 60; *Bottomly v. Grace Church*, 2 Cal. 90; *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397;

*Young v. McKenzie*, 3 Ga. 31; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425; 2 Am. Dec. 586; *Hollman v. Bennett*, 44 Miss. 322; *Hays v. Miller*, 1 Wash. Ter. 143; *Harrison v. Leach*, 4 W. Va. 383.

In *Hollman v. Bennett*, 44 Miss. 322, the court said: "The common law of *England* brought over by the colonists, so far as applicable to the new circumstances and conditions of the people and the country, and so far as not changed by statute, is the law of this state; and the courts will construe strictly laws in modification or derogation thereof, assuming that the legislature has, in the terms used, expressed all the change it intended to make in the old law, and will not, by construction or intentment, enlarge its operation."

In *Pendleton v. Bank of Ky.*, 2 J. J. Marsh. (Ky.) 148, it was held that a joint action could not be maintained against the drawer and indorser of a foreign bill of exchange for the amount of the debt without interest and cost of protest, under a statute which provided that such action might be brought for the debt, interest and costs of protest, on the ground that the statute was in derogation of the common law and should be construed strictly. *Citing Wilson v. Lenox*, 1 Cranch (U. S.) 211; *Johnson v. Bank of Ky.*, 5 T. B. Mon. (Ky.) 119.

In *Harrison v. Leach*, 4 W. Va. 383, it was held that the suitor's test oath act which provided that the plaintiff must take a stated oath in certain cases or be liable to be non-suited, was in derogation of a common-law right, and could not be extended beyond its express terms.

A statute preventing a concurrent (remedy) action for the recovery of the mortgage debt, pending a foreclosure suit, is in derogation of the common law, and therefore should be strictly construed. *Hays v. Miller*, 1 Wash. Ter. 143.

In *Miller v. Childriss*, 2 Humph. (Tenn.) 320, where a statute, giving the right to sureties to be discharged from a note or obligation upon refusal of the creditor, after notification, to sue the principal, provided that such notice should be in writing and proved by two

And the common law will be held to be no further abrogated than is expressly declared, or the clear import of the language used absolutely requires. The law rather presumes that the legislature did not intend to make any change other than what is specified and plainly pronounced.<sup>1</sup> And even the liberal construction of remedial statutes may be modified by this rule.<sup>2</sup>

As a rule, affirmative words without negative words do not annul the common law, but it is well established that a statute which treats of the whole of any subject-matter abrogates the common law on that subject, as a subsequent statute treating of the whole

witnesses, it was held that the provisions of the statute should be strictly followed, as the act was in derogation of the common law.

Statutes in regard to chattel mortgages, upon compliance with which the mortgagor may retain possession of the property mortgaged, are in derogation of the common law, and are to be strictly construed. To be valid as to third parties, no provision of the act can be neglected. *Crane v. Chandler*, 5 Colo. 21; *Porter v. Dement*, 35 Ill. 478; *Gassner v. Patterson*, 23 Cal. 299; *Dufficy v. Shields*, 63 Cal. 332; *Butte Hardware Co. v. Sullivan*, 7 Mont. 312.

Statutes making the real estate of a deceased person liable for his debts are in derogation of the common-law rights of the heir, and should be construed strictly. *Hollman v. Bennett*, 44 Miss. 322; *Dean v. Dean*, 3 Mass. 258; *Drinkwater v. Drinkwater*, 4 Mass. 356; *Mitchell v. Lunt*, 4 Mass. 658.

So statutes giving administrators power over real estate are in derogation of the common law and are strictly construed. *Jones v. Lamar*, 34 Fed. Rep. 454.

**Commercial Law.**—In *Louisiana* this same rule of construction has been applied to the commercial law. In *Crowell v. Van Bibber*, 18 La. Ann. 637, it was held that laws in derogation of the commercial law should be strictly construed, and that a statute would not be construed as restraining this law without a clear expression of such purpose on the part of the legislature. See also *State v. Whetstone*, 13 La. Ann. 376.

1. 1 Kent's Com. 464; *Ash v. Abdy*, 3 Swanst. 664; *Scaife v. Stovall*, 67 Ala. 237; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Wilbur v. Crane*, 13 Pick. (Mass.) 284; *Keech v. Baltimore*, etc., R. Co., 17 Md. 32; *Hooper v. Baltimore*, 12 Md. 464; *Heiskell v. Baltimore*, 65 Md. 125; *Dean v. Metropoli-*

*tan El. R. Co.*, 119 N. Y. 540; *People v. Bristol*, etc., *Turnpike Co.*, 23 Wend. (N. Y.) 222; *Jackson v. Bradt*, 2 Cai. (N. Y.) 169; *In re Heath*, 3 Hill (N. Y.) 52; *People v. Hall*, 80 N. Y. 117; *Manhattan Co. v. Lambeer*, 108 N. Y. 578; *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *Bowen v. Lease*, 5 Hill (N. Y.) 221; *Howe v. Peckham*, 6 How. Pr. (N. Y.) 229; *People v. Palmer*, 109 N. Y. 110; 4 Am. St. Rep. 423; *Tinsman v. Belvidere*, etc., R. Co., 26 N. J. L. 148; 69 Am. Dec. 565; *Glover v. Alcott*, 11 Mich. 470; *Mayo v. Wilson*, 1 N. H. 55; *Davis v. Com.*, 17 Gratt. (Va.) 617; *Potter's Dwarrris*, 70-71-219; 2 Inst. 199; *R. v. Moseley*, 2 Burr. 1011; *Rex v. Cumberland*, 6 T. R. 194.

In *Thompson v. Weller*, 85 Ill. 197, the court said: "In the construction of statutes in derogation of the common law, courts cannot properly give force to the statute beyond what is expressed by its words or necessarily implied from what is expressed."

2. In *Smith v. Moffat*, 1 Barb. (N. Y.) 65, the court said, in reference to a remedial statute which gave a landlord a summary remedy to recover possession, "The object of that statute was to remedy evils alluded to; and so far it is to be construed liberally to see that it carries out the purposes for which it was designed. But as the remedy was sought to be attained by a summary proceeding under the statute, which was in derogation of the common law, in that respect the statute is to be strictly construed."

In *Webb v. Mullin*, 78 Ala. 111, although it was held that the statute was remedial and should have a liberal construction, the court said: "But being in modification of the common law it will not be presumed to modify it further than is expressly declared; and construction and intentment will not be resorted to for the purpose of extending its operation."

subject-matter of a previous statute will be a virtual repeal of the previous statute.<sup>1</sup>

Statutes changing the common law rules of evidence and the law concerning the competency of witnesses, should be construed strictly.<sup>2</sup>

Statutes conferring powers and rights upon married women are in derogation of the common law, and are to be construed strictly.<sup>3</sup> And although these enabling statutes should be construed so as to effect the purpose and object of the legislature,

1. *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 306; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Jennings v. Com.*, 17 Pick. (Mass.) 80; *Com. v. Marshall*, 11 Pick. (Mass.) 350; 22 Am. Dec. 377; *Bartlet v. King*, 12 Mass. 537; 7 Am. Dec. 99; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Com. v. Evans*, 13 S. & R. (Pa.) 429; *Dugan v. Gittings*, 3 Gill (Md.) 138; 43 Am. Dec. 306; *Leighton v. Walker*, 9 N. H. 62; *State v. Norton*, 23 N. J. L. 41; *Gilkey v. Cook*, 60 Wis. 139.

In *Com. v. Cooley*, 10 Pick. (Mass.) 37, the court said: "A statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first. *Bartlet v. King*, 12 Mass. 545; 7 Am. Dec. 99; *Nichols v. Squire*, 5 Pick. (Mass.) 168; and in the case of a statute revising the common law, the implication is at least equally strong."

In *State v. Norton*, 23 N. J. L. 39, Green, C. J., said: "It is conceded that where a statute has varied the whole subject of the common law in regard to a particular crime, and has changed the character of the offense, or the nature or degree of punishment, that the statute must be regarded as a virtual repeal of the common law, because such must be presumed to have been the intention of the legislature. But unless such intent is manifest, the repeal by implication cannot be inferred."

2. *Dyson v. West*, 1 Har. & J. (Md.) 567; *Broadbent v. State*, 7 Md. 416; *Thistle v. Frostburg Coal Co.*, 10 Md. 129; *Smith v. Randall*, 3 Hill (N. Y.) 495; *Hotaling v. Cronise*, 2 Cal. 60; *Sheetz v. Hanbest*, 81 Pa. St. 100; *Packer v. Noble*, 103 Pa. St. 188; *Dequasie v. Harris*, 16 W. Va. 345; *Warner v. Fowler*, 8 Md. 25.

In *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54, the court said: "At common law the party could not be a witness for himself to prove any part of the issue, and the statute authorizing it

is not to be extended in his behalf, beyond what it clearly imports."

So it is held that statutes compelling persons to give evidence against themselves must be strictly construed, and never be extended beyond the limits to which the strictest interpretation of the language of the legislature confines them. *Broadbent v. State*, 7 Md. 416.

An act permitting a party to prove his own accounts by oath or affirmation, being in derogation of the common law, must be construed strictly. *Warner v. Fowler*, 8 Md. 25.

**Husband and Wife.**—In *Dwelly v. Dwelly*, 46 Me. 377, where a statute provided that no person should be excused or excluded from being a witness in any civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same, as party or otherwise, "except in certain cases set out," it was held that this act, being in derogation of the common law, should be construed strictly and not extended so as to remove the incompetence of husband and wife as witness for or against each other, for it could not be presumed that the legislature intended to abrogate the rule of the common law.

**Jurors.**—So statutes which permit the testimony of jurors to be introduced on a motion for a new trial, to show that the verdict was made by lot, are held to be strictly construed, as in derogation of the common law. *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397. See *Taylor v. Garnett*, 110 Ind. 289.

3. **Married Women's Acts.**—*Alexander v. Saulsbury*, 37 Ala. 375; *Perryman v. Greer*, 39 Ala. 133; *Canty v. Sanderford*, 37 Ala. 91; *Ashford v. Watkins*, 70 Ala. 156; *Warfield v. Ravessies*, 38 Ala. 518; *Cook v. Meyer*, 73 Ala. 580; *Gibson v. Marquis*, 29 Ala. 668; *Graham v. Van Wyck*, 14 Barb. (N. Y.) 532; *Perkins v. Perkins*, 7 Lans. (N. Y.) 19; *Chambovet v. Cagney*, 35 N. Y. Super. Ct. 474; *Reynolds v. Robinson*, 64 N. Y. 589; *Bertles v.*

yet they are not to be extended by construction, nor is the common law to be altered beyond what is plainly expressed or manifestly intended.<sup>1</sup>

Nunan, 92 N. Y. 152; 44 Am. Rep. 361; Thompson v. Weller, 85 Ill. 197; Cunningham v. Hanney, 12 Ill. App. 437; Lord v. Parker, 3 Allen (Mass.) 128; Brown v. Fifield, 4 Mich. 322; Marburg v. Cole, 49 Md. 402; 33 Am. Rep. 266; Compton v. Pierson, 28 N. J. Eq. 229; Triplett v. Graham, 58 Iowa 135; Pettit v. Fretz, 33 Pa. St. 118; Quick v. Miller, 103 Pa. St. 67; Dorris v. Erwin, 101 Pa. St. 239; Longey v. Leach, 57 Vt. 377.

1. Perkins v. Perkins, 7 Lans. (N. Y.) 19; Diver v. Diver, 56 Pa. St. 109; Bergey's Appeal, 60 Pa. St. 418; 100 Am. Dec. 578; Swift v. Luce, 27 Me. 285. Also Olive v. Walton, 33 Miss. 103.

In Haas v. Shaw, 91 Ind. 384, Howk, J., speaking of such statutes, said: "While the provisions of the act must be liberally construed according to their true intent and meaning, yet, as they are in derogation of the common-law rule, they are not to be enlarged by construction beyond the plain meaning of the language used by the law-making power in their enactment."

In Kelso v. Tabor, 52 Barb. (N. Y.) 129, Potter, J., said: "These statutes in their creation of new powers and authorities are limited and confined to those powers which are expressed; or, in other words, they are not to be made, by construction, to extend to any object or purpose beyond that expressed."

An act which provided that the property of a married woman "shall be owned, used and enjoyed, etc., as if she were a feme sole," was held not to enable her to sell, incumber, or give it away without the consent of her husband. Pettit v. Fretz, 33 Pa. St. 118; Haines v. Ellis, 24 Pa. St. 255; Moore v. Cornell, 68 Pa. St. 320; Swift v. Luce, 27 Me. 285.

In Compton v. Pierson, 28 N. J. L. 229, it was held that the Married Woman's Act of 1852, which was intended to secure to married women during coverture the use of their real and personal property, did not confer upon them the right of testamentary disposition. Pentz v. Simonson, 13 N. J. Eq. 232; Naylor v. Field, 29 N. J. L. 287.

**Contracts.**—The power conferred on the wife to make contracts cannot be extended beyond the clear expression or necessary implication of the statute.

Cook v. Meyer, 73 Ala. 580; Carpenter v. Mitchell, 50 Ill. 471; Thompson v. Weller, 85 Ill. 197; Lord v. Parker, 3 Allen (Mass.) 128; Moore v. Cornell, 68 Pa. St. 320; Quick v. Miller, 103 Pa. St. 68; Dorris v. Erwin, 101 Pa. St. 245; Eckert v. Reuter, 33 N. J. L. 268.

So also in Yale v. Diederer, 18 N. Y. 265; 72 Am. Dec. 503, a statute, though it expressly authorized a married woman to hold, convey, and devise her real and personal property, was held not to remove her common-law incapacity to contract debts. Gardiner v. Gardiner, 22 Wend. (N. Y.) 528; Colvin v. Currier, 22 Barb. (N. Y.) 371.

In Jones v. Crosthwaite, 17 Iowa 393, it was held that the statute for the protection of married women, while it gave them the power to make contracts in reference to their own property by necessary implication, did not confer on them the right to contract in reference to other property.

#### **Contracts Between Husband and Wife.**

—While by statute the wife may make contracts in the same manner as if she were sole, the Massachusetts courts have not allowed the statute to be construed as removing the common-law incapacity so far as to allow the validity of contracts between husband and wife; but on the contrary, have repeatedly held that a promissory note or any other personal contract made between husband and wife is absolutely void. Ingham v. White, 4 Allen (Mass.) 412; Lord v. Parker, 3 Allen (Mass.) 127; Fowle v. Torrey, 135 Mass. 87; Bassett v. Bassett, 112 Mass. 99. And this same doctrine is held in other states. See Barnett v. Harshbarger, 105 Ind. 413; Savage v. O'Neil, 42 Barb. (N. Y.) 374; Eckert v. Reuter, 33 N. J. L. 266. And statutes authorizing a married woman to convey and devise real and personal property will not be construed as abrogating the common law which forbids her conveying to her husband. White v. Wager, 25 N. Y. 328; Corn Exchange Ins. Co. v. Babcock, 57 Barb. (N. Y.) 222; Winans v. Peebles, 32 N. Y. 423; Meeker v. Wright, 76 N. Y. 270; Perkins v. Perkins, 7 Lans. (N. Y.) 19.

**Liberally Construed.**—In Michigan a very different rule prevails in the interpretation of these statutes. In DeVries v. Conklin, 22 Mich. 258, Cooley, J.,

And generally, the common-law incidents of marriage are swept away only by express enactment or necessary implication.<sup>1</sup>

said: "We have construed this law liberally with a view to effectuate its general purpose. We have sustained contracts made by married women for the purchase of property on credit; though perhaps they might not come strictly within the terms of the statutes." *Tillman v. Shackleton*, 15 Mich. 447; 93 Am. Dec. 198.

And in *White v. Zane*, 10 Mich. 333, the court held the common law to be abolished by the Married Woman's Act of that state. See also *Burdeno v. Amperse*, 14 Mich. 97; 90 Am. Dec. 225; *Tillman v. Shackleton*, 15 Mich. 455; 93 Am. Dec. 198; *Tong v. Marvin*, 15 Mich. 60; *Rankin v. West*, 25 Mich. 195.

So in *Kentucky* in *Hannon v. Madden*, 10 Bush (Ky.) 664, the court held that the legislature intended their married woman's law as a substitute for the common law, and that it should be given a liberal construction to promote the object of its enactment. And in *Iowa* these statutes are given a liberal construction on the same ground. *Kramer v. Rebman*, 9 Iowa 144.

1. *Neelly v. Lancaster*, 47 Ark. 175; 58 Am. Rep. 752; *Bertles v. Nunan*, 92 N. Y. 160; 44 Am. Rep. 361; *Haines v. Ellis*, 24 Pa. St. 255; *Glover v. Alcott*, 11 Mich. 470; *Thompson v. Weller*, 85 Ill. 197; *Hays v. Hays*, 5 Rich. (S. Car.) 31.

The statute providing that the property of a married woman, . . . whether acquired before or after marriage, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband or liable for his debts, was held not to abolish the husband's right of curtesy. *Neelly v. Lancaster*, 47 Ark. 175; 58 Am. Rep. 752.

**Suits.**—In *Fitzgerald v. Quann*, 109 N. Y. 441, it was held that a provision of a statute declaring that a married woman may be sued in any of the courts of the state, and that a judgment recovered against her may be enforced by execution, does not assume to enact that the wife may sue alone in all cases—but when suable, *e. i.*, in actions in reference to her separate estate, she may be sued in any of the courts.

In *Perkins v. Perkins*, 7 Lans. (N. Y.) 19, Potter, J., said: "I shall feel

bound to hold that the unity of a person created by the marriage contract between husband and wife, has been no further severed than the statutes in express terms or by necessary implication have effected that purpose." In this case it was held that statutes enfranchising married women would not be construed as conferring any new rights on the husband, such as power to sue his wife.

In *Vankirk v. Skillman*, 34 N. J. L. 114, it appears that an act provided "in all cases where a married woman transacts any business or purchases any property, and debts and claims thereby remain unsatisfied, it shall be lawful for any person holding such debt or claim to institute a suit for the recovery of the same in any court of law of this state against the husband and wife, or against the survivor of them," etc. The court held that this act referred only to such contracts as are made by a married woman when the consideration moves to herself, and would not be extended so as to include contracts of suretyship, or those of a merely collateral obligation.

In *Thynne v. St. Maur*, 34 Ch. Div. 465, it was held that the Married Woman's Act of 1882, which provides that she shall be capable of suing and being sued . . . in all respects as if she were a *feme sole*, does not abrogate the common law principle that a married woman cannot fill the office of next friend, or guardian *ad litem*. See also *MARRIED WOMEN*, vol. 14, p. 589.

**Tenancy by Entirety.**—These statutes are not so construed as to make husband and wife joint tenants, or tenants in common, where property is conveyed to them as husband and wife. The common-law rule that they are tenants by entirety prevails, unless the contrary intent is clearly expressed. *Goelet v. Gori*, 31 Barb. (N. Y.) 314; *Torrey v. Torrey*, 14 N. Y. 430; *Farmers', etc., Nat. Bank v. Gregory*, 49 Barb. (N. Y.) 155; *Miller v. Miller*, 9 Abb. Pr. N. S. (N. Y.) 444; *Beach v. Hollister*, 3 Hun (N. Y.) 519; *Freeman v. Barber*, 3 Thomp. & C. (N. Y.) 574; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Zornlein v. Bram*, 100 N. Y. 12; *Washburn v. Burns*, 34 N. J. L. 18; *Robinson v. Eagle*, 29 Ark. 202; *Diver v. Diver*, 56 Pa. St. 106; *French v. Mehan*, 56 Pa. St. 286; *Bates v. Seely*, 46 Pa. St. 248; *Mc-*

It has been held that statutes providing for mechanics' liens ought to be strictly construed, because they make distinctions between citizens and confer special privileges in derogation of the common law.<sup>1</sup> On the other hand, it has been held that, in view of their remedial nature, and of the public policy of protecting the laborer, these statutes should receive a liberal construction in favor of the mechanic; and this view seems to be more generally adopted.<sup>2</sup> But where undue advantage is given the mechanic, in

*Curdy v. Canning*, 64 Pa. St. 39; *Fisher v. Provin*, 25 Mich. 347; *McDuff v. Beauchamp*, 50 Miss. 531; *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266; *Pray v. Stebbins*, 141 Mass. 219; 55 Am. Rep. 462; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692; *Chandler v. Cheney*, 37 Ind. 391; *Patton v. Rankin*, 68 Ind. 245; 34 Am. Rep. 254; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210.

In *Cooper v. Cooper*, 76 Ill. 57, a different doctrine was held. The court, however, recognizing the decisions of the other states, said: "But it may be our statute is materially different from theirs. But if it is not, still the tenor of our legislation has been broader and more liberal." See also *Clark v. Clark*, 56 N. H. 109.

*Meeker v. Wright*, 76 N. Y. 262, held tenancy by entirety to be abolished by the law relating to married women, but this case has been overruled by *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; and *Zornlein v. Bram*, 100 N. Y. 12.

1. *Wade v. Reitz*, 18 Ind. 307; *Chapin v. Persse*, etc., Paper Works, 30 Conn. 461; 79 Am. Dec. 263; *Cook v. Heald*, 21 Ill. 425; *Brady v. Anderson*, 24 Ill. 110; *Rothgerber v. Dupuy*, 64 Ill. 452; *Lynch v. Cronan*, 6 Gray (Mass.) 531; *Schulenburg v. Bascom*, 38 Mo. 188; *Roberts v. Fowler*, 3 E. D. Smith (N. Y.) 632; *Rafter v. Sullivan*, 13 Abb. Pr. (N. Y.) 262; *Ayres v. Revere*, 25 N. J. L. 474; *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415; *Greenough v. Nichols*, 30 Vt. 768.

In *Esterley's Appeal*, 54 Pa. St. 192, the court said: "The judicial mind ought to incline to a strict limitation of the terms of the statute upon the principle that statutes in derogation of the common law and contrary to the general policy of the public are always to be strictly construed."

A statute giving liens to the creditors of a contractor does not apply to the creditors of a sub-contractor. *Wood v.*

*Donaldson*, 17 Wend. (N. Y.) 550; *Harlan v. Rand*, 27 Pa. St. 511.

In *Willard v. Magoon*, 30 Mich. 273, *Graves, Ch. J.*, said: "It is undoubtedly true that the legislature intended that actions under the statute in question should be prosecuted in a manner to exempt them from technical refinements; but when we consider that the remedy looks to a somewhat summary subjection of real property under loose verbal arrangements, and to the passage and findings of titles to land as the result of compulsory proceedings, it appears too clear to be disputed, that all matters of substance, and every step in any way essential to the security of rights and titles, ought to be strictly insisted on." To the same effect is *Wagar v. Briscoe*, 38 Mich. 587.

2. *Tuttle v. Montford*, 7 Cal. 358; *Buck v. Brian*, 2 How. (Miss.) 880; *Buchanan v. Smith*, 43 Miss. 90; *Weatherby v. Sinclair*, 43 Miss. 189; *Collins Granite Co. v. Devereux*, 72 Me. 422; *Putnam v. Ross*, 46 Mo. 337; *Oster v. Rabeneau*, 46 Mo. 595; *Donaldson v. Wood*, 22 Wend. (N. Y.) 399; *Montandon v. Deas*, 14 Ala. 33; 48 Am. Dec. 84; *Thomas v. Huesman*, 10 Ohio St. 152; *Barnes v. Thompson*, 2 Swan (Tenn.) 313; *Gilman v. Gard*, 29 Ind. 291; *In re Hope Min. Co.*, 1 Sawy. (U. S.) 710.

The law favors the claims of mechanics, and the court will give a free interpretation to statutes in favor of the laborer. *Buchanan v. Smith*, 43 Miss. 90.

In *De Witt v. Smith*, 63 Mo. 266, *Wagner, J.*, said: "The courts at one time held that enactments for mechanics' liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefit. But the better doctrine now is that these statutes are highly remedial in their nature and should receive a liberal construction to advance the just and beneficial objects had in view in their passage."



derogation of the rights of others, the courts have adopted a strict construction, and have not extended the operation of the statute beyond its clear requirements.<sup>1</sup>

A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication; the new remedy is cumulative and either may be pursued. Where they are not inconsistent, but can well stand together, the old is never to be abrogated by the act creating the new remedy.<sup>2</sup> But when a right is created by a statute and a specific remedy is provided, the right can be vindicated in

1. *Noll v. Swineford*, 6 Pa. St. 187; *Mushlitt v. Silvermann*, 50 N. Y. 360; *Consociated Presbyterian Soc. v. Staples*, 23 Conn. 544; *Wagar v. Briscoe*, 38 Mich. 587.

So when the effect of a lien law was to charge the lands of a party with a debt not contracted by him or for his ultimate benefit, the court held that it should receive a strict construction. *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415.

In *Wagar v. Briscoe*, 38 Mich. 592, *Graves, J.*, said, in reference to the mechanics' lien laws: "This court has repeatedly declared in substance that these acts are innovations upon the common law over the rights of property, by permitting the institution of private charges on property without or against the owner's consent, and without any judicial or other official sanction, and by authorizing an enforcement of such charges by unusual and summary methods, and that the provision of these enactments cannot be extended in their operation and effect beyond the plain and fair sense of the terms, and that parties asserting liens or titles resting upon them must bring themselves and their titles plainly and distinctly within these terms, . . . and that every essential statutory step, either in the creation, continuance or enforcement of the lien has been duly taken."

In *Ayers v. Revere*, 25 N. J. L. 475, *Green, C. J.*, said: "The statute charges the property of one man with the debt of another. Though the owner may have paid the contractor in full for the erection of the building and for all the materials used in its construction, his property is nevertheless charged by the default of the contractor with the repayment of the debt. It gives preference to one class of creditors over another. . . . It gives to the favored creditor a remedy not only against his debtor, but against an innocent third

party with whom he has never contracted and for whom he has never labored. It gives him a summary remedy which, if enforced, may compel the owner to pay a debt which he has once satisfied in full. . . . The statute is not of that purely remedial character which calls for a peculiarly liberal construction at the hands of the court."

Where the lien of the mechanic is clearly and primarily enacted for his protection as a personal benefit, and the aid of the court is invoked by an assignee, such assignee must clearly show that the statute authorizes the transfer. *Roberts v. Fowler*, 4 Abb. Pr. (N. Y.) 263.

2. *Potter's Dwaris* 70; *Sedgw. St.* 38, 39; *Collinson v. Newcastle, etc., R. Co.*, 1 Car. & K. 546; 47 E. C. L. 545; *Castle's Case*, Cro. Jac. 644; *Litchfield v. Simpson*, 8 Q. B. 65; 55 E. C. L. 65; *Rex v. Wright*, 1 Burr. 544; *Mitchell v. Duncan*, 7 Fla. 13; *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Jennings v. Com.*, 17 Pick. (Mass.) 82; *Methodist Church v. Remington*, 1 Watts (Pa.) 218; 26 Am. Dec. 61; *Wilson v. Myers*, 4 Hawk. (N. Car.) 73; 15 Am. Dec. 510; *Almy v. Harris*, 5 Johns. (N. Y.) 175; *Farmers' Turnpike Road Co. v. Coventry*, 10 Johns. (N. Y.) 389; *Scidmore v. Smith*, 13 Johns. (N. Y.) 322; *Looney v. Hughes*, 30 Barb. (N. Y.) 605; *People v. Stevens*, 13 Wend. (N. Y.) 341; *Clark v. Brown*, 18 Wend. (N. Y.) 213; *People v. Bristol, etc., Turnpike Co.*, 23 Wend. (N. Y.) 222; *Farmers' Bank v. Hale*, 59 N. Y. 61; *Stafford v. Ingersol*, 3 Hill (N. Y.) 38; *Renwick v. Morris*, 3 Hill (N. Y.) 621; *Behan v. People*, 17 N. Y. 516; *Lane v. Salter*, 51 N. Y. 1; *Burnham v. Onderdonk*, 41 N. Y. 425; *Fremain v. Richardson*, 68 N. Y. 617; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; 15 Am. Dec. 462; *Gooch v. Stephenson*, 13 Me. 371; *Dawson v. Miller*, 20 Tex. 171; 70 Am. Dec. 380; *Thouvenin v.*

no other way than that prescribed by the law. The remedy is exclusive.<sup>1</sup>

(5) *Statutes Delegating Powers*—The power of eminent domain belongs in the first instance to the state exclusively, and when the legislature delegates such power to municipal or private corpora-

Rodrigues, 24 Tex. 468; Booker v. McRoberts, 1 Call (Va.) 243.

A statute authorizing suits to be brought, etc., on lost bonds and notes, was held cumulative, and not to repeal any remedy which previously existed. Branch Bank v. Tillman, 12 Ala. 214.

In Colden v. Eldred, 15 Johns. (N. Y.) 220, the court decided that the common-law remedy of trespass was not taken away by the statutory remedy of distress and sale of beasts, *damage feasant*; but that such remedy was merely cumulative.

A new remedy given by statute, upon failure of a bidder to comply with the terms of a probate sale, is cumulative, and does not take away the common-law remedy or remedy by suit, to compel specific performance. Dawson v. Miller, 20 Tex. 171; 70 Am. Dec. 380.

At common law, keeping swine in the city of London was a nuisance and of course indictable. By a statute the hogs were liable to be seized, etc.; but it was held that notwithstanding the statute, the offense was still indictable. Rex v. Wigg, 2 Salk. 460. But see Com. v. Cromley, 1 Ashm. (Pa.) 179.

**Statutory Submission.**—A statute prescribing certain forms for submission to arbitrators, and allowing the parties to agree that a judgment of a court of record, designated in the instrument of submission, shall be rendered upon the award, gives a cumulative remedy; and an award pursuant to a submission which would have been valid at common law, but which did not conform to the statute, will support an action. Lamar v. Nicholson, 7 Port. (Ala.) 158; Burnside v. Whitney, 21 N. Y. 149; Wells v. Lain, 15 Wend. (N. Y.) 99; Diedrick v. Richley, 2 Hill (N. Y.) 271; Logsdon v. Robert, 3 T. B. Mon. (Ky.) 256; Evans v. McKinsey, Litt. Sel. Cas. (Ky.) 264; Richardson v. Cassily, 3 Watts (Pa.) 320. See also Dickerson v. Tyner, 4 Blackf. (Ind.) 253. But see Deerfield v. Arms, 20 Pick. (Mass.) 480; 32 Am. Dec. 228.

1. Miller v. Taylor, 4 Burr. 2305; Bickford v. Hood, 7 T. R. 620; Dollar Sav. Bank v. U. S., 19 Wall. (U. S.) 227; Janney v. Buell, 55 Ala. 408;

Phillips v. Ash, 63 Ala. 414; Chandler v. Hanna, 73 Ala. 390; Bassett v. Carleton, 32 Me. 553; 54 Am. Dec. 605; Dudley v. Mayhew, 3 N. Y. 9; Almy v. Harris, 5 Johns. (N. Y.) 175; Renwick v. Morris, 3 Hill (N. Y.) 621; *In re* Townsend, 4 Hun (N. Y.) 31; Hollister v. Hollister Bank, 2 Keyes (N. Y.) 245; People v. Hall, 80 N. Y. 117; People v. Hazard, 4 Hill (N. Y.) 207; Smith v. Lockwood, 13 Barb. (N. Y.) 209; Smith v. Drew, 5 Mass. 514; Andover, etc., Turnpike Corp. v. Gould, 6 Mass. 40; 4 Am. Dec. 80; Franklin Glass Co. v. White, 14 Mass. 286; Chestnut Hill Turnpike Co. v. Martin, 12 Pa. St. 361; Huntington, etc., Turnpike Co. v. Brown, 2 P. & W. (Pa.) 463; App v. Dreisbach, 2 Rawle (Pa.) 287; 21 Am. Dec. 447; State v. Cole, 2 McCord (S. Car.) 1; Lang v. Scott, 1 Blackf. (Ind.) 405; 12 Am. Dec. 257; Sturgeon v. State, 1 Blackf. (Ind.) 39; Storms v. Stevens, 104 Ind. 46; Butler v. State, 6 Ind. 165; Toney v. Johnson, 26 Ind. 382; McCormack v. Terre Haute, etc., R. Co., 9 Ind. 283; Journey v. State, 1 Mo. 428; Riddick v. Governor, 1 Mo. 147.

So where a statute authorizes an injury, as in the case of acts allowing lands to be condemned for roads, canals, etc., and provides a remedy for it, no action will lie at common law. Sudbury Meadows v. Middlesex Canal, 23 Pick. (Mass.) 36; Dodge v. Essex Com'rs., 3 Met. (Mass.) 380. See also Boston v. Shaw, 1 Met. Mass. 130; Wiley v. Yale, 1 Met. (Mass.) 553; Elder v. Bemis, 2 Met. (Mass.) 599; Calking v. Baldwin, 4 Wend. (N. Y.) 667; 21 Am. Dec. 168.

But where the statute creating a new right provides no remedy for its infraction, the common law will supply the remedy. Beckford v. Hood, 7 T. R. 620; Dudley v. Mayhew, 3 N. Y. 9; Smith v. Drew, 5 Mass. 514; Chisholm v. Northern Transp. Co., 61 Barb. (N. Y.) 363; *In re* Townsend, 4 Hun (N. Y.) 31; Burnham v. Ondonendon, 41 N. Y. 425; Lynes v. State, 5 Port. (Ala.) 216; 30 Am. Dec. 557; Branch Bank v. Tillman, 12 Ala. 214; Russell v. Irby, 13 Ala. 131.

tions, the act under which the right to exercise the power is claimed must be construed strictly;<sup>1</sup> and the procedure provided for the exercise of the power of condemnation must be pursued strictly in all respects.<sup>2</sup>

So also statutes delegating the power to levy taxes or local assessments must be construed strictly. The power may not be exercised unless it be authorized by clear and unambiguous language or by necessary implication, and, when exercised, it must be confined to the purposes for which it is authorized.<sup>3</sup> So also

1. *Martin v. Rushton*, 42 Ala. 289; *Reynolds v. Speers*, 1 Stew. (Ala.) 34; *Spofford v. Bucksport, etc.*, R. Co., 66 Me. 26; *Binney's Case*, 2 Bland Ch. (Md.) 99; *Lea v. Johnston*, 9 Ired. (N. Car.) 15; *Belknap v. Belknap*, 2 Johns. Ch. (N. Y.) 463; 7 Am. Dec. 548; *Watson v. The Acquackanonck Water Co.*, 36 N. J. L. 195; *Alabama G. S. R. Co. v. Gilbert*, 71 Ga. 591; *Doe v. Hileman*, 2 Ill. 323; *Morris v. Chicago*, 11 Ill. 650; *Chicago, etc., R. Co. v. Wiltse*, 116 Ill. 449; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121; *Cox v. Tipton*, 18 Mo. App. 450; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *Central R. Co. v. Hudson Terminal R. Co.*, 46 N. J. L. 289; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Pittsburg, etc., R. Co. v. Bruce*, 102 Pa. St. 23; *Simpson v. South Staffordshire Water Works Co.*, 34 L. J. Eq. 380; *Gray v. Liverpool, etc., R. Co.*, 9 Beav. 391; *In re Claiborne Street*, 4 La. Ann. 7; *In re Exchange Alley*, 4 La. Ann. 4; *In re Philip Street*, 10 La. Ann. 313. See also MUNICIPAL CORPORATIONS, vol. 15, p. 1041, and EMINENT DOMAIN, vol. 6, p. 522.
2. *Roberts v. Williams*, 15 Ark. 43; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; 73 Am. Dec. 575; *Curran v. Shattuck*, 24 Cal. 427; *Lincoln v. Colusa County*, 28 Cal. 662; *Damrell v. San Joaquin County*, 40 Cal. 154; *Young v. McKenzie*, 3 Ga. 31; *Pike County v. Griffin, etc.*, Plank Road Co., 9 Ga. 475; *Hyslop v. Finch*, 99 Ill. 171; *Chicago, etc., R. Co. v. Smith*, 78 Ill. 96; *New Orleans v. Sohr*, 16 La. Ann. 393; *Jefferson v. Delachaise*, 22 La. Ann. 26; *State v. Van Geison*, 15 N. J. L. 339; *Griscom v. Gilmore*, 15 N. J. L. 475; *State v. Jersey City*, 25 N. J. L. 309; *State v. Bergen*, 33 N. J. L. 72; *Harris v. Marblehead*, 10 Gray (Mass.) 40; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Kroop v. Forman*, 31 Mich. 144; *Toledo, etc., R. Co. v. Munson*, 57 Mich. 42; *Stockett v. Nicholson, Walk. (Miss.)* 75; *Bohlman v. Green Bay, etc., R. Co.*, 40 Wis. 157; *St. Louis v. Franks*, 78 Mo. 41; *Harbeck v. Toledo*, 11 Ohio St. 219; *Killbuck Private Road*, 77 Pa. St. 39; *Adams v. Clarksburg*, 23 W. Va. 203; *Bartleson v. Minneapolis*, 33 Minn. 468; *Miller v. Brown*, 56 N. Y. 383.
3. *Paine v. Spratley*, 5 Kan. 525; *Leavenworth v. Norton*, 1 Kan. 432; *Burnes v. Atchison*, 2 Kan. 454; *Taylor v. Donner*, 31 Cal. 480; *Emery v. San Francisco Gas Co.*, 28 Cal. 354; *Bucknall v. Story*, 36 Cal. 67; *Swamp Land Dist. v. Haggin*, 64 Cal. 204; *Mason v. Police Jury*, 9 La. Ann. 368; *Moseley v. Tift*, 4 Fla. 402; *St. Louis v. Laughlin*, 49 Mo. 559; *State v. Van Every*, 75 Mo. 530; *Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441; *Lot v. Ross*, 38 Ala. 156; *Mobile v. Baldwin*, 57 Ala. 61; 29 Am. Rep. 712; *Stone v. Mobile*, 57 Ala. 61; *Savannah v. Hart-ridge*, 8 Ga. 23; *Augusta v. Dunbar*, 50 Ga. 387; *Caldwell v. Rupert*, 10 Bush (Ky.) 182; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Murray v. Tucker*, 10 Bush (Ky.) 240; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *Vance v. Little Rock*, 30 Ark. 439; *Ottawa v. Spencer*, 40 Ill. 211; *English v. People*, 96 Ill. 566; *Webster v. People*, 98 Ill. 343; *Scammon v. Chicago*, 40 Ill. 146; *Wright v. Chicago*, 20 Ill. 252; *Chicago v. Wright*, 32 Ill. 192; *Drake v. Phillips*, 40 Ill. 388; *Hyde Park v. Borden*, 94 Ill. 26; *Gridley v. Bloomington*, 88 Ill. 555; 30 Am. Rep. 566; *Jeffries v. Lawrence*, 42 Iowa 498; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 201; *Harmony Tp. v. Osborne*, 9 Ind. 458; *Kyle v. Malin*, 8 Ind. 34; *Nelson v. La Porte*, 33 Ind. 258; *Jackson v. Newman*, 59 Miss. 385; 42 Am. Rep. 367; *Boston v. Schaffer*, 9 Pick. (Mass.) 419; *Annapolis v. Harwood*, 32 Md. 471; *St. Mary's, etc., School v. Brown*, 45 Md. 310; *Vansant v. Harlem Stage Co.*, 59 Md. 330; *Hender-*

statutes authorizing the sale of land for taxes are to be strictly construed; and a strict compliance with all the material requirements of the statute is necessary.<sup>1</sup>

Municipal corporations and counties have no power to subscribe and pay for the stock of private corporations, in the absence of express authority from the legislature, and statutes which confer such authority are construed with great strictness.<sup>2</sup> Charters of all corporations are grants of power to exercise a franchise, and

son v. Baltimore, 8 Md. 352; *In re* Second Avenue M. E. Church, 66 N. Y. 395; Sharpe v. Speir, 4 Hill (N. Y.) 76; Sharpe v. Johnson, 4 Hill (N. Y.) 92; Dyckman v. New York, 5 N. Y. 434; Howell v. Buffalo, 15 N. Y. 512; Bennett v. Buffalo, 17 N. Y. 385; Manice v. New York, 8 N. Y. 120; Rathbun v. Acker, 18 Barb. (N. Y.) 393; Merritt v. Port Chester, 71 N. Y. 309; 27 Am. Rep. 47; Zanesville v. Richards, 5 Ohio St. 589; Mays v. Cincinnati, 1 Ohio St. 268; Jonas v. Cincinnati, 18 Ohio 318; Asheville v. Means, 7 Ired. (N. Car.) 406; Sewall v. St. Paul, 20 Minn. 511; Oregon Steam Nav. Co. v. Portland, 2 Oregon 81; State v. Maysville, 12 S. Car. 76; Columbia v. Hunt, 5 Rich. (S. Car.) 550; State v. Jersey City, 26 N. J. L. 444; State v. Guttenberg, 39 N. J. L. 660; Columbia v. Beasley, 1 Humph. (Tenn.) 240; Dean v. Gleason, 16 Wis. 1; Peters v. Lynchburg, 76 Va. 927; Schoonfield v. Lynchburg, 78 Va. 366; Richmond v. Daniel, 14 Gratt. (Va.) 387; Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176; Henry v. Chester, 15 Vt. 460; Heine v. Levee Com'rs, 19 Wall. (U. S.) 660; Meriweather v. Garrett, 102 U. S. 472.

It has been held that where express authority to incur a debt is granted, the authority to levy a tax to pay it results by necessary implication, if nothing indicates a contrary intent on the part of the legislature. *U. S. v. New Orleans*, 98 U. S. 381; *Ralls County Ct. v. U. S.*, 105 U. S. 733.

1. *Waldron v. Chastaney*, 2 Blatchf. (U. S.) 62; *Warner v. Howell*, 3 Wash. (U. S.) 12; *Segee v. Thomas*, 3 Blatchf. (U. S.) 11; *Piatt v. McCullough*, 1 McLean (U. S.) 82; *Bright v. Boyd*, 1 Story (U. S.) 487; *Stead v. Cource*, 4 Cranch (U. S.) 403; *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Miner v. McLean*, 4 McLean (U.

S.) 138; *Mayhew v. Davis*, 4 McLean (U. S.) 213; *Parker v. Overman*, 18 How. (U. S.) 137; (*reversing* *Hempst. (U. S.) 692*); *Ogden v. Harrington*, 6 McLean (U. S.) 418; *Stansbury v. Taggart*, 3 McLean (U. S.) 457; *Washington v. Platt*, 8 Wheat. (U. S.) 681; *Mason v. Fearson*, 9 How. (U. S.) 248; *Holyroyd v. Pumphrey*, 18 How. (U. S.) 69; *Thompson v. Carroll*, 22 How. (U. S.) 422; *Bradley v. Conner*, 5 Cranch (C. C.) 615; *Rodbird v. Rodbird*, 5 Cranch (C. C.) 125; *Harvey v. Tyler*, 2 Wall. (U. S.) 329; *McGunnegle v. Rutherford*, *Hempst. (U. S.) 45*; *Ransom v. Williams*, 2 Wall. (U. S.) 313; *Denike v. Rourke*, 3 Biss. (U. S.) 39; *Walker v. Moore*, 2 Dill. (U. S.) 256; *Harkness v. Board of Public Works*, 1 McArthur (D. C.) 121; *Coombs v. O'Neal*, 1 McArthur (D. C.) 405; *LeRoy v. Reeves*, 5 Sawy. (U. S.) 102; *Gould v. Day*, 94 U. S. 405; *Rule v. Parker*, *Cooke (Tenn.) 365*; *Bush v. Williams*, *Cooke (Tenn.) 360*; *Sibley v. Smith*, 2 Mich. 487; *Ritter v. Worth*, 58 N. Y. 627; *Cruger v. Dougherty*, 1 Lans. (N. Y.) 464; *National F. Ins. Co. v. McKay*, 5 Abb. Pr. N. S. (N. Y.) 445; *Finlay v. Cook*, 54 Barb. (N. Y.) 9.

2. *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *English v. Clicot County*, 26 Ark. 454; *Jacksonport v. Watson*, 33 Ark. 704; *French v. Teschemaker*, 24 Cal. 516; *People v. Coon*, 25 Cal. 635; *McCoy v. Briant*, 53 Cal. 247; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Jones v. Columbus*, 25 Ga. 610; *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395; *Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413; *Indianapolis, etc., R. Co. v. Attica*, 56 Ind. 476; *Lafayette v. Cox*, 5 Ind. 38; *Atchison v. Butcher*, 3 Kan. 104; *Burnes v. Atchison*, 2 Kan. 454; *Gaddis v. Richland County*, 92 Ill. 119; *Pitzman v. Freeburg*, 92 Ill. 111; *Welch v. Post*, 99 Ill. 471; *McManus v. Duluth, etc., R. Co. (Minn. 1892)*, 52 N. W. Rep. 980; *St. Louis v. Alexander*, 23 Mo. 483; *Starin*

are, in a sense, to be construed strictly; that is, the powers exercised by corporations are to be confined to those expressly granted in their charters and those incident to or necessary for the exercise of such express grants.<sup>1</sup>

And it may be stated generally that where special powers for the accomplishment of a particular purpose are conferred by stat-

*v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 439; *Rome Bank v. Rome*, 18 N. Y. 38; *People v. Mitchell*, 35 N. Y. 551; *Cook v. Sumner Spinning, etc., Co.*, 1 Sneed (Tenn.) 698; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252; *Milan Taxpayers v. Tennessee, Cent. R. Co.*, 11 Lea (Tenn.) 330; *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160; *Wells v. Supervisors*, 102 U. S. 625; *Concord v. Robinson*, 121 U. S. 165; *Katzenberger v. Aberdeen*, 16 Fed. Rep. 745; *Savannah v. Kelly*, 108 U. S. 184; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Lewis v. Shreveport*, 3 Woods (U. S.) 203; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Commercial Nat. Bank v. Iola*, 2 Dill. (U. S.) 353; 20 Wall. (U. S.) 655; *Pulaski v. Gilmore*, 21 Fed. Rep. 870; *Ottawa v. Carey*, 108 U. S. 110; *Davies County v. Dickinson*, 117 U. S. 657.

1. *Colman v. Eastern, etc., R. Co.*, 10 Beav. 1; *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; 73 E. C. L. 775; *Solomons v. Laing*, 12 Beav. 339; *Bagshaw v. Eastern Union R. Co.*, 7 Hare 114; *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 22 L. J. Ch. 682; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 348; *re Dudley*, 8 Q. B. Div. 93; *Ashbury R., etc., Co. v. Riche, L. R.*, 7 H. L. 653; *Atty. Gen'l v. Great Eastern R. Co.*, 5 App. Cas. 481; *London, etc., R. Co. v. Limehouse Board*, 2 K. & J. 123; 26 L. J. Ch. 164; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 587; *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63; *Huntington v. National Sav. Bank*, 96 U. S. 388; *North Western Fertilizing Co. v. Hyde Park*, 97 U. S. 666; *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *State v. Mobile*, 5 Port. (Ala.) 279; *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Bowling Green, etc., R. Co. v. Warren County Ct.*, 10 Bush (Ky.) 712; *South Newmarket Meth. Seminary v. Peaslee*, 15 N. H. 330; *Downing*

*v. Mt. Washington Road Co.*, 40 N. H. 231; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 501; *New London v. Brainard*, 22 Conn. 552; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 357; 8 Am. Rep. 243; *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 675; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 699; *Camden, etc., R. Co. v. Remer*, 4 Barb. (N. Y.) 130; *LeCouteulx v. Buffalo*, 33 N. Y. 333; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 352; 67 Am. Dec. 471; *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464; *Cleveland, etc., R. Co. v. Erie*, 27 Pa. St. 380; *Pennsylvania, etc., Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248; 29 Am. Dec. 543; *Weckler v. First Nat. Bank*, 42 Md. 581; 20 Am. Rep. 95; *St. Louis v. Weber*, 44 Mo. 547; *Matthews v. Skinker*, 62 Mo. 329; 21 Am. Rep. 425; *Shawmut Bank v. Plattsburgh, etc., R. Co.*, 31 Vt. 491; *Mobile, etc., R. Co. v. Franks*, 41 Miss. 494; *Leonard v. Canton*, 35 Miss. 189; *Petersburgh v. Metzker*, 21 Ill. 205; *Whitman Gold, etc., Min. Co. v. Baker*, 3 Nev. 386; *White's Bank v. Toledo F., etc., Ins. Co.*, 12 Ohio St. 601; *Lima v. Cemetery Assoc.*, 42 Ohio St. 128; 51 Am. Rep. 809; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 243; *Sutton Parish v. Cole*, 3 Pick. (Mass.) 240; *Hood v. Dighton Bridge*, 3 Mass. 263; *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Perry v. Wilson*, 7 Mass. 393; *Com. v. Smith*, 10 Allen (Mass.) 448; 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen (Mass.) 65; 87 Am. Dec. 700; *Middlesex R. Co. v. Boston, etc., R. Co.*, 115 Mass. 347; *Whitton Mills v. Upton*, 10 Gray (Mass.) 582; 71 Am. Dec. 681; *Mills v. Williams*, 11 Ired. (N. Car.) 558; *Bridge Co. v. Hoboken Land, etc., Co.*, 13 N. J. Eq. 81, 503; *Waxahachie v. Brown*, 67 Tex. 519.

In *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23, *Parker, C. J.*, said: "The power of corporations is derived only from the act, grant, charter or

ute upon corporations or individuals, the acts conferring such powers are to be construed strictly and the powers cannot be exercised for any collateral purpose.<sup>1</sup>

(6) *Grants of Monopolies.*—All grants by the legislature of exclusive privileges to corporations or individuals must be construed strictly against the grantees and in favor of the public,<sup>2</sup> and the charters of municipal corporations are construed so strictly in that regard that nothing short of express authority from the legislature will authorize their creating monopolies or granting special privileges.<sup>3</sup>

patent by which they are created. In this commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority, except what is given by express terms or by necessary implication by that body."

In *Gaines v. Coates*, 51 Miss. 342, it is said that "a corporation created by statute possesses only those powers which the charter confers upon it either expressly or as incidental to its very existence, and in order to derive a power in a corporation by implication, it must appear that the power thus sought to be implied is so necessary to the enjoyment of some specially granted right, that without it the right would fail."

*Citing McIntyre v. Ingraham*, 35 Miss. 25, and *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 636. See also *CORPORATIONS*, vol. 4, p. 207; *MUNICIPAL CORPORATIONS*, vol. 15, p. 1041; *ULTRA VIRES*.

1. *Galloway v. London*, L. R., 1 H. L. 34; *Reg. v. Cousins*, 4 B. & S. 849; 116 E. C. L. 849; *Rex v. Loxdale*, 1 Burr. 145; *The Killarney*, Lush. 202; *The Earl of Auckland*, Lush. 164; 30 L. J. Adm. 121; *Richter v. Hughes*, 2 B. & C. 499; 9 E. C. L. 162; *Calder*, etc., *Nav. Co. v. Pilling*, 14 M. & W. 76; *Shawnee County v. Carter*, 2 Kan. 115; *Garrigus v. Pike County*, 39 Ind. 66; *State v. Chase*, 5 Ohio St. 528; *Pike County v. Rowland*, 94 Pa. St. 238; *Geter v. Tobacco Com'rs*, 1 Bay (S. Car.) 354. See also cases cited in the last five notes, and *Hughes v. Chester*, etc., R. Co., 21 L. J. Ch. 97; *Anonymous*, Loft 438; *Rex v. Croker*, *Cowp.* 26; *Scales v. Pickering*, 4 Bing. 448; 1 M. & P. 195; 15 E. C. L. 37.

In *Richter v. Hughes*, 2 B. & C. 499; 9 E. C. L. 162, by a local act for the building of a chapel the trustees were authorized to appoint officers and to borrow thirty thousand pounds, which was to be payable out of the burial fees

and rates and assessments to be made in pursuance of the act. They borrowed more than thirty thousand pounds. It was held that all assessments to pay the interest on the sum borrowed were void, on the ground that the power conferred upon them by the act had not been strictly pursued.

In *Reg. v. Cousins*, 4 B. & S. 849; 116 E. C. L. 849, it was held that the appointment of one person only by the justices of the peace as an overseer of the poor of a parish was void under Stat. 43 Eliz., ch. 2, which authorized the justices to appoint to the office four, three or two substantial householders, although there was no other household resident in the parish qualified for appointment.

2. *Reed v. Ingham*, 3 El. & Bl. 888; 77 E. C. L. 889; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 394, 412; *Foley v. Fletcher*, 3 H. & N. 781; *Stourbridge Canal v. Wheely*, 2 B. & Ad. 793; *Westfall v. Mapes*, 3 Grant's Cas. (Pa.) 108; *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515; *Fanning v. Gregoire*, 16 How. (U. S.) 524; *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145; *Wheeling Bridge Co. v. Wheeling*, etc., *Bridge Co.*, 34 W. Va. 155; *affirmed Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 540; *Bridge Co. v. Hoboken Land*, etc., Co., 13 N. J. Eq. 81; *State v. Curry*, 1 Nev. 251; *Lake v. Virginia*, etc., R. Co., 7 Nev. 204; *Binghampton Bridge Case*, 3 Wall. (U. S.) 51; *Cleveland v. Norton*, 6 Cush. (Mass.) 380, *per Shaw*, C. J.

3. *Minturn v. Larue*, 23 How. (U. S.) 435; *Richmond County Gas*, etc., Co. v. Middletown, 59 N. Y. 228; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Brenham v. Brenham Water Co.*, 67 Tex. 436; *Altgelt v. San Antonio*, 81 Tex. 543; *Saginaw Gas Light*

(7) *Exemptions from Liabilities.*—Acts creating exemptions from common-law liabilities are construed strictly. A party who claims such an exemption must bring his case within the letter and spirit of the statute.<sup>1</sup> Statutes providing for homestead exemptions and the exemption of a certain amount of personal property from execution have been put in this class,<sup>2</sup> but by the weight of authority they are exceptions to the rule.<sup>3</sup> So too

*Co. v. Saginaw*, 28 Fed. Rep. 529; *Nash v. Lowry*, 37 Minn. 261; *Long v. Duluth*, 49 Minn. 280; *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; *Birmingham, etc., Street R. Co. v. Birmingham Street R. Co.*, 79 Ala. 465; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; *Vincennes v. Citizens Gas Light Co.*, 132 Ind. 114; *New Orleans, etc., R. Co. v. New Orleans*, 44 La. Ann. 748; *North Baltimore Pass. R. Co. v. Baltimore* (Md. 1892), 23 Atl. Rep. 470; *Houston v. City Houston St. R. Co.*, 83 Tex. 548.

1. *Gale v. Laurie*, 5 B. & C. 156; 12 E. C. L. 187; *Smith v. Kirby*, 1 Q. B. Div. 131; *The Protector*, 1 W. Rob. 45; *The Diana*, 4 Moore P. C. 11; *The Ionia*, L. R., 1 P. C. 426; *Willis v. Long Island R. Co.*, 32 Barb. (N. Y.) 398; *affirmed* 34 N. Y. 670; *Breitenbach v. Bush*, 44 Pa. St. 313; 84 Am. Dec. 442; *Andrews v. Schott*, 10 Pa. St. 47; *Vandike v. Roskam*, 67 Pa. St. 339; *Maloney v. Bruce*, 94 Pa. St. 249; *Elliot v. Himrod*, 108 Pa. St. 569; *Pierce v. Bryant*, 5 Allen (Mass.) 91.

In *Gale v. Laurie*, 5 B. & C. 156; 12 E. C. L. 187, it was held that the statute providing that shipowners should not be liable for damages done by their ships without their default beyond the value of the ship and its freight, must be construed strictly against the owner, and that everything on the ship belonging to the owner was liable for such damage.

In *Willis v. The Long Island R. Co.*, 32 Barb. (N. Y.) 398, it appeared that the general railroad act provided that in case any passenger should be injured while on the platform of any car in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company should not be liable for the injury, provided the said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers. The statute was strictly construed as being one exempting the company from lia-

bility, and it was held that a passenger was not obliged to go from one car to another while the train was in motion to search for a seat, neither was he bound to require a person occupying an entire seat to make room for him nor displace him so as to obtain a seat though the seat were large enough for two persons to occupy, nor was it the duty of a passenger to require persons to displace articles which they had placed upon a seat in order that he might be seated, but that it was the duty of the railroad company to furnish accommodations mentioned in the statute—the room and the seats—and not merely to furnish passengers with the means of obtaining them.

In *Maloney v. Bruce*, 94 Pa. St. 249, it was held that parties who seek to have the advantages of a partnership and yet limit their liability to creditors by taking advantage of the Limited Partnership Act must comply strictly with all the provisions of such act.

2. *Guillory v. Deville*, 21 La. Ann. 686; *Crilly v. Sheriff*, 25 La. Ann. 219; *Briant v. Lyons*, 29 La. Ann. 64; *Todd v. Gordy*, 28 La. Ann. 666; *Kinder v. Lyons*, 38 La. Ann. 713; *Grimes v. Bryne*, 2 Minn. 106; *Ward v. Huhn*, 16 Minn. 159; *Rue v. Alter*, 5 Den. (N. Y.) 119; *Garaty v. Du Bose*, 5 S. Car. 500.

3. *Allman v. Gann*, 29 Ala. 240; *Favers v. Glass*, 22 Ala. 621; 58 Am. Dec. 272; *Sallee v. Waters*, 17 Ala. 482; *Noland v. Wickham*, 9 Ala. 169; 44 Am. Dec. 435; *Wassell v. Tunnah*, 25 Ark. 101; *Tumlinson v. Swinney*, 22 Ark. 408; 74 Am. Dec. 432; *Montague v. Richardson*, 24 Conn. 346; 63 Am. Dec. 173 (but see *Seeley v. Gwillim*, 40 Conn. 106); *Good v. Fogg*, 61 Ill. 449; 14 Am. Rep. 71; *Deere v. Chapman*, 25 Ill. 610; 79 Am. Dec. 350; *Bevan v. Hayden*, 13 Iowa 122; *Davis v. Humphrey*, 22 Iowa 137; *Kenyon v. Baker*, 16 Mich. 373; *King v. Moore*, 10 Mich. 538; *Alvord v. Lent*, 23 Mich. 369; *Vogler v. Montgomery*, 54 Mo. 577; *Wade v. Jones*, 20 Mo. 75; 61 Am. Dec. 584; *Megehe v. Draper*, 21 Mo. 510; 64 Am. Dec. 245; *Carpenter v.*

there is a presumption that all property is subject to the common burden of taxation, and statutes which make exceptions to the rule must be construed strictly.<sup>1</sup>

To this class belong also bankruptcy and insolvency laws which provide for the discharge of an insolvent debtor's liabilities without full payment of his debts. In order that the debtor may be entitled to his discharge the provisions of the statute must be strictly pursued.<sup>2</sup>

(8) *Statutes Creating Liabilities.*—Statutes which create liabilities where, at common law, none existed, or which increase common-law liabilities, are, as a rule, construed strictly. In such cases, the newly created liability will not be extended beyond the

Herrington, 25 Wend. (N. Y.) 370; 37 Am. Dec. 239; Wilcox v. Hawley, 31 N. Y. 648; Stewart v. Brown, 37 N. Y. 350; 93 Am. Dec. 578; Ford v. Johnson, 34 Barb. (N. Y.) 364; Becker v. Becker, 47 Barb. (N. Y.) 497; Shaw v. Davis, 55 Barb. (N. Y.) 389; Tillotston v. Wolcott, 48 N. Y. 188; Buxton v. Dearborn, 46 N. H. 44; Peverly v. Sayles, 10 N. H. 356; Lindley v. Davis, 7 Mont. 206; Campbell v. Adair, 45 Miss. 178; Richardson v. Buswell, 10 Met. (Mass.) 506; 43 Am. Dec. 450; Gibson v. Jenney, 15 Mass. 205; Richardson v. Duncan, 2 Heisk. (Tenn.) 220; Webb v. Brandon, 4 Heisk. (Tenn.) 285; Hawthorne v. Smith, 3 Nev. 182; 93 Am. Dec. 397; Cobbs v. Coleman, 14 Tex. 594; Anderson v. McKay, 30 Tex. 100; Rogers v. Ferguson, 32 Tex. 534; Comstock v. Becktel, 63 Wis. 656; Gilman v. Williams, 7 Wis. 329; 76 Am. Dec. 219; Binzel v. Grogan, 67 Wis. 147; Connaughton v. Sands, 32 Wis. 387; Kuntz v. Kinney, 33 Wis. 503; Mundell v. Hammond, 40 Vt. 641; Webster v. Orne, 45 Vt. 40; Carrington v. Herrin, 4 Bush (Ky.) 624; Kelley v. McFadden, 80 Ind. 536; Puett v. Beard, 86 Ind. 172; 44 Am. Rep. 280; Barkley v. Mahon, 95 Ind. 101; Butner v. Bowser, 104 Ind. 255; *In re Jones*, 2 Dill (U. S.) 343.

1. See *TAXATION, Exemptions*, where this subject is fully discussed.

2. *Salters v. Tobias*, 3 Paige (N. Y.) 339; *Stanton v. Ellis*, 12 N. Y. 575; 64 Am. Dec. 512; *McNair v. Gilbert*, 3 Wend. (N. Y.) 344; *Slidell v. McCrea*, 1 Wend. (N. Y.) 156; *Ely v. Cooke*, 28 N. Y. 365; *Hale v. Sweet*, 40 N. Y. 97; *People v. Gray*, 10 Abb. Pr. (N. Y.) 468; 19 How. Pr. (N. Y.) 238; *Dieckhoff v. Ahlborn*, 2 Abb. N. Cas. (N. Y.) 372; *People v. Daly*, 4 Hun (N. Y.) 641; 67 Barb. (N. Y.) 325; *In re*

*Underwood*, 3 Cow. (N. Y.) 59; *Morewood v. Hollister*, 6 N. Y. 309; *In re Cohen*, 18 Civ. Proc. Rep. (N. Y.) 156; *In re Tolman*, 83 Me. 353; *In re Harrison*, 46 Minn. 331.

In *Salters v. Tobias*, 3 Paige (N. Y.) 346, Walworth, Ch., said: "But statutes of this description which are intended to deprive the creditor of all remedy for the recovery of an honest debt, must be construed strictly, and should not be extended by implication beyond the fair and legitimate meaning of the terms used by the legislature."

In *Re Tolman*, 83 Me. 353, under a statute requiring a trader to keep proper books, it was held that one could not be said to keep proper books of account who keeps merely memorandum books containing deliveries of milk to customers, some informal accounts or settlements, and an occasional inventory of farming stock, but nothing to indicate where or how the principal proceeds of his business have been expended. The court said: "The counsel for the insolvent thinks it a hardship to require an honest debtor in such limited and humble business, without education in the matter of books and accounts, to keep books of account as a condition of a discharge from debt, in case of his financial misfortune. There can be no remedy but an appeal to the legislature."

In *Re Harrison*, 46 Minn. 331, it was held that an assignment under the insolvent law must assign all the insolvent's unexempt property wherever situated, and his right to a discharge depended upon his having *bona fide* subjected all of it to the proceeding so that it might be appropriated, so far as it would go, to the payment of his debts; and that the doing by him in that state or elsewhere of any act mentioned in the tenth section of the insolvency act



expressed provisions of the statute.<sup>1</sup> It has been held that statutes which give a right of action to the personal representative of the deceased for tortious acts resulting in death should be construed strictly.<sup>2</sup> But, on the other hand, it is held that such statutes are remedial, inasmuch as they simply provide a remedy for an obvious wrong, and that they should be construed liberally,<sup>3</sup> except in so far as they provide for the recovery of punitive damages.<sup>4</sup> So also statutes which impose upon the stockholders of corporations a liability for the corporate debts in addition to the value of their stock are not to be extended beyond the plain meaning of the language employed.<sup>5</sup>

Statutes imposing costs may be classed among statutes creat-

as amended, whether the property was situated in that state or elsewhere, would defeat his right to the discharge.

1. *In re Hollister Bank*, 27 N. Y. 393; *Hollister v. Hollister Bank*, 2 Keyes (N. Y.) 245; *Steamboat Ohio v. Stunt*, 10 Ohio St. 582; *Cohn v. Neeves*, 40 Wis. 393; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *O'Reilly v. Bard*, 105 Pa. St. 569; *Chicago, etc., R. Co. v. Sturgis*, 44 Mich. 538; *Detroit v. Putnam*, 45 Mich. 265; *Detroit v. Chaffee*, 70 Mich. 80.

2. *Pittsburg, etc., R. Co. v. Hine*, 25 Ohio St. 629; *Hamilton v. Jones*, 125 Ind. 176; *Burns v. Grand Rapids, etc., R. Co.*, 13 Ind. 169; *Jackson v. St. Louis, etc., R. Co.*, 87 Mo. 422; 56 Am. Rep. 460; *Daly v. Stoddard*, 66 Ga. 145; *Eustace v. Jahns*, 38 Cal. 3.

3. *Soule v. New York, etc., R. Co.*, 24 Conn. 575; *Lamphear v. Buckingham*, 33 Conn. 237; *Merkle v. Bennington Tp.*, 58 Mich. 156; 55 Am. Rep. 666; *Haggerty v. Central R. Co.*, 31 N. J. L. 349; *Bolinger v. St. Paul, etc., R. Co.*, 36 Minn. 418; *Wabash, etc., R. Co. v. Shacklett*, 10 Ill. App. 404; *Hayes v. Williams*, 17 Colo. 465; *Beech v. Bay State Co.*, 6 Abb. Pr. (N. Y.) 415; 16 How. Pr. (N. Y.) 1; 27 Barb. (N. Y.) 248.

4. In *Shelby County v. Searce*, 2 Duv. (Ky.) 576, it appeared that one section of the *Kentucky* statute giving a right of action for tortious acts producing death, provided for compensatory damages only when death resulted from simple negligence or carelessness, while another provided for punitive damages for the loss or destruction of life by willful neglect of another person. The court held, the first section being entirely remedial, it should be construed liberally, but that the third

section, providing for punitive damages, being chiefly penal, should be interpreted strictly.

5. *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 489; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Knowlton v. Ackley*, 8 Cush. (Mass.) 93; *Stedman v. Eveleth*, 6 Met. (Mass.) 114; *O'Reilly v. Bard*, 105 Pa. St. 569; *Mean's Appeal*, 85 Pa. St. 75; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Youghiogheny Shaft Co. v. Evans*, 72 Pa. St. 331; *Chase v. Lord*, 77 N. Y. 1; *Diven v. Lee*, 36 N. Y. 302; *Lowry v. Inman*, 46 N. Y. 120; *Davidson v. Rankin*, 34 Cal. 503; *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; 73 Am. Dec. 658; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Grose v. Hill*, 36 Me. 22; *Coffin v. Rich*, 45 Me. 511; 71 Am. Dec. 559; *Windham Provident Sav. Inst. v. Sprague*, 43 Vt. 502; *Dauchy v. Brown*, 24 Vt. 197; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; *Dewey v. St. Albans Trust Co.*, 57 Vt. 332.

In *Gray v. Coffin*, 9 Cush. (Mass.) 192. Shaw, C. J., said: "To create any individual liability of members for the debt of a corporation, a body politic created by law and regarded as a legal being distinct from that of all the members composing it and capable of contracting and being contracted with as a person, is a wide departure from established rules of law founded in consideration of public policy and depending solely upon provisions of positive law. It is therefore to be construed strictly and not extended beyond the limits to which it is plainly carried by such provision of the statute."

But in *Carver v. Braintree Mfg. Co.*,

ing liabilities which did not exist at common law, and it has been held that they are to be construed strictly;<sup>1</sup> and so as to statutes allowing compensation to officers.<sup>2</sup>

(9) *Statutory Remedies and Proceedings.*—When a statute gives a right or a remedy which did not exist at common law, and provides a specific method of enforcing it, the mode of procedure provided by the statute must be pursued strictly.<sup>3</sup>

2 Story (U. S.) 432. Judge Story gave the same statute a more liberal construction, holding that the provision "that every person who shall become a member of any manufacturing corporation which may be hereafter established in this commonwealth shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation," included also a claim for tortious infringement of a patent right.

**Officers of Corporations.**—In *Rorke v. Thomas*, 56 N. Y. 560, which was an action by creditors against the trustees of a corporation to charge them individually with the payment of a debt of the company to the plaintiffs, under section 13, ch. 40, Laws of 1848, upon the ground that the defendants while they were such trustees declared and paid to the stockholders of the company a dividend which diminished the amount of its capital stock, it was held that the statute was penal in its nature, and was not to be extended beyond the clear import of the language employed in it.

1. *Cone v. Bowles*, 1 Salk. 205; *Cobb v. Mid-Wales R. Co.*, L. R., 1 Q. B. 351; *Dent v. State*, 42 Ala. 514; *State v. Kinne*, 41 N. H. 238; *Van Horne v. Petrie*, 2 Cal. (N. Y.) 213; *Farrington v. Rennie*, 2 Cal. (N. Y.) 220; *Briggs v. Allen*, 4 Hill (N. Y.) 538; *Van Hovenburgh v. Case*, 4 Hill (N. Y.) 541; *Dockstader v. Sammons*, 4 Hill (N. Y.) 546; *Clark v. Dewey*, 5 Johns. (N. Y.) 251; *Walker v. Sheftall*, 73 Ga. 806.

2. In *United States v. Clough*, (C. C. A.) 55 Fed. Rep. 373, which was an action brought by a United States commissioner against the government for fees earned as such commissioner, the court said: "We do not concur in the opinion of the court in *McKinstry v. U. S.*, 40 Fed. 813, as to the principle to be followed in the construction of the fee bill. We do not know any rule of public policy or of practical experience which requires that where a statute allowing an officer's compensation 'admits of two interpretations, the words should be construed liberally in

favor of the officer and not strictly in favor of the United States.' The well-known abuses under the fee system by which the government has been defrauded of large amounts through unconscionable charges and the lax administration of the law in this respect would seem to require a strict interpretation in favor of the United States rather than in favor of the officer."

But in *U. S. v. Morse*, 3 Story (U. S.) 87, Story, J., in construing an act which provided that no deputy collector should receive more than one thousand dollars for any services performed for the United States in any office or capacity, held that it applied only to emoluments received as deputy collector and did not prevent one who was also an inspector from collecting his fees as such.

3. *Cole v. Muscatine*, 14 Iowa 296; *Moore v. White*, 45 Mo. 206; *St. Pancras v. Batterbury*, 2 C. B. N. S. 477; 89 E. C. L. 471; *Dudley v. Mayhew*, 3 N. Y. 9; *First Nat. Bank v. Lamb*, 57 Barb. (N. Y.) 434; *U. S. v. Wyngall*, 5 Hill (N. Y.) 16; *Olcott v. Frazier*, 5 Hill (N. Y.) 562; *Sharpe v. Speir*, 4 Hill (N. Y.) 76; *Sharpe v. Johnson*, 4 Hill (N. Y.) 92; *In re Petition of Ford*, 6 Lans. (N. Y.) 92; *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615; *Wheeler v. Mills*, 40 Barb. (N. Y.) 644; *Whitney v. Thomas*, 23 N. Y. 281; *Hascal v. Madison University*, 8 Barb. (N. Y.) 174; *In re Petition of Folsom*, 2 Thomp. & C. (N. Y.) 55; *People v. Gates*, 57 Barb. (N. Y.) 291; *People v. Adirondack Co.*, 57 Barb. (N. Y.) 656; *People v. Hillsdale, etc.*, *Turnpike Co.*, 2 Johns. (N. Y.) 190; *Westbrook v. Willey*, 47 N. Y. 457; *Cruger v. Dougherty*, 43 N. Y. 107; *Weed v. Lyon*, Walk. Ch. (Mich.) 77; *Galpin v. Abbott*, 6 Mich. 17; *Thurston v. Prentiss*, 1 Mich. 193; *Kroop v. Forman*, 31 Mich. 144; *Bennett v. Olney*, 56 Mich. 634; *Lane v. Burnap*, 39 Mich. 736; *Burnett v. Scully*, 56 Mich. 374; *Welker v. Potter*, 18 Ohio St. 85; *Dennison v. Blumenthal*, 37 Ill. App. 385; *Wistar v. Kammerer*, 2 Yeates (Pa.) 100; *Day v. Cushman*, 2 Ill. 475; *Chapin v. Persse, etc.*

(10) *Statutes Imposing Taxes.*—In England, it is a firmly established rule that statutes imposing public burdens in the form of taxation are to be construed strictly. Where there is an ambiguity in the language which raises a doubt as to the legislative intent, such doubt must be resolved in favor of the persons upon whom it is sought to impose the burden.<sup>1</sup>

But in the *United States* there is an irreconcilable conflict of

Works, 30 Conn. 461; 79 Am. Dec. 263; *Souter v. The Sea Witch*, 1 Cal. 162; *Logwood v. Planters', etc.*, Bank, Minor (Ala.) 23; *Childress v. McGehee*, Minor (Ala.) 131; *Crawford v. State*, Minor (Ala.) 143; *Yancy v. Hankins*, Minor (Ala.) 171; *Hale v. Burton*, Dudley (Ga.) 105.

Statutes giving married women the right to make contracts which they could not make at common law, must be followed strictly when they prescribe the manner of exercising such right. *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 Mo. 537; *Bagby v. Emberson*, 79 Mo. 139; *Beckman v. Stanley*, 8 Nev. 257; *Shumaker v. Johnson*, 35 Ind. 33; *Mattox v. Hightshue*, 39 Ind. 95; *Leggatt v. Clark*, 111 Mass. 308; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Trimmer v. Heagy*, 16 Pa. St. 484; *Glidden v. Strupler*, 52 Pa. St. 400; *Dunham v. Wright*, 53 Pa. St. 167; *Graham v. Long*, 65 Pa. St. 385; *Miller v. Wentworth*, 82 Pa. St. 280; *Innis v. Templeton*, 95 Pa. St. 262; 40 Am. Rep. 643; *Miller v. Ruble*, 107 Pa. St. 395; *Montoursville Overseers v. Fairfield Overseers*, 112 Pa. St. 199. See also, *supra*, this title, *In Derogation of Common Law*.

In *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; 73 Am. Dec. 573, the court said: "All statutory modes of divesting titles are strictly construed. He who relies for a title upon an extraordinary mode of acquisition not by the will of the owner, express or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues."

Where parties undertake to enter into a submission to arbitration under a statute, they must follow strictly the statutory requirements. *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Monosiet v. Post*, 4 Mass. 532; *Barnett v. Peck*, 6 Vt. 456; *Willingham v. Harrell*, 36 Ala. 583; *Halloran v. Bray*, 29 Ga. 422. See also *infra*, this title, *Mandatory or Directory*; *ATTACHMENT*, vol. 1, p. 894; *GARNISHMENT*, vol. 8, p. 1096;

*MECHANICS' LIENS*, vol. 15, p. 1; *SERVICE OF PROCESS* vol. 22, p. 107; *EMINENT DOMAIN*, vol. 6, p. 509.

1. *Gurr v. Scudds*, 11 Exch. 190; *Warrington v. Furbor*, 8 East 242; *Williams v. Sangar*, 10 East 66; *Wroughton v. Turtle*, 11 M. & W. 561; *Denn v. Diamond*, 4 B. & C. 243; 10 E. C. L. 320; *Tomkins v. Ashby*, 6 B. & C. 541; 13 E. C. L. 249; *Doe v. Snaith*, 8 Bing. 146; 21 E. C. L. 253; *Burder v. Veley*, 12 Ad. & El. 246; 40 E. C. L. 48; *Atty. Gen'l v. Middleton*, 3 H. & N. 138; *In re Micklethwait*, 11 Exch. 452; *Marquis of Chandos v. Com'rs*, 6 Exch. 464; *Caswell v. Cook*, 11 C. B. N. S. 637; 103 E. C. L. 635; *Oriental Bank v. Wright*, 5 App. Cas. 842; *Pryce v. Monmouthshire, etc., Canal Co.*, 4 App. Cas. 197; *Reg. v. Barclay*, 8 Q. B. Div. 306; *Daines v. Heath*, 3 C. B. 938; 54 E. C. L. 937; *Gosling v. Veley*, 12 Q. B. 407; 64 E. C. L. 405; *Iles v. West Ham Assessment Committee*, 8 Q. B. Div. 69; *Partington v. Atty. Gen'l*, L. R., 4 H. L. 122; *Shaw v. Rudder*, 9 Ir. C. L., N. S. 214; *Reg. v. Mallow Union*, 12 Ir. C. L., N. S. 35.

In *Doe v. Snaith*, 8 Bing. 147; 21 E. C. L. 253, *Tindal, C. J.*, said: "As all stamp acts, being a burden on the subject, must be clearly expressed wherever they impose the burden, I should say that even if there were doubt we should take the smaller sum."

In *Wroughton v. Turtle*, 11 M. & W. 561, *Parke, Baron*, said: "It is a well-settled rule of law that every charge on the subject must be imposed by clear and unambiguous words."

In *Marquis of Chandos v. Com'rs*, 6 Exch. 464, *Pollock, C. B.*, said: "It is a well-established rule in the construction of revenue acts that a duty cannot be imposed on the subject except by clear words. The meaning of the legislature must be distinctly made out from the terms of the statute."

In *Gurr v. Scudds*, 11 Exch. 190, *Pollock, C. B.*, said: "If there is any doubt as to the meaning of the stamp act, it ought to be construed in favor of

authority on this point. Many decisions approve and follow the English rule of strict construction;<sup>1</sup> but, on the other hand, it has been held in the *United States* courts that revenue laws are remedial and should receive a liberal construction,<sup>2</sup> although

the subject, because a tax cannot be imposed without clear and express words for that purpose."

In *Williams v. Sangar*, 10 East 66, Lord Ellenborough, C. J., said: "In the construction of these tax acts we must look at the strict words, however we may sometimes limit the generality of the expression used in them; but we must construe those words according to their plain meaning with reference to the subject-matter."

1. *U. S. v. Wigglesworth*, 2 Story (U. S.) 369; *Powers v. Barney*, 5 Blatchf. (U. S.) 202; *Adams v. Bancroft*, 3 Sumn. (U. S.) 387; *U. S. v. Watts*, 1 Bond (U. S.) 580; *U. S. v. 84 Boxes of Sugar*, 7 Pet. (U. S.) 453; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Green v. Holway*, 101 Mass. 248; 3 Am. Rep. 339; *Barnes v. Doe*, 4 Ind. 132; *Williams v. State*, 6 Blackf. (Ind.) 36; *Smith v. Waters*, 25 Ind. 397; *Williamsburg v. Lord*, 51 Me. 599; *Boyd v. Hood*, 57 Pa. St. 98; *Cahoon v. Coe*, 57 N. H. 556.

In *U. S. v. 84 Boxes of Sugar*, 7 Pet. (U. S.) 453, McLean, J., said: "The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly."

In *Adams v. Bancroft*, 3 Sumn. (U. S.) 387, Story, J., said: "I may add in this connection that laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burden on the public at large and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."

In *U. S. v. Wigglesworth*, 2 Story (U. S.) 369, the same learned judge said: "It is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens not to extend their provision by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out although standing upon a close analogy. In every case, therefore, of doubt, such statutes are

construed most strongly against the government and in favor of the subjects or citizens, because burdens are not to be imposed nor presumed to be imposed beyond what the statutes expressly and clearly import. The revenue statutes are in no just sense either remedial laws or laws founded upon any public policy, and therefore are not to be liberally construed."

In *Powers v. Barney*, 5 Blatchf. (U. S.) 202, Nelson, J., said: "Another principle may also be invoked which is that in cases of serious ambiguity in the language of the act, or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on the citizens upon vague or doubtful interpretations."

In *Sewall v. Jones*, 9 Pick. (Mass.) 412, Parker, C. J., said: "Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly."

In *Green v. Holway*, 101 Mass. 248; 3 Am. Rep. 339, the court said: "Acts imposing duties of any kind are not to be extended by doubtful interpretation, but are to be construed by the rule that every charge upon the subject must be created by clear, unambiguous words."

2. *Cliquot's Champagne*, 3 Wall. (U. S.) 145; *Taylor v. U. S.*, 3 How. (U. S.) 197; *U. S. v. Hodson*, 10 Wall. (U. S.) 406; *U. S. v. 100 Barrels of Spirits*, 2 Abb. (U. S.) 305; *U. S. v. Willetts*, 5 Ben. (U. S.) 220; *U. S. v. 36 Barrels of High Wines*, 7 Blatchf. (U. S.) 459; *U. S. v. 3 Tons of Coal*, 6 Biss. (U. S.) 379; *U. S. v. Olney*, 1 Abb. (U. S.) 275; 28 Cases, 2 Ben. (U. S.) 63; *U. S. v. Cases of Cloths*, Crabbe (U. S.) 356. *Taylor v. U. S.*, 3 How. (U. S.) 197, is cited by the subsequent cases in that court as the authority upon which these decisions rest. But an examination of the case reveals the fact that Judge Story, who delivered the opinion, did not decide that revenue laws were remedial. And Judge Cooley, in his *Treatise on Taxation* (2d ed.), p. 271, note 3, says: "The opinion in this last case (*Taylor v. U. S.*, 3 How. (U. S.) 197) was given by Mr. Justice Story, and the language made use of, which

recent decisions indicate a return to the rule of strict construction.<sup>1</sup> Again, some of the courts take an intermediate position and hold that such statutes are neither penal nor remedial, and should receive an interpretation in accordance with the obvious intention and meaning of the legislature without invoking the rules of strict and liberal construction.<sup>2</sup>

consists largely in a quotation from the opinion given in the lower court, does not express his own views so clearly as was customary with that learned judge. . . . It would have been a remarkable circumstance if Mr. Justice Story had overruled his own opinion (*U. S. v. Wigglesworth*), delivered so recently that, at that time, his son (and reporter) had not issued the volume containing it."

In *Cliquot's Champagne*, 3 Wall. (U. S.) 145, Swayne, J., said: "Revenue laws are not penal laws in the sense that it requires them to be considered with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character and intended to prevent fraud, suppress public wrong, and promote public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish this object," citing *Taylor v. U. S.*, 3 How. (U. S.) 210.

In *U. S. v. Hodson*, 10 Wall. (U. S.) 406, Swayne, J., again said: "The revenue statutes are not to be regarded as penal and therefore to be construed strictly; they are remedial in their character and are to be construed liberally to carry out the purpose of their enactment," citing *Cliquot's Champagne*, 3 Wall. (U. S.) 145.

In criticizing this case (*U. S. v. Hodson*, 10 Wall. (U. S.) 406), Judge Cooley in his *Treatise on Taxation* (2d ed.), pp. 270, 271, says: "It seems highly probable that the word 'remedial' has been employed by the learned judge delivering the opinion in this case in a sense different from that in which it is commonly used in the law. A remedial law, as the term is generally employed, is something quite different from the revenue laws." After examining the definitions of a remedial law by the elementary writers, the learned author continues: "These considerations would seem to justify the conclusion that the learned judge in applying the word 'remedial' to tax laws has used it in some political or special rather than in the strict legal

sense, and that it was not the intention of the court to overrule the opinion of Mr. Justice Story in *Wigglesworth's Case*."

1. In *American Net, etc., Co. v. Worthington*, 141 U. S. 468, the court said: "We think the intention of Congress that these goods should be classified as 'gilling twine' is plain; but were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language," citing *U. S. v. Isham*, 17 Wall. (U. S.) 496; *Hartman v. Wiegmann*, 121 U. S. 609, and *Gurr v. Scudds*, 11 Exch. 190.

In *Rice v. U. S.*, 53 Fed. Rep. 910, the court quoted the language of Judge Story in *U. S. v. Wigglesworth*, 2 Story (U. S.) 369, as the correct statement of the law, and cited *American Net, etc., Co. v. Worthington*, 141 U. S. 474, among other authorities in support of the rule of strict construction.

2. *U. S. v. Breed*, 1 Sumn. (U. S.) 159; *U. S. v. 1,412 Gallons Distilled Spirits*, 10 Blatchf. (U. S.) 428; *Hubbard v. Brainard*, 35 Conn. 568; *Cornwall v. Todd*, 38 Conn. 447. See also *Higgins v. Rinker*, 47 Tex. 393.

In *U. S. v. Breed*, 1 Sumn. (U. S.) 159, it is said: "Revenue and duty acts are not in the sense of the law penal acts, and are not, therefore, to be construed strictly; nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them."

In *Hubbard v. Brainard*, 35 Conn. 568, Butler, J., said: "A law imposing a tax is not to be construed strictly because it takes money or property *in invitum* (although its provisions are for that reason to be strictly executed), for it is taken as a share of a necessary public burden; nor liberally, like laws

(11) *Statutes Conferring Right to Sue State*.—A state cannot be sued in its own courts unless it has expressly consented to such action. And a statute permitting such suits is in derogation of sovereign power and must be construed strictly.<sup>1</sup>

(12) *Statutes Affecting Jurisdiction of Courts*.—Acts creating courts of limited jurisdiction are construed strictly, and the powers of such courts will not be extended by implication further than is necessary for the exercise of the jurisdiction expressly conferred upon them.<sup>2</sup> On the other hand, it is a well-settled rule of construction that the jurisdiction of superior courts cannot be taken away except by express words or by necessary and irresistible implication.<sup>3</sup> And if the jurisdiction is con-

intended to effect directly some great public object, but fairly for the government and justly for the citizen, and so as to carry out the intention of the legislature gathered from the language used, read in connection with the general purpose of the law, and the nature of the property on which the tax is imposed, and of the legal relation of the taxpayer to it."

1. *Greene v. Graham*, 29 Ala. 61; *State v. Stout*, 7 Neb. 89; *Rose v. Governor*, 24 Tex. 496; *Raymond v. State*, 54 Miss. 562; 28 Am. Rep. 382; citing *State v. Joiner*, 23 Miss. 500; *Parmilee v. McNutt*, 1 Smed. & M. (Miss.) 179; *Josselyn v. Stone*, 28 Miss. 753. But see *State v. Curran*, 12 Ark. 321, where it appears that the state constitution contains a mandatory provision directing the legislature to make provision for suing the state, and a statute making such provision was construed liberally.

For presumptions against the sovereign's being included when not expressly mentioned in a statute, see *supra*, this title, *Presumptions as to Including Government*.

2. *Thompson v. Cox*, 8 Jones (N. Car.) 311; *Pringle v. Carter*, 1 Hill (S. Car.) 53; *School Inspectors v. People*, 20 Ill. 525; *Steamboat Delta v. Walker*, 24 Ill. 233; *Wakefield v. State*, 5 Ind. 195; *Matlock v. Strange*, 8 Ind. 57; *O'Brian v. State*, 12 Ind. 369; *Martin v. Fales*, 18 Me. 23; 36 Am. Dec. 693; *Call v. Mitchell*, 39 Me. 465; *State v. Metzger*, 26 Mo. 65; *Williams v. Bower*, 26 Mo. 601; *State v. Anderson*, 2 Overt (Tenn.) 6; 5 Am. Dec. 648; *Walker v. Wynne*, 3 Yerg. (Tenn.) 62; *Vanbibber v. Vanbibber*, 10 Humph. (Tenn.) 53; *Caulfield v. Stevens*, 28 Cal. 118; *East Union Tp. v. Ryan*, 86 Pa. St. 459; *Diss Urban Sanitary Authority*

*v. Aldrich*, 2 Q. B. Div. 179; *Flower v. Lloyd*, 6 Ch. Div. 297; *Hartley v. Hooker*, 2 Cowp. 523; *Montreal v. Stevens*, 3 App. Cas. 605.

In *Hartley v. Hooker*, 2 Cowp. 523, Lord Mansfield, said: "If a new offense is created by statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued all is a nullity and *coram non iudice*, and objections may be taken in any stage of the cause."

Where a limited jurisdiction is given by statute, the act should be construed strictly as to the extent of the jurisdiction and liberally as to the mode of proceeding. *Barret v. Chitwood*, 2 Bibb (Ky.) 431; *Russell v. Wheeler*, 1 Hempst. (U. S.) 3.

3. *Barnawell v. Threadgill*, 5 Ired. Eq. (N. Car.) 86; *Com. v. Hudson*, 11 Gray (Mass.) 64; *Com. v. White*, 8 Pick. (Mass.) 453; *Gould v. Hayes*, 19 Ala. 450; *Burginhofen v. Martin*, 3 Yeates (Pa.) 479; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Com. v. McCloskey*, 2 Rawle (Pa.) 369; *In re Twenty-eighth Street*, 102 Pa. St. 140; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Murfree v. Leeper*, 1 Overt. (Tenn.) 1; *State v. St. Louis County Ct.*, 38 Mo. 403; *Tackett v. Vogler*, 85 Mo. 480 (*overruling* *Stamps v. Bridwell*, 57 Mo. 22, and *Williams v. Payne*, 80 Mo. 409); *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 737; *Rex v. Abbott*, 2 Doug. 553, note; *Cates v. Knight*, 3 T. R. 442; *Shipman v. Hanbest*, 4 T. R. 109; *Albon v. Pyke*, 4 M. & G. 424; 43 E. C. L. 222; *Balfour v. Malcolm*, 8 C. & F. 500; *Jacobs v. Brett*, L. R., 20 Eq. 1; *Rex v. London*, 9 B. & C. 27; 17 E. C. L. 325; *Crisp v. Bunbury*, 8 Bing. 394; 21 E. C. L. 333; *Reeves v. White*, 17 Q. B. 995; 79 E. C. L. 995;

stitutional, the legislature has no power to enlarge or abridge it at all.<sup>1</sup>

(13) *Private Acts*.—Acts conferring special privileges upon or granting public property to private individuals or corporations are construed strictly against the grantees and in favor of the state.<sup>2</sup> Such acts are in the nature of common assurances, but the rule of construction of contracts between private individuals is exactly reversed when the government is the grantor. This rule is adopted on the ground that the language used is not that

Richards v. Dyke, 3 Q. B. 256; 43 E. C. L. 724; Timms v. Williams, 3 Q. B. 413; 43 E. C. L. 798.

In Barnawell v. Threadgill, 5 Ired. Eq. (N. Car.) 86, Ruffin, C. J., said: "The rule of construction is settled that statutes which merely give affirmative jurisdiction to one court, do not oust that previously existing in another court. There is nothing incongruous in concurrent jurisdiction. And, therefore, that of the court of equity or of the higher courts proceeding according to the course of the common law is never taken away but by plain words or as plain intents."

In Com. v. Hudson, 11 Gray (Mass.) 65, Shaw, C. J., said: "It is contended that the word concurrent being omitted in section 2 the justices of the peace have exclusive jurisdiction. It is immaterial whether it was omitted by amendment or not. Taking the language of the statute as it is, what is the effect of this section? Before this statute, the court of common pleas had jurisdiction over its subject-matter. Is that jurisdiction taken away? It is no answer to say that another tribunal has jurisdiction, for that is very common. It is, in such case, concurrent jurisdiction whether so called in the statute or not. Then is the jurisdiction of the court of common pleas, which it had before, taken away? There must be words of limitation to take it away, either by using the word 'exclusive' or by repealing the former act giving jurisdiction by which it may appear the legislature meant not only to confer jurisdiction on justices of the peace, but also to take away the other jurisdiction."

1. Dillard v. Noel, 2 Ark. 449; Hicks v. Bell, 3 Cal. 219; Meyer v. Kalkmann, 6 Cal. 582; Parsons v. Tuolumne County Water Co., 5 Cal. 43; 63 Am. Dec. 76; Com. v. Allegheny County, 37 Pa. St. 237; State v. Mace, 5 Md. 337; State v. Northern Cent. R. Co., 18 Md. 193; Chandler v. Nash, 5 Mich.

409; Waldby v. Callendar, 8 Mich. 430; Jones v. Smith, 14 Mich. 334; Heath v. Judge, 37 Mich. 372; Averill v. Perrott, 74 Mich. 296; Vail v. Dinning, 44 Mo. 210; Landers v. Staten Island R. Co., 14 Abb. Pr. N. S. (N. Y.) 346; Callanan v. Judd, 23 Wis. 343; Connors v. Gorey, 32 Wis. 518; Galsworthy v. Durrant, 8 W. R. 594.

2. Blakemore v. Glamorganshire Canal Co., 1 M. & K. 162; Gildart v. Gladstone, 11 East 685; Rex v. Croke, Cowp. 301; Loft 438; Dock Co. v. La Marche, 8 B. & C. 52; 15 E. C. L. 153; Dudley Canal Co. v. Grazebrook, 1 B. & Ad. 59; Eton College v. Bishop of Winchester, Loft 401; Hull Dock Co. v. Browne, 2 B. & Ad. 45; Rex v. Cumberworth, 4 Ad. & El. 741; 31 E. C. L. 170; Webb v. Manchester R. Co., 4 Myl. & C. 116; Stockton, etc., R. Co. v. Barrett, 11 Cl. & F. 590; 7 M. & G. 870 (per Lords Lyndhurst and Brougham in House of Lords); Scales v. Pickering, 4 Bing. 448; 15 E. C. L. 37; Parker v. Great Western R. Co., 7 M. & G. 253; 49 E. C. L. 253; Eversfield v. Mid-Sussex R. Co., 3 De G. & J. 286; Simpson v. Staffordshire Water Works, 34 L. J. Ch. 380; Reg. v. Wycombe R. Co., L. R., 2 Q. B. 310; Morgan v. Metropolitan R. Co., L. R., 4 C. P. 97; Fenwick v. East London R. Co., L. R., 20 Eq. 544; Atty. Gen'l v. Furness R. Co., 47 L. J. Ch. 776; Lamb v. North London R. Co., L. R., 4 Ch. 522; Clowes v. Staffordshire Potteries Waterworks Co., L. R., 8 Ch. 125; Stourbridge Canal v. Wheeley, 2 B. & Ad. 792; Abergavenny v. Brace, L. R., 7 Exch. 160; Moran v. Miami County, 2 Black (U. S.) 722; Martin v. Waddell, 16 Pet. (U. S.) 411; Mills v. St. Clair County, 8 How. (U. S.) 581; Binghamton Bridge Case, 3 Wall. (U. S.) 51; U. S. v. Arredondo, 6 Pet. (U. S.) 738; Slidell v. Grandjean, 111 U. S. 412; Hannibal, etc., R. Co. v. Missouri River Packet Co., 125 U. S. 271; Rice v. Railroad Co., 1 Black (U. S.)

of the grantor, but that of the grantees who sought and obtained the enactment of such statutes.<sup>1</sup> But such acts are laws as well

358; *Ohio Life, etc., Co. v. Debolt*, 16 How. (U. S.) 435; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. (U. S.) 66; *St. Paul, etc., R. Co. v. Phelps*, 26 Fed. Rep. 569; *Broadbent v. Tuscaloosa Scientific, etc., Assoc.*, 45 Ala. 170; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Campbell's Case*, 2 Bland (Md.) 209; 20 Am. Dec. 360; *Young v. McKenzie*, 3 Ga. 31; *Macon v. Macon, etc., R. Co.*, 7 Ga. 221; *Pike County v. Griffin, etc., Plank Road Co.*, 9 Ga. 475; *Sugar v. Sackett*, 13 Ga. 462; *Miners' Bank v. U. S.*, 1 Greene (Iowa) 553; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Indianapolis, etc., R. Co. v. Kinney*, 8 Ind. 402; *Coolidge v. Williams*, 4 Mass. 145; *Wales v. Stetson*, 2 Mass. 143; 3 Am. Dec. 39; *Hood v. Dighton Bridge*, 3 Mass. 263; *Perry v. Wilson*, 7 Mass. 393; *St. Louis River, etc., Co. v. Nelson Lumber Co.* (Minn. 1892), 52 N. W. Rep. 976; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *Drake v. Drake*, 4 Dev. (N. Car.) 110; *Perry v. Newsom*, 1 Ired. Eq. (N. Car.) 28; *Lee v. Shankle*, 6 Jones (N. Car.) 313; *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155; *McAden v. Jenkins*, 64 N. Car. 796; *McAfee v. Southern R. Co.*, 36 Miss. 666; *Bank of Louisiana v. Williams*, 46 Miss. 618; 12 Am. Rep. 319; *Galnes v. Coates*, 51 Miss. 335; *State v. Bentley*, 23 N. J. L. 538; *Bridge Co. v. Hoboken Land, etc., Co.*, 13 N. J. Eq. 81, 503; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 436; *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Camden, etc., R. Co. v. Briggs*, 22 N. J. L. 623; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Townsend v. Brown*, 24 N. J. L. 80; *Currier v. Marietta, etc., R. Co.*, 11 Ohio St. 228; *Stormfeltz v. Manor Turnpike Co.*, 13 Pa. St. 555; *Bank of Pennsylvania v. Com.*, 19 Pa. St. 144; *Packer v. Sunbury, etc., R. Co.*, 19 Pa. St. 211; *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 9; *Allegheny v. Ohio, etc., R. Co.*, 26 Pa. St. 355; *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464; *West Branch Boom Co. v. Dodge*, 31 Pa. St. 285; *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506; *Talmadge v. North American*

*Coal, etc., Co.*, 3 Head (Tenn.) 337; *Brennan v. Bradshaw*, 53 Tex. 330. See also *Tompkins v. Little Rock, etc., R. Co.*, 15 Fed. Rep. 6; 18 Fed. Rep. 344; 21 Fed. Rep. 370.

1. In *Parker v. Great Western R. Co.*, 7 M. & G. 288; 49 E. C. L. 287, *Tindal, C. J.*, said: "And it is to be observed that the language of these acts of Parliament is to be treated as the language of the promoters of them. They ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public."

In *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155, *Pearson, C. J.*, said: "It is well settled that contracts made by the state with individuals, in granting charters, are not to be construed by the same rules as contracts between individuals. In the latter, the rule of the common law, which is the same as common sense, is, 'words are to be taken in the strongest sense against the party using them,' on the idea that self-interest induces a man to select words most favorable for himself. It is otherwise when the state is a party, for it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant; and that 'the promoters,' as they are styled in *England*, or the 'lobby members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes." This language is quoted and approved in *McAden v. Jenkins*, 64 N. Car. 801. *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155, was reversed, on constitutional grounds, by the Supreme Court of the *United States* in 13 Wall. (U. S.) 269.

In *Coolidge v. Williams*, 4 Mass. 145, *Parsons, C. J.*, said: "Private statutes made for the accommodation of particular citizens or corporations ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication."

In *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 436, the court said: "It is a well-settled rule of construction



as contracts, and when the language leaves no doubt as to the legislative intent, there is no room for construction. The will of the legislature should control.<sup>1</sup>

*b. LIBERAL CONSTRUCTION*—(1) *Definition*.—A liberal construction is that by which the letter of the statute<sup>2</sup> is enlarged or restrained so as more effectually to accomplish the purpose intended. It is called also "equitable construction."<sup>3</sup>

in regard to a public grant that the grantee can take nothing not clearly given him by the grant. In cases of doubt the grant is construed in favor of the state and most strongly against the grantee."

In *May v. Frazee*, 4 Litt. (Ky.) 391; 14 Am. Dec. 169, the court by Mills, J., said: "It is true, it is decided by this court in the case of *Elmondorff*, etc. *v. Carmichael*, 3 Litt. (Ky.) 472; 14 Am. Dec. 86, that the recital in a private act of assembly cannot be evidence against strangers, or conclude their rights; still, if admissions were there made against the parties procuring the passage of the act, such admissions ought to be heard against them, on the principle that their writings and sayings may be used as evidence against them, and not for them. The recitals in such an act, as said in the case before cited, are evidence that facts were so represented to the legislature by the petitioners."

1. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Missouri*, etc., R. Co. *v. Kansas Pac. R. Co.*, 97 U. S. 491; *Winona*, etc., R. Co. *v. Barney*, 113 U. S. 618; *St. Paul*, etc., R. Co. *v. Grenhalgh*, 26 Fed. Rep. 563; *Wolcott v. Des Moines Co.*, 5 Wall. (U. S.) 681; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque*, etc., R. Co. *v. Des Moines*, etc., R. Co., 109 U. S. 329; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Nash v. Sullivan*, 29 Minn. 206; *Jackson*, etc., R. Co. *v. Davison*, 65 Mich. 416, citing *Johnson v. Ballou*, 28 Mich. 384; *Bowes v. Haywood*, 35 Mich. 241; *Fenn v. Kinsey*, 45 Mich. 446; *Rogers v. Port Huron*, etc., R. Co., 45 Mich. 460; *Farnsworth v. Minnesota*, etc., R. Co., 92 U. S. 49.

In *Missouri*, etc., R. Co. *v. Kansas Pac. R. Co.*, 97 U. S. 491, *Field, J.*, said: "It is always to be borne in mind in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by apply-

ing to the grant the rules of the common law which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments with words of present grant are operative if at all only as contracts to convey; but the rules of the common law must yield in this as in all other cases to the legislative will." Quoted with approval in *Nash v. Sullivan*, 29 Minn. 214.

In *Jackson*, etc., R. Co. *v. Davison*, 65 Mich. 430, the court, after analyzing the argument of defendant's counsel, said: "The fault of this reasoning is that it seeks to apply the principles which relate to common-law grants between private persons to an act of the legislature which differs from a grant of a private person in that it is both a grant and a law, and, as such, the intent of the law is to be kept in view and its purpose effectuated whenever the subject-matter of the grant comes in controversy; and that construction must be placed upon it which will preserve and carry out the object of the legislature, however such construction may conflict with the principles of the common law or prevent the attaching of equities which would spring from transactions between private parties."

2. 1 Bouv. Inst. 87.

3. Bouv. Law Dict., tit. *Construction*; *Anderson's Law Dict.*, tit. *Construction*.

"By an equitable construction, a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law maker could not set down every case in express terms." *Bacon's Abr.*, tit. *Statute* (I) 6.

"In law, all cases cannot be foreseen or expressed. The object of interpreting laws by what is called 'equity,' supplies as far as possible this deficiency by a recurrence to natural principles of

(2) *Early Application of Rule.*—As formerly understood, equitable construction extended to general cases the application of statutes which literally included special cases only.<sup>1</sup> And the doctrine was frequently invoked to exclude from the operation of a statute cases which were clearly within its letter, on the ground that they were not within the spirit and reason of the act.<sup>2</sup>

(3) *The Modern Rule.*—The extreme cases of equitable construction, it has been said, were justified only by the great con-

justice. It is the same with cases excepted by reason and necessity out of the prescribed rules." Potter's Dwaris 239.

When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. 1 Kent Com. 462; 10 Coke 101b; Eshleman's Appeal, 74 Pa. St. 47; People v. Utica Ins. Co., 15 Johns. (N. Y.) 380; 8 Am. Rep. 243; Holbrook v. Holbrook, 1 Pick. (Mass.) 258.

In *Somerset v. Dighton*, 12 Mass. 383, it is said: "But in the exposition of statutes such a construction will be given as will best effectuate the intention of the makers. In some cases the letter of a statute may be restrained by an equitable construction; in others enlarged; and in others, the construction may be even contrary to the letter, for a case may be within the letter and not within the meaning of a statute."

1. The word "ancestor" was construed to include "predecessor." 2 Inst. 242. A statute relating to "executors" was held to apply also to "administrators." *Eyston v. Studd*, 2 Plowd. 465. See *Hoguet v. Wallace*, 28 N. J. L. 526. A statute naming the "warden of the Fleet" was construed to include all jailers. *Platt v. Lock*, 1 Plowd. 35. An act giving a bill of exceptions to the rulings of the judges of the court of common pleas was construed to apply to all the superior courts at Westminster, and to the county courts, hundred courts, and courts baron, on the ground that they were still more liable to err. 2 Inst. 426; *Strother v. Hutchinson*, 4 Bing. N. Cas. 83; 33 E. C. L. 283. And a statute which directed judges of the king's bench to hear their cases in due order was extended by equitable construction to the judges of the other courts. 2 Inst. 256. The statute of Gloucester which named London only was held to apply to all cities and boroughs. 2 Inst. 321. A statute directing judges not to interfere with the Bishop of Norwich or his

clergy in spiritual suits was held to protect all other bishops. 2 Inst. 487. See *Platt v. Sheriffs of London*, 1 Plowd. 36. A statute which enacted that a vessel should not be adjudged a wreck, if a man, a dog, or a cat escaped from it, was held to include a ship from which any other animal escaped. 2 Inst. 165; 5 Rep. 107. In *Hill v. Grange*, 1 Plowd. 178, it was said: "When an act is made to remedy any mischief, there, in order to aid things in like degree, one action has been used for another; one thing for another; one place for another, and one person for another, notwithstanding that in some cases the thing is penal." See also *Wheatley v. Lane*, 1 Saund. 216, and note to *Eyston v. Studd*, 2 Plowd. 465.

2. The equitable doctrine of part performance, whereby contracts within the letter of the Statute of Frauds are excluded from its operation by judicial construction, arose from the operation of this rule. The declared purpose of the act was to prevent frauds and perjuries, and cases in which there was no danger of either were said to be out of the statute. *Atty. Gen'l v. Day*, 1 Ves. 221 (per Lord Hardwicke); *Lincoln v. Wright*, 4 De G. & J. 16; *Haigh v. Kaye*, L. R., 7 Ch. 474; *Williams v. Evans*, L. R., 19 Eq. 547; *Ungley v. Ungley*, 5 Ch. Div. 587; *Bond v. Hopkins*, 1 S. & L. 433 (per Lord Redesdale); *Lester v. Foxcroft*, 1 Colles 108; *Webster v. Webster*, 27 L. J. Ch. 115; *Wilson v. West Hartlepool Co.*, 2 De G. J. & G. 475; *Nunn v. Fabian*, L. R., 1 Ch. 35; *Hughes v. Morris*, 2 De G. M. & G. 349. The application of the rule to these cases was never recognized by the common-law courts. *Cocking v. Ward*, 1 C. B. 858; 50 E. C. L. 858; *Boydell v. Drummond*, 11 East 159. See *FRAUDS, STATUTES OF*, vol. 8, p. 738.

So, too, decisions extending the time within which a new action might be brought, where a former one was brought within the time named in the

ciseness of ancient statutes.<sup>1</sup> Again, it has been remarked that the lax interpretation of the period may have caused much of the looseness and lack of precision in the language employed by Parliament in contemporaneous statutes.<sup>2</sup> Whatever necessity there may have been for this method of construction in early times, it has long been considered dangerous,<sup>3</sup> and the courts have grown much more conservative. The modern rule is that where the language of a statute is plain and unambiguous it must not be modified by the courts; and if an ambiguity arises, the operation of the statute may be enlarged or restrained so far as is necessary to carry out the ascertained will of the legislature and no farther.<sup>4</sup>

Statute of Limitations, and was abated by the death of one of the parties, were due to an equitable construction of the Statute of Limitations. *Hodsdon v. Harridge*, 2 Wm. Saund. 64a; *Curlewis v. Mornington*, 7 El. & Bl. 283; 90 E. C. L. 281; *Wilcox v. Huggins*, 2 Str. 907; *Fitzgib. 172*, 189; *Piggott v. Rush*, 4 Ad. & El. 912; 31 E. C. L. 228.

So, where an act declared that no method of assigning or transferring stock, except that provided in the act, should be valid, and directed that the owner might devise it by will attested by two witnesses, it was held that where the owner devised stock by an unattested will, the executor was bound by the direction for the disposition of the property, notwithstanding the invalidity of the devise. *Ripley v. Waterworth*, 7 Ves. 440; *Franklin v. Bank of Eng.*, 1 Russ. 589.

To this class of decisions belong also refusals on the part of courts of equity to give relief against usurious contracts without payment of the debts and lawful interest. *Benfield v. Solomon*, 9 Ves. Jr. 184; *Eslava v. Elmore*, 50 Ala. 587; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Tooke v. Newman*, 75 Ill. 215; *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367; *Mitchell v. Oakley*, 7 Paige (N. Y.) 68; *Fulton Bank v. Beach*, 1 Paige (N. Y.) 429; *Utica Ins. Co. v. Scott*, 6 Cow. (N. Y.) 606; *Jackson v. Varick*, 2 Wend. (N. Y.) 294; *Miller v. Ford*, 1 N. J. Eq. 358; *Jordan v. Trumbo*, 6 Gill & J. (Md.) 102; *Legoux v. Wante*, 3 Har. & J. (Md.) 184; *McRaven v. Forbes*, 6 How. (Miss.) 569.

1. 2 Inst. 401; 10 Rep. 30b.

In *Gwynne v. Burnell*, 6 Bing. N. Cas. 453; 37 E. C. L. 451, Lord Brougham, after characterizing such construction as legislation and not interpretation, said: "This becomes particularly improper in dealing with a modern statute, because the extreme conciseness of

the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words, and the prolixity of modern statutes is still more remarkable than the shortness of the old."

2. *Wilson v. Knubley*, 7 East 134; 3 Smith 128 (per Lord Ellenborough).

3. *Brandling v. Barrington*, 6 B. & C. 475; 13 E. C. L. 238 (per Lord Tenterden); *Gwynne v. Burnell*, 6 Bing. N. Cas. 453; 37 E. C. L. 451 (opinion of Lord Brougham); *Colleham v. Cook*, Willes 397 (per Willes, C. J.); *Guthrie v. Fisk*, 3 B. & C. 183; 110 E. C. L. 48; *Entick v. Carrington*, 19 How. St. Tr. 1029, 1060.

4. *Ex parte Walton*, 17 Ch. Div. 746; *Edwards v. Edwards*, 2 Ch. Div. 291; *Abley v. Dale*, 11 C. B. 390; 73 E. C. L. 389; *Castrique v. Page*, 13 C. B. 463; 76 E. C. L. 462; *Mattison v. Hart*, 14 C. B. 385; 78 E. C. L. 383; *Macdougall v. Paterson*, 11 C. B. 769; 73 E. C. L. 767; *Gether v. Capper*, 15 C. B. 706; 80 E. C. L. 704; *Perry v. Skinner*, 2 M. & W. 476; *Eastern Union R. Co. v. Cochrane*, 9 Exch. 204; *Hollingsworth v. Palmer*, 4 Exch. 267; *Heslop v. Baker*, 6 Exch. 740; *Warburton v. Loveland*, 1 H. & B. 648; *Atty. Gen'l v. Hallett*, 2 H. & N. 375; *In re Hammersmith Rent Charge*, 4 Exch. 100.

In *Ex parte Walton*, 17 Ch. Div. 746, Jessel, M. R., said: "I should like to say a word or two as to the rules which are binding on all courts in regard to the construction of statutes as well as of all other instruments. Whatever may have been the case in times past, in modern times those rules have become perfectly well settled. They have become much more limited as regards the power of the courts and at the same time so well recognized as to be binding on this court and all other courts."

In *Caledonian R. Co. v. North British R. Co.*, 6 App. Cas. 114, Lord Sel-

The American rule is in substantial accord with the modern English rule. It is laid down as a fundamental principle of construction that effect must be given to the intent of the legislature, and where that intent is plainly expressed the language must be taken in its plain and ordinary signification. But when the court is confronted with an ambiguity, or an absurdity would arise from giving the language its ordinary meaning, the rules of construction are invoked to ascertain the true legislative intent, and the letter of an act may be sacrificed only so far as is necessary to give effect to such intent.<sup>1</sup>

borne, in construing the statute then under consideration, said: "The more literal construction ought not to prevail, if (as the court below has thought) it is opposed to the intentions of the legislature as apparent by the statute; and, if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." And in the same case at page 131, Lord Blackburn said: "Lord Wensleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Grey v. Pearson*, 6 H. L. Cas. 106, in the following terms: 'I have been long and deeply impressed with the wisdom of the rule now I believe universally adopted, at least in the courts of law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or some inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.' I agree in that completely; but, unfortunately, in the cases in which there is real difficulty, it does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words used, with reference to the subject-matter, is."

In *Abley v. Dale*, 11 C. B. 390; 73 E. C. L. 389, Jervis, C. J., said: "If the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though they do lead in our view of the case to an absurdity or manifest injustice. Words may be modi-

fied or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to the literal meaning."

1. *Kennedy v. Kennedy*, 2 Ala. 571; *Thompson v. State*, 20 Ala. 54; *Sprowl v. Lawrence*, 33 Ala. 674; *Reynolds v. Holland*, 35 Ark. 56; *Haney v. State*, 34 Ark. 263; *Ex parte Ellis*, 11 Cal. 222; *People v. Dana*, 22 Cal. 11; *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Tynan v. Walker*, 35 Cal. 634; *Farrell Foundry v. Dart*, 26 Conn. 376; *George v. Board of Education*, 33 Ga. 344; *Erwin v. Moore*, 15 Ga. 361; *Chandler v. Lee*, 1 Idaho, N. S. 349 (to avoid absurdity); *Frye v. Chicago etc., R. Co.*, 73 Ill. 399; *Castner v. Walrod*, 83 Ill. 171; 25 Am. Rep. 369; *Perry County v. Jefferson County*, 94 Ill. 214 (where literal interpretation leads to an absurdity); *People v. Hoffman*, 97 Ill. 234; *Maxwell v. Collins*, 8 Ind. 38; *Miller v. State*, 106 Ind. 415; *Middleton v. Greeson*, 106 Ind. 18; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308; *State v. Poydras*, 9 La. Ann. 165; *Bathurst v. Course*, 3 La. Ann. 260; *Commercial Bank v. Foster*, 5 La. Ann. 516; *Swift v. Luce*, 27 Me. 285; *Whitney v. Whitney*, 14 Mass. 92; *Somerset v. Dighton*, 12 Mass. 383; *Staniels v. Raymond*, 4 Cush. (Mass.) 314; *Shaw, C. J.*, in *Com. v. Kimball*, 24 Pick. (Mass.) 370; 35 Am. Dec. 326; *Wilde, J.*, in *Doane v. Phillips*, 12 Pick. (Mass.) 226; *Burlingame v. Bell*, 16 Mass. 318; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 250; *Mendon v. Worcester*, 10 Pick. (Mass.) 235; *Com. v. Cambridge*, 20 Pick. (Mass.) 267; *Brown v. Pendergast*, 7 Allen (Mass.) 427; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1; *Beall v. Harwood*, 2 Har. & J. (Md.) 167; 3 Am. Dec. 532;

*Cearfoss v. State*, 42 Md. 403; *Ingraham v. Speed*, 30 Miss. 410; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17; *Bidwell v. Whitaker*, 1 Mich. 469; *Barstow v. Smith, Walk.* (Mich.) 394; *State v. King*, 44 Mo. 283; *Riddick v. Governor*, 1 Mo. 147; *Riddick v. Walsh*, 15 Mo. 519; *State v. Brewster*, 42 N. J. L. 125; *Brown v. Wright*, 13 N. J. L. 240; *Associates of Jersey Co. v. Davison*, 29 N. J. L. 415; *Tonnele v. Hall*, 4 N. Y. 140; *Hyatt v. Taylor*, 42 N. Y. 259; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; 8 Am. Rep. 243; *Crocker v. Crane*, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228; *Murray v. New York Cent. R. Co.*, 3 Abb. App. Dec. (N. Y.) 339; *Allen v. Parish*, 3 Ohio 198; *Keith v. Quinney*, 1 Oregon 364; *Bradbury v. Wagonhorst*, 54 Pa. St. 180; *State v. Clarks-ville, etc., R. Co.*, 2 Sneed (Tenn.) 88; *People v. Hill*, 3 Utah 344 (false reference corrected); *Simonds v. Powers*, 28 Vt. 354; *Ryegate v. Wardsboro*, 30 Vt. 746; *Gilkey v. Cook*, 60 Wis. 133 (to avoid absurdity); *Palms v. Shawano County*, 61 Wis. 211 ("south" read "north"); *Encking v. Simmons*, 28 Wis. 272; *Chapman v. State*, 16 Tex. App. 76; *Wilkinson v. Leland*, 2 Pet. U. S. 627; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 64; *U. S. v. Buchanan*, 9 Fed. Rep. 689.

In *Com. v. Kimball*, 24 Pick. (Mass.) 366; 35 Am. Dec. 326, *Shaw, C. J.*, said: "It is unquestionably a well-settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute, and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature to avoid such conclusion."

In *Encking v. Simmons*, 28 Wis. 272, *Dixon, C. J.*, said: "The proposition, however it may once have been held or considered, that the courts, upon what is termed an equitable construction or otherwise, may, against the plain language of the statute, in opposition to the intent clearly expressed by the words, mitigate the 'violence of the letter' by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience, has been too long and too frequently rejected to be now the

subject of serious argument or doubt. Such doctrine, if it ever existed, was long since exploded, and the rule now uniformly recognized and acted upon is, that whatever else may be done with the words of a statute, they may never, in the language of Lord Bacon, 'be taken to a repugnant intent.'"

In *Farrell Foundry v. Dart*, 26 Conn. 376, *Storrs, C. J.*, said: "The rule of expounding statutes referred to by the plaintiff in error by which they may be sometimes extended beyond their words, does not apply to this case, because it is resorted to only in furtherance of the clear intention of the legislature, and where the words of an act are not plain or are doubtful."

In *Swift v. Luce*, 27 Me. 285, *Shepley, J.*, said: "But courts of justice can give effect to legislative enactments only to the extent to which they may be made operative by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments. This would be but an assumption by the judicial of the duties of the legislative department."

In *Cearfoss v. State*, 42 Md. 403, *Stewart, J.*, said: "It is only in cases where the meaning of a statute is doubtful that the courts are authorized to indulge in conjecture as to the intention of the legislature, or to look to consequences in the construction of the law."

In *Rudderow v. State*, 31 N. J. L. 512, *Elmer, J.*, said: "No principle is better settled or more important to be faithfully adhered to by courts called upon to enforce written statutes than, in the absence of ambiguity in the language used, no exposition shall be made which is in opposition to the express words; or, as the maxim is sometimes expressed, it is not allowed to interpret what has no need of interpretation."

In *State v. Brewster*, 42 N. J. L. 125, the court said: "Unless an intent, differing from that which arises from the literal sense of the words used, results from a resort to the context of the section or from acts *in pari materia*, the only duty of the court is to construe the words of the section naturally and literally." *citing* *Douglass v. Essex County*, 38 N. J. L. 214; *Camden, etc., R. Co. v. Com'rs*, 18 N. J. L. 71; *Townsend v. Brown*, 24 N. J. L. 89; *Gay v. Hervey*, 41 N. J. L. 39.

(4) *Remedial Statutes.*—Remedial statutes are made to supply defects or abridge superfluities in the law;<sup>1</sup> and the rule is that they are to be construed liberally for the suppression of the mischief and the advancement of the remedy.<sup>2</sup> In construing such statutes, the old law, the mischief, and the remedy must be kept in mind;<sup>3</sup> and, within the limits of the modern rule just examined, that which is within the mischief intended to be remedied

In *U. S. v. Fisher*, 2 Cranch (U. S.) 399, Washington, J., said: "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. But, if from a view of the whole law or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature."

1. 1 Black. Com. 86-87.

2. *Drayton v. Grimke*, 1 Bailey Eq. (S. Car.) 392; *Blake v. Heyward*, 1 Bailey Eq. (S. Car.) 208; *Turtle v. Hartwell*, 6 T. R. 429; *Twycross v. Grant*, 2 C. P. Div. 530; *Wimbish v. Tailbois*, 1 Plowd. 47; *Heydon's Case*, 3 Rep. 7b; *Magdalen College's Case*, 11 Rep. 74; *St. Peter's v. Middleborough*, 2 Y. & J. 196; *Johnes v. Johnes*, 3 Dow. 15; *Atcheson v. Everitt*, 1 Cowp. 391; *Dapuetto v. Wyllie, L. R.*, 5 P. C. 482; *Reg. v. Pilkington*, 2 El. & Bl. 546; 75 E. C. L. 546; *U. S. v. Freeman*, 3 How. (U. S.) 565; *U. S. v. Rhodes*, 1 Abb. (U. S.) 36; *Jacob v. U. S.*, 1 Brock. (U. S.) 520; *Vigo's Case*, 21 Wall. (U. S.) 648; *Silver v. Ladd*, 7 Wall. (U. S.) 226; *Parks v. Turner*, 12 How. (U. S.) 46; *Sprowl v. Lawrence*, 33 Ala. 674; *White County v. Key*, 30 Ark. 603; *White v. Steam Tug Mary Ann*, 6 Cal. 462; *Cullerton v. Mead*, 22 Cal. 95; *Wolcott v. Pond*, 19 Conn. 597; *First School Dist. v. Ufford*, 52 Conn. 44; *Neal v. Moultrie*, 12 Ga. 104; *Shumate v. Williams*, 34 Ga. 251; *State v. Blair*, 32 Ind. 313; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260; *Jackson v. Warren*, 32 Ill. 331; *Smith v. Stevens*, 82 Ill. 554; *New Orleans v. St. Romes*, 9 La. Ann. 573; *Fox v. Sloo*, 10 La. Ann. 11; *Brown v. Pendergast*, 7 Allen (Mass.) 427; *Whitney v. Whitney*, 14 Mass. 88; *Edwards v. Goulding*, 38 Miss. 118; *Excelsior Mfg. Co. v. Keyser*, 62 Miss. 155; *Franklin v. Franklin*, 1 Md. Ch. 342; *Ordway v. Central Nat. Bank*, 47

Md. 217; *Camden, etc., R. Co. v. Briggs*, 22 N. J. L. 676; *Davenport v. Barnes*, 2 N. J. L. 211; *Smith v. Allen*, 79 Me. 536; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Hudler v. Golden*, 36 N. Y. 446; *Van Hook v. Whitlock*, 2 Edw. Ch. (N. Y.) 304; *Gillespie v. Winberg*, 4 Daly (N. Y.) 325; *Stuyvesant v. New York*, 7 Cow. (N. Y.) 604; *Hart v. Albany*, 9 Wend. (N. Y.) 571; *Gillet v. Moody*, 3 N. Y. 479; *Wilber v. Paine*, 1 Ohio 256; *Pancoast v. Ruffin*, 1 Ohio 385; *Burgett v. Burgett*, 1 Ohio 481; 13 Am. Dec. 634; *McCormick v. Alexander*, 2 Ohio 74; *Tucker v. Constable*, 16 Oregon 407; *Poor Dist. v. Poor Dist.*, 109 Pa. St. 579; *Hassenplug's Appeal*, 106 Pa. St. 527; *Quinn v. Fidelity Ben. Assoc.*, 100 Pa. St. 382; *Schuykill Nav. Co. v. Loose*, 19 Pa. St. 15; *Taylor v. McGill*, 6 Lea (Tenn.) 294; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 147; *Congdon v. Congdon*, 59 Vt. 597; *Janesville Hay Tool Co. v. Boyd*, 35 W. Va. 240; and other cases cited in other notes to this section.

3. *Heydon's Case*, 3 Rep. 7b; *Plowd.* 205; *Co. Litt.* 11, 42.

In 1 Black. Com. 87, it said: "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." Cited with approval in *State v. Canton*, 43 Mo. 48; *State v. Denny*, 67 Ind. 155; *Davis v. Tarwater*, 13 Ark. 58; *McKenzie v. Murphy*, 24 Ark. 155; *Wassell v. Tunnali*, 25 Ark. 101; *Wallis v. Smith*, 29 Ark. 354.

In *Heydon's Case*, 3 Rep. 7b, *Plowd.* 205, the following resolutions of the barons of the exchequer were declared to be essential in the construction of all statutes: "For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or

is considered within the statute though not within the letter, and, that which is not within the mischief is not considered within the statute, though within the letter.<sup>1</sup> This class of statutes is very comprehensive and includes acts on a great variety of subjects,

enlarging of the common law, four things are to be discerned and considered: *First*, What was the common law before the making of the act? *Second*, What was the mischief and defect against which the common law did not provide? *Third*, What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And, *Fourth*, the true reason of the remedy. It was then held to be the duty of the judges at all times to make such construction as should suppress the mischief and advance the remedy; putting down all subtle inventions and evasions for continuance of the mischief, *et pro privato commodo*; and adding force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico*." See also *Mayo v. Wilson*, 1 N. H. 55; *Howe v. Peckam*, 6 How. Pr. (N. Y.) 229; *Van Horne v. Dorance*, 2 Dall. (U. S.) 316; *Talbot v. Simpson*, Pet. (C. C.) 188.

1. *Eyston v. Studd*, 2 Plowd. 464; *Woodruff v. State*, 3 Ark. 285; *Maxwell v. Collins*, 8 Ind. 38; *Smith v. Stevens*, 82 Ill. 554; *State v. Boyd*, 2 Gill & J. (Md.) 374; *Baltimore v. Root*, 8 Md. 95; *State v. Canton*, 43 Mo. 48; *People v. Lacombe*, 99 N. Y. 43; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362; *Brown v. Gates*, 15 W. Va. 165; *U. S. v. Freeman*, 3 How. (U. S.) 565.

In *State v. Canton*, 43 Mo. 48, the court said: "It is an established rule applicable to the construction of all remedial statutes that cases within the reason, though not within the letter of a statute, shall be embraced by its provisions; and that cases not within the reason, though within the letter, shall not be taken to be within the statute."

In *State v. Boyd*, 2 Gill & J. (Md.) 375, the court said: "Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes though within the letter, on the principle that what is within the intention of the makers of a statute is within the statute though not within the letter; and that what is within the letter of the statute and not within the intention of the makers is not within the statute, it being an acknowledged rule in con-

struction of statutes that the intention of the makers ought to be regarded."

In *Phillips v. Pope*, 10 B. Mon. (Ky.) 172, the court said: "It is said that to construe a statute as if certain words which it contains were not in it and as if it did contain other words which are not in it, is transcending the judicial function and assuming that of the legislature. But while it is admitted that the court has no power to make the law, it is equally true that it is their province and duty so to expound the statutes as to ascertain and effectuate the will of the law-makers. And experience has shown that if every word or clause of every statute were to have its literal force and effect without regard to the context and spirit of the whole or to the subject-matter or the causes or consequences of the enactment, and of the construction, some statutes might be found wholly incapable of enforcement, while others might in their operation defeat, or fall entirely short of, their manifest object."

In *Mason v. Rogers*, 4 Litt. (Ky.) 377, the court said: "The literal interpretation of an act is certainly not the interpretation which either reason or law requires to be given to it; for it is not the words of the act but the will of the legislature which constitutes the law; and though words are the most common they are not the only signs of the legislative will. . . . And it is therefore an established rule of construction, applicable to all remedial statutes, that cases within the reason, though not within the letter of the statute, shall be embraced by its provisions, and cases not within the reason, though within the letter, shall not be taken to be within the statute," citing *Stradling v. Morgan*, 1 Plowd. 206, and *Eyston v. Studd*, 2 Plowd. 464.

In *People v. Lacombe*, 99 N. Y. 49, the court said: "A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within the letter. It is the spirit and purpose of the statute which are to be regarded in its interpretation, and if these find fair expression in the statute,

some of the more important of which are acts for the suppression of fraud;<sup>1</sup> acts concerning the administration of justice;<sup>2</sup> acts providing for the redemption of property sold for the non-payment of taxes;<sup>3</sup> acts regulating the practice of law;<sup>4</sup> acts

it should be so construed as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some of the provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the law-makers," citing *People v. Com'rs of Taxes*, 95 N. Y. 558; *Burch v. Newbury*, 10 N. Y. 389; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 461; *People v. New York Cent. R. Co.*, 13 N. Y. 78; *Donaldson v. Wood*, 22 Wend. (N. Y.) 397; *Watervliet Turnpike Co. v. McKean*, 6 Hill (N. Y.) 619; *Com. v. Kimball*, 24 Pick. (Mass.) 370; 35 Am. Dec. 326.

1. *Heydon's Case*, 3 Rep. 7b; *Wimbish v. Tailbois*, 1 Plowd. 47; *White County v. Key*, 30 Ark. 603; *White v. Steam Tug Mary Ann*, 6 Cal. 470; *Carey v. Giles*, 9 Ga. 253; *Sharp v. New York*, 31 Barb. (N. Y.) 572; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 289; 3 Am. Dec. 625; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Bank of U. S. v. Lee*, 13 Pet. (U. S.) 107.

In *Carey v. Giles*, 9 Ga. 259, it is said: "It is a fundamental maxim of the common law, as laid down by Lord Bacon, and one which is never lost sight of by the courts, that a statute made for the suppression of a fraud, or to give a more speedy remedy for a right, ought to be construed liberally, because such construction is for the furtherance of justice."

In *Bank of U. S. v. Lee*, 13 Pet. (U. S.) 118, the court said: "That a liberal construction should be given to the clause in the *Virginia* statute for the suppression of fraud, we admit; this is the well-established rule in construing the statutes of *Elizabeth*, which the first section of the *Virginia* statute substantially adopts," citing *Heydon's Case*, 3 Rep. 7b; 1 Black. Com. 88; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 289; 3 Am. Dec. 625.

2. *Mitchell v. Mitchell*, 1 Gill (Md.) 84; *White County v. Key*, 30 Ark. 603; *Willis v. Fincher*, 68 Ga. 444; *Fisher v. Hervey*, 6 Colo. 16; *State v. Buchanan County Ct.*, 41 Mo. 254; *Quinn v. Fidelity Ben. Assoc.*, 100 Pa. St. 382; *Hassenplug's Appeal*, 106 Pa. St. 527;

*Clark's Succession*, 11 La. Ann. 124; *Larkin v. Saffarans*, 15 Fed. Rep. 147.

Under the Common-Law Procedure act of 1854, which provided for a discovery of documents upon an affidavit by a party to an action, it was held that the affidavit must be made by the party and not by his attorney. *Christopherson v. Lotinga*, 15 C. B. N. S. 809; 109 E. C. L. 808; *Herschfeld v. Clarke*, 11 Exch. 712. But in *Kingsford v. Great Western R. Co.*, 16 C. B. N. S. 761; 111 E. C. L. 761, it was held that where the party applying for a discovery was a corporation, the affidavit might be made by the attorney as the corporation could not make it.

Statutes giving the right of appeal are liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored. *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Arceneaux v. Benoit*, 21 La. Ann. 673; *Converse v. Burrows*, 2 Minn. 240.

3. *Alter v. Shepherd*, 27 La. Ann. 207; *Corbett v. Nutt*, 10 Wall. (U. S.) 464.

In *Dubois v. Hepburn*, 10 Pet. (U. S.) 22, the court said: "A law authorizing the redemption of lands so sold, ought to receive a liberal and benign construction in favor of those whose estates will be otherwise divested, especially where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner."

4. Statutes relating to amendments are liberally construed in furtherance of trial upon the merits. *Fidler v. Hershey*, 90 Pa. St. 366; *Bolton v. King*, 105 Pa. St. 83; *Dick's Appeal*, 106 Pa. St. 596; *Nash v. Adams*, 24 Conn. 33; *Spencer v. Howe*, 26 Conn. 201; *Hoyt v. Smith*, 27 Conn. 472; *Beers v. Woodruff, etc.*, Iron Works, 30 Conn. 308; *Stuart v. Corning*, 32 Conn. 105; *Bulkley v. Andrews*, 39 Conn. 523.

A statute regulating the amount of attorneys' fees in mortgage foreclosures has been given a retrospective operation. *Kossuth County v. Wallace*, 60 Iowa 508.

Statutes extending the time within which new actions may be brought in



providing indemnity for those who suffer damages by reason of some other person's exercise of a statutory privilege; <sup>1</sup> acts making towns liable for injuries caused by defects in highways; <sup>2</sup> a statute giving double damages for injuries by dogs; <sup>3</sup> acts to quiet title to real estate; <sup>4</sup> statutes of mortmain; <sup>5</sup> acts to legitimate the offspring of marriages otherwise void; <sup>6</sup> registration acts; <sup>7</sup> an act requiring a non-suited plaintiff to pay the costs of the first action before bringing a second; <sup>8</sup> an act abolishing forms of action *ex contractu*; <sup>9</sup> and acts to prevent unjust discrimination by railroads. <sup>10</sup> It has been held that acts providing for laborers' liens are remedial and should be construed liberally. <sup>11</sup> Statutes for the benefit of married women should be construed liberally, <sup>12</sup> as should also statutes passed for the public good; <sup>13</sup> and by the weight of authority, statutes providing for homestead and personal property exemptions are entitled to a liberal construction. <sup>14</sup>

c. EXCEPTIONAL CONSTRUCTION—(1) *In General*.—When to give the words of a statute their ordinary meaning, or to adhere strictly to the arrangement of words and phrases of sentences, would result in manifest contradiction of, or inconsistency with, the plain purpose of the law, evident mistakes, accidental omissions, and the improper use of words, may be remedied, the ordinary meaning may be modified, and even the structure of sentences may be altered, to prevent such a result. <sup>15</sup>

cases where actions were brought within the time specified in the Statute of Limitations, but failed through some error, are construed liberally. *Coffin v. Cottle*, 16 Pick. (Mass.) 383; *Johnston v. Sikes*, 56 Conn. 589.

1. *Boston, etc., Mill Corp. v. Gardner*, 2 Pick. (Mass.) 37 (per Parker, C. J.); *New York v. Lord*, 17 Wend. (N. Y.) 285.

2. *Reed v. Northfield*, 13 Pick. (Mass.) 94; 23 Am. Dec. 662 (per Shaw, C. J.).

3. *Mitchell v. Clapp*, 12 Cush. (Mass.) 278; *Le Forest v. Tolman*, 117 Mass. 109; 19 Am. Rep. 400.

4. *Holmes v. Chester*, 26 N. J. Eq. 79.  
5. *Doe v. Waterton*, 3 B. & Ald. 151;  
5 E. C. L. 247.

6. *Brower v. Bowers*, 1 Abb. App. Dec. (N. Y.) 214; *Baity v. Cranfill*, 91 N. Car. 293; 49 Am. Rep. 641; *Beall v. Beall*, 8 Ga. 210.

7. *Cheval v. Michals*, 1 Stra. 664; *Worsley v. Demattos*, 1 Burr. 467; *Le Neve v. Le Neve*, 3 Atk. 648; *Doe v. Allsop*, 5 B. & Ald. 142; 7 E. C. L. 46; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373; *Janesville Hay Tool Co. v. Boyd*, 35 W. Va. 240.

8. *Smith v. Allen*, 79 Me. 536.

9. *Jones v. Gordon*, 124 Pa. St. 263.

10. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567; *State v. Fremont, etc., R. Co.*, 22 Neb. 313.

11. *In re Hope Mining Co.*, 1 Sawy. (U. S.) 710; *Pinkerton v. Le Beau* (S. Dak. 1893), 54 N. W. Rep. 97, where it is said that the rule of strict construction has been abolished by statute. But see *Esterley's Appeal*, 54 Pa. St. 192, where it is held that such statutes are in derogation of the common law and should be construed strictly. See also *supra*, this title, *Strict Construction—In Derogation of Common Law*.

12. *Warford v. Noble*, 9 Biss. (U. S.) 324.

13. *U. S. v. State Bank*, 6 Pet. (U. S.) 35; *Beaston v. Farmers' Bank*, 12 Pet. (U. S.) 134; *Marshall v. Vultee*, 1 E. D. Smith (N. Y.) 294.

14. See *supra*, this title, *Strict Construction—Exemptions from Liabilities*.

15. *Atty. Gen'l v. Lockwood*, 9 M. & W. 398; *Miller v. Salomons*, 7 Exch. 475; *Becke v. Smith*, 2 M. & W. 195; *Wright v. Williams*, 1 M. & W. 97; *Hollingworth v. Palmer*, 4 Exch. 267; *Ex parte Rashleigh*, 2 Ch. Div. 9; *Com. v. Kimball*, 24 Pick. (Mass.) 366; 35 Am. Dec. 326. See also *AND*, vol.

It is often provided in statutes that acts done "under," "by virtue of," or "in pursuance of," the same shall not be actionable, except on certain conditions; and the statutes set forth the time and manner of proceeding when such acts are actionable. It is obvious that these words are not to be taken in their literal import, for acts done strictly under authority of the law cannot be actionable. Such provisions have been uniformly extended to those cases where the defendant has acted with honest intention under color of the statute, but where his acts or omissions are not in truth such as are justified by the statutes conferring upon him his authority.<sup>1</sup>

(2) *Interpolation and Elimination.*—Courts cannot add to, or

1, p. 569; OR, vol. 17, p. 218; *supra*, this title, *Presumptions—as to Grammatical Construction.*

1. *Wilson v. Halifax*, L. R., 3 Exch. 114; *Newton v. Ellis*, 5 El. & Bl. 115; 85 E. C. L. 114; *Greenway v. Hurd*, 4 T. R. 553; *Parton v. Williams*, 3 B. & Ald. 330; 5 E. C. L. 307; *Roberts v. Orchard*, 2 H. & C. 769; *Hughes v. Buckland*, 15 M. & W. 346; *Booth v. Clive*, 10 C. B. 827; 70 E. C. L. 826; *Carpue v. London, etc., R. Co.*, 5 Q. B. 747; 48 E. C. L. 746; *Tarrant v. Baker*, 14 C. B. 199; 78 E. C. L. 198; *Burling v. Harley*, 3 H. & N. 271; *Hopkins v. Crowe*, 4 Ad. & El. 774; 31 E. C. L. 177; *Kine v. Evershed*, 10 Q. B. 143; 59 E. C. L. 142; *Hermann v. Seneschal*, 13 C. B. N. S. 392; 106 E. C. L. 391; *Downing v. Capel*, L. R., 2 C. P. 461; *Leete v. Hart*, L. R., 3 C. P. 322; *Chamberlain v. King*, L. R., 6 C. P. 474; *Selmes v. Judge*, L. R., 6 Q. B. 724; *Mason v. Aird*, 51 L. J. Q. B. 244; *Denny v. Thwaites*, 2 Exch. Div. 21; *Mitchell v. Cowgill*, 4 Binn. (Pa.) 20.

In *Jones v. Hughes*, 5 S. & R. (Pa.) 301; 9 Am. Dec. 364, where the Act of Assembly extended to the magistrate the privilege of a previous notice of action for acts done "in the execution of his office," Gibson, J., said: "It may be laid down as a general rule that wherever the officer has acted honestly, although mistakenly; where he supposed he was in the execution of his duty, although he had no authority to act, he is entitled to protection of the Act of Assembly."

In *Booth v. Clive*, 10 C. B. 827; 70 E. C. L. 826, where an act provided that in actions and in prosecutions to be commenced against any person for anything done "in pursuance of the act," a notice in writing of such action and the cause thereof should be given to the defendant

one calendar month at least before the commencement of the action, it was held in a case against the judge of a county court for making an order committing the plaintiff to jail for disobedience of an order for payment of certain installments, after due service upon him of a writ of prohibition, that if the defendant acted upon the *bona fide* belief that his duty as judge of the county court rendered it incumbent upon him to do so, notwithstanding the prohibition, the act should be considered as done in pursuance of the county court act and the judge was entitled to notice of action.

In *Read v. Coker*, 13 C. B. 850; 76 E. C. L. 848, Maule, J., *approving and following Booth v. Clive*, 10 C. B. 827; 70 E. C. L. 826, said: "It decides that a party is entitled to notice of action provided he has acted *bona fide* in belief that he is pursuing the statute, even though there may be no reasonable foundation for such belief."

And in *Horn v. Thornborough*, 3 Exch. 846, Rolfe, B., said: "I am reported to have said in *Hughes v. Buckland*, 15 M. & W. 265, and I have no doubt correctly, that 'All who *bona fide* and reasonably think that they fill the character mentioned in the several statutes, and act in pursuance of them, are protected.'"

**Acts "Under Warrant."**—In *Parton v. Williams*, 3 B. & Ald. 330, 5 E. C. L. 307, where an act for the protection of constables, provided protection for such officers for anything done in obedience to any warrant, it was held that a constable who, acting under a warrant commanding him to take the goods of A, took the goods of B, believing them to belong to A, was entitled to the protection of the act.

So in *Gosdon v. Elpick*, 4 Exch. 445,

take from, the words of a statute to give effect to any supposed intention of the legislature; but when the intention can be ascertained with reasonable certainty, words may be altered or supplied in the statute, so as to give it effect and avoid any repugnancy to, or inconsistency with, such intention.<sup>1</sup>

it was held that a constable who acts *bona fide*, believing that he is doing his duty, is, though mistaken, within the protection of that act.

And in *Wedge v. Berkeley*, 6 Ad. & El. 663, 34 E. C. L. 167, it was held that a magistrate, sued for detaining goods on suspicion of felony, was entitled to notice under that act if he proceeded under a *bona fide* belief that he was executing his duty, although it were proved that he had no reasonable ground of suspicion.

"Done" Including "Omitted."—These statutes requiring notice of action for anything "done" under them are construed as including omission of an act which ought to be done, as well as the commission of a wrongful one. *Wilson v. Halifax*, L. R., 3 Exch. 114; *Poulsum v. Thirst*, L. R., 2 C. P. 449; *Newton v. Ellis*, 5 El. & Bl. 115; 85 E. C. L. 114.

1. *Quin v. O'Keefe*, 10 Ir. C. L. N. S. 393; *East London R. Co. v. Whitechurch*, L. R., 7 H. L. 89; *In re Wainwright*, 1 Phil. 258; *The Beta*, 3 Moo. N. S. 23; *Ex parte Greenwood*, 27 L. J. 28; *Moyle v. Jenkins*, 51 L. J. Q. B. 112; *Wilson v. Nightingale*, 8 Q. B. 1035; 55 E. C. L. 1034; *Kennedy v. Gibson*, 8 Wall. (U. S.) 491; *Donohue v. Ladd*, 31 Minn. 244; *Furey v. Gravesend Tp.*, 104 N. Y. 410; *Thurston v. State*, 3 Coldw. (Tenn.) 115; *Worth v. Peck*, 7 Pa. St. 268; *Big Black Creek Imp. Co. v. Com.*, 94 Pa. St. 455; *Fairchild v. Masonic Hall Assoc.*, 71 Mo. 526.

"If in any law we find the omission of something essential to it, or which is a necessary result of its provisions and requisite to give the law its full effect, we may supply what is wanting, but not expressed, and extend the law to what it was manifestly intended to embrace but in its terms does not include." *Potter's Dwarrie*, 140, 141.

In *Philadelphia v. Ridge Ave. Pass. R. Co.*, 102 Pa. St. 106, where an act authorizing the directors of a road to declare dividends of the profits "at such time or times as they may deem expedient," further provided, that "the said company shall annually pay into the treasury of the city of Philadelphia, for the use of the said city, the tax of six

per centum upon so much of any dividend declared which may exceed six per centum upon their said capital stock," it was held that the provision for the payment annually of a tax on any dividend declared, etc., contemplated that said tax should be based on the aggregate dividends declared in any one year and not upon any single dividend. To accomplish this purpose, the court thought it essential to supply the words "within the year."

An act provided that no witness before an election inquiry should be excused from answering self-criminating questions relating to corrupt practices at the election under inquiry, and entitled him, when he answered every question relating to those matters, to a certificate of indemnity declaring that he had answered all such criminating questions. It was held that the words "truly in the opinion of the commissioners" should be understood or inserted. *Reg. v. Hulme*, L. R. 5 Q. B. 377.

An act provided that "this act shall take effect from and after the 15th day of May next." It was held, that in view of all its provisions and the purpose of the act, it was evidently in the mind of the legislature that the act should take effect from and after the 15th day of May next thereafter; and the act was so construed. *Fosdick v. Perrysburg*, 14 Ohio St. 472.

A statute provided that a person, on conviction of a specified offense, was to be imprisoned in the penitentiary not less than two nor more than five years, and an amendatory act added the words "or by fine and imprisonment, one or both, at the discretion of the jury trying the same." The court held that it was required to supply after the word "or" the words "be punished." *Turner v. State*, 40 Ala. 21.

In an act making it penal "to buy, sell or receive from any slave," etc., the word "to" was interpolated to give effect to the word "sell." *Worrell v. State*, 12 Ala. 732.

A law provided that "the keeper of a boarding house shall have the same lien upon, and right to retain, the baggage and effects of any boarder for the

And, on the other hand, words and phrases which might operate to defeat the clear purpose of a statute, or which would have no sensible meaning, should be eliminated; notwithstanding the rule that full effect must be given to every part of a statute.<sup>1</sup>

amount which may be due for board by such boarder, to the same extent and in the same manner as innkeepers have such lien and such right of detention." It was held that the words "with respect to the baggage and effects of their guests" should be supplied to give effect to the obvious intention of the law. *Nichols v. Halliday*, 27 Wis. 406.

An act provided, that "if an insolvent petitions" for a discharge from prison, the insolvent court should refer his petition to the court of the district where he was imprisoned, but made no provision for cases where the petitioner was a creditor. The court, however, considered that the intention to include the latter sufficiently appeared, and the words "if an insolvent petitions" were understood to have merely put that case as an example of the more general intention, viz., if a petition be presented. *Reg. v. Dowling*, 8 El. & Bl. 605; 92 E. C. L. 605.

A statute authorized an aqueduct company to take and use the waters of two ponds named, and of a certain lake. It was further provided in the statute that nothing in the act should be construed to authorize the company "to raise the water of any of said ponds above higher-water mark, nor to drain any of them below low-water mark." It was held that the restriction applied to the lake as well as to the ponds. *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394.

**Transposition.**—The imperfect meaning of phrases may be corrected in order to give effect to a statute, by changing the order of the words. *Lyde v. Barnard*, 7 M. & W. 101. So the phrase "current expenses of the year" was read "expenses of the current year." *Babcock v. Goodrich*, 47 Cal. 488. See also *Matthews v. Com.*, 18 Gratt. (Va.) 989; *Doe v. Considine*, 6 Wall. (U.S.) 458.

**Strict Construction.**—Interpolation and the insertion of words, and exceptional construction generally, although necessary to effect the evident intention of the law-makers, has been forbidden in acts within the rule of strict construction. In *Underhill v. Longbridge*, 29 L. J. M. C. 654, where the owner of mines was required, under penalty, in case, first, of loss of life in

the mine by accident, or, second, of personal injury arising from explosion, to send notice of such accident within twenty-four hours "from the loss of life" (omitting the case of personal injury), the court refused to supply the obvious omission in the latter branch of the sentence, and held that notice was not necessary where personal injury from explosion, short of loss of life, had occurred.

An act which empowered inspectors to examine "weights, measures and scales" in shops, and if, upon examination, it should appear that the said weights or measures were light or unjust, to seize them, was held not to authorize the seizure of scales. *Thomas v. Stephenson*, 2 El. & Bl. 108; 75 E. C. L. 107.

To effectuate the intention of the legislature, it was necessary to interpolate the words "any other person who." The court refused to do this, as the result would have been to bring a person within a penal enactment. *Reg. v. Davis*, L. R., 1 C. C. 272. See also *Ex parte National Mercantile Bank*, 15 Ch. Div. 42; *Broadhead v. Holdsworth*, 2 Exch. Div. 321; *Coe v. Lawrence*, 1 El. & Bl. 516; 72 E. C. L. 516.

In *Southwestern R. Co. v. Cohen*, 49 Ga. 627, where an act prohibited the collection of the consideration for any commodity sold by weight or measures not properly marked, the court refused to extend the act so as to include the consideration for articles bought by such weight and measures.

1. *Lyde v. Barnard*, 7 M. & W. 116; *Hall v. Knox*, 4 B. & S. 515; 116 E. C. L. 514; *U. S. v. Rossvally*, 3 Ben. (U. S.) 157; *U. S. v. Stern*, 5 Blatchf. (U. S.) 512; *McCahan v. Hirst*, 7 Watts (Pa.) 175; *Com. v. Marshall*, 69 Pa. St. 332; *State v. Lee*, 37 Iowa 402; *State v. Beasley*, 5 Mo. 91; *State v. Heman*, 70 Mo. 441; *Pond v. Maddox*, 38 Cal. 572; *Chapman v. State*, 16 Tex. App. 76.

In *Stone v. Yeovil*, 1 C. P. Div. 701, Brett, J., said: "It is a canon of construction, that if it be possible, effect must be given to every word of an act of Parliament, or other document; but that, if there be a word or phrase therein to which no sensible meaning can be

(3) *Correction of Obvious Errors.*—Where it is manifest upon the face of an act that an error has been made in the use of words, the court may correct the error and read the statute as corrected, in order to give effect to the obvious intention of the legislature.<sup>1</sup>

given, it must be eliminated." And in this case, the word "such," in the act under consideration, which provided for the assessment of purchase money for lands taken from parties under disability and compensation for injury, "to any such lands" was eliminated as being inconsistent with the clear intention.

In *U. S. v. Stern, 5 Blatchf. (U. S.) 512*, where an act relating to the offense of bribing officers of the *United States* provided, that if any one shall be thereof convicted, he shall be liable to indictment, etc., the words "shall be thereof convicted" were eliminated, on the ground that their retention would render the statute inoperative.

An act provided that "if any guardian of any white female under the age of eighteen years, or of any other person under whose care or protection any such female shall have been confided, shall defile her," etc. It was held that the word "of" before "any other person" should be stricken out. *State v. Acuff, 6 Mo. 55.*

In *State v. Beasley, 5 Mo. 91*, it was held that the word "such" should be stricken from the phrase "if any such person or persons," because it was apparent that it had no reference to anything preceding it.

1. *Haney v. State, 34 Ark. 263* ("fifth" read "fourth"); *Metropolitan Board of Works v. Steed, 8 Q. B. D. 445* ("or" read "nor"); *People v. Hoffman, 97 Ill. 234* ("*ad satisfaciendum*" read "*ad respondendum*"); *Jocelyn v. Barrett, 18 Ind. 128* ("acts" read "act"); *Moody v. Stephenson, 1 Minn. 401* ("penal judgments" read "final judgments"); *Graham v. Charlotte, etc., R. Co., 64 N. Car. 631* ("venire" read "venue"); *Gould v. Wise, 18 Nev. 253* ("on" read "or"); *Levering v. Philadelphia, etc., R. Co., 8 W. & S. (Pa.) 459* ("or" read "on"); *Ex parte Hedley, 31 Cal. 109* ("without" read "within"); *Chambers v. State, 25 Tex. 307* ("provisions" read "proviso"); *Burch v. Newbury, 10 N. Y. 374* ("first day of July" read "first Monday in July"); *Mankel v. U. S., 19 Ct. of Cl. 295* ("Lewis Mankel" read "Louis Mankel").

In *Lancaster Co. v. Frey, 128 Pa. St. 593*, the word "county" was corrected

and read "city." Clark, J., speaking of the use of the word "county" in the statute, said: "It is a mistake apparent on the face of the act which may be rectified by the context. In making this correction we are not to be understood as correcting the act of the legislature. We are enabled to carry out the intention of the legislature from the plain and obvious meaning of the context in which the real purpose or intention of the legislature is manifest. It falls within the province of the courts to correct a merely clerical error in an act of the assembly when, as it is written, it involves a manifest absurdity, and the error is plain and obvious."

**Erroneous Descriptions May be Corrected.**—*Brown v. Hamlett, 8 Lea (Tenn.) 732*; *Reynolds v. Holland, 35 Ark. 56*; *State v. Orange, 32 N. J. L. 49*; *State v. Platt, 2 S. Car. 150*; *16 Am. Rep. 647*; *Atty. Gen'l v. Chicago, etc., R. Co. 35 Wis. 557*; *State v. Timme, 56 Wis. 423.*

An act contained a description of property as "Dennis" Mill property; it, however, appeared that there was no "Dennis" Mill property, but "Dunn's" Mill property, answering the description, and was clearly that intended by the act; the court corrected the description. *Lindsley v. Williams, 20 N. J. Eq. 93.*

And in *Palms v. Shawano County, 61 Wis. 215*, the word "south" in the description of county boundaries was considered a clerical error, and was corrected so as to read "north." The court said: "The word 'south' destroys all sense of the description; the word 'north' makes it sensible, and the boundary complete." And this rule was stated: "The court will inspect the whole act, and if the true intention of the legislature can be reached, the false description will be rejected as surplusage or words substituted in place of those wrongfully used which will give effect to the law."

In *State v. Timme, 56 Wis. 425*, Cassoday, J., said: "We agree that questions of misdescription in statutes, like all other questions calling for construction, merely present questions of intent," and held that "Northern Mechanical and Agricultural Society" in an act was a

The power to make such corrections is well established, but it is exercised only where the error is so manifest as to leave no doubt in the judicial mind as to the actual intent of the legislature.<sup>1</sup>

**9. Special Classes—*a.* PRIVATE AND SPECIAL—(1) *In General.*—**The rules of interpretation applicable to private statutes do not, as a rule, differ from those applicable to public and general acts.<sup>2</sup>

**(2) *General and Particular Statutes and Clauses.*—**A general law will not repeal an earlier special act by mere implication.<sup>3</sup>

sufficient description for "The Northern Wisconsin Agricultural and Mechanical Association."

**Mistakes in Codifications and Compilations May be Corrected.**—*Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *State v. Lee*, 37 Iowa 404; *Mobile Sav. Bank v. Patty*, 16 Fed. Rep. 751.

**Misrecitals of Dates May be Rejected.**—*Shrewsbury v. Boylston*, 1 Pick. (Mass.) 105.

**In Amendatory and Supplementary Acts, Erroneous References to Other Acts or Sections May be Corrected.**—*People v. King*, 28 Cal. 265; *Murray v. Hobson*, 10 Colo. 66; *School Directors v. School Directors*, 73 Ill. 249; *Poock v. Lafayette Bldg. Assoc.*, 71 Ind. 357; *Winona v. Whipple*, 24 Minn. 61; *Blake v. Brackett*, 47 Me. 28; *Pue v. Hetzell*, 16 Md. 539; *Gibson v. Belcher*, 1 Bush (Ky.) 145; *Watervliet Turnpike Co. v. McKean*, 6 Hill (N. Y.) 616; *People v. Clute*, 50 N. Y. 451; 10 Am. Rep. 508; *Bradbury v. Wagonhorst*, 54 Pa. St. 180; *Com. v. Marshall*, 69 Pa. St. 332; *Madison, etc., R. Co. v. Reynolds*, 3 Wis. 287; *Custin v. Viroqua*, 67 Wis. 314; *State v. McCracken*, 42 Tex. 383; *People v. Hill*, 3 Utah 334.

1. *Blanchard v. Sprague*, 3 Sumn. (U. S.) 279; *De Sentmanat v. Soule*, 33 La. Ann. 609; *Hicks v. Jamison*, 10 Mo. App. 35; *McConvill v. Jersey City*, 39 N. J. L. 38; *Com. v. Bank*, 3 W. & S. (Pa.) 177; *Ward v. Ward*, 37 Tex. 89; *Harrington v. Smith*, 28 Wis. 44; *Green v. Wood*, 7 Q. B. 178; 53 E. C. L. 178; *Doe v. Moffatt*, 15 Q. B. 257; 69 E. C. L. 256.

In *Lancaster County v. Frey*, 128 Pa. St. 599, the court said: "The power is undoubted, but it can only be exercised when the error is so manifest, upon an inspection of the act, as to preclude all manner of doubt, and when the correction will relieve the sense of the statute from an actual absurdity and carry out the clear purpose of the legislature."

2. *Bartlett v. Morris*, 9 Port. (Ala.) 266.

The construction of private acts is to be governed by the principles of common law, and applied to the subject in a manner analogous to the rules of interpretation in a private deed or conveyance. *Eton College v. Bishop of Winchester*, Lofft 401.

Ambiguous words in a private act incorporating a public company, are to be construed against the company and in favor of private property. *Scales v. Pickering*, 4 Bing. 448; 15 E. C. L. 37. For example, statutory provisions as to compensation for damage in a local and personal act must be regarded as a contract between the parties, whether made by their mutual consent or forced on them by the legislature. *Roths v. Kirkcaldy, etc., Waterworks Com'rs*, 7 App. Cas. 707.

3. *Lyn v. Wyn, Bridg.* 127; *Williams v. Pritchard*, 4 T. R. 2; *Rex v. St. Pancras Church*, 6 Ad. & El. 314; 33 E. C. L. 86; *Shepherd v. Hodsman*, 18 Q. B. 316; 83 E. C. L. 316; *Westbrook v. Blythe*, 3 El. & Bl. 742; 77 E. C. L. 741; *London, etc., R. Co. v. Limehouse Board*, 3 K. & J. 123; *Fitzgerald v. Champneys*, 2 Johns. & H. 54; *Hawkins v. Gathercole*, 6 De G. M. & G. 31; *Thames Conservancy v. Hall*, L. R., 3 C. P. 415; *Thorpe v. Adams*, L. R., 6 C. P. 125; *Reg. v. Champneys*, L. R., 6 C. P. 394; *Abergavenny v. Brace*, L. R., 7 Exch. 145; *Dodds v. Shepherd*, 1 Exch. Div. 78; *Garnett v. Bradley*, 2 Exch. Div. 351; *reversed* 3 App. Cas. 944, on the ground that, in the statute construed, the legislature clearly intended to repeal an earlier special act; but the rule itself was approved; *Walsall v. London, etc., R. Co.*, 4 App. Cas. 467; *Seward v. The Vera Cruz*, 10 App. Cas. 68; per *Kay, J.* in *Gard v. Sewer Com'rs*, 28 Ch. Div. 486; *In re Smith's Estate*, 35 Ch. Div. 595; *Furman v. Nichol*, 8 Wall. (U. S.) 44; *State v. Stoll*, 17 Wall. (U. S.) 425; *Cass Co. v. Gillett*, 100 U. S. 585; *Louisiana v. Taylor*, 105 U. S. 454; *Ex parte Crow Dog*, 109 U. S. 556; *Chew Heong v. U.*

S., 112 U. S. 536; *Lewis v. Sherman County*, 1 McCrary (U. S.) 377; *Third Nat. Bank v. Harrison*, 8 Fed. Rep. 721; *Gilchrist v. Helena, etc.*, R. Co., 47 Fed. Rep. 595; *Mobile, etc.*, R. Co. v. State, 29 Ala. 573; *Daughdrill v. Alabama L. Ins., etc.*, Co., 31 Ala. 100; *Pearce v. Bank of Mobile*, 33 Ala. 702; *Magruder v. State*, 40 Ala. 347; *Ex parte Selma, etc.*, R. Co., 46 Ala. 245; *Iverson v. State*, 52 Ala. 170; *McFarland v. State Bank*, 4 Ark. 415; *Ex parte Trapnall*, 6 Ark. 14; *Babcock v. Helena*, 34 Ark. 502; *Blackwell v. State*, 45 Ark. 90; *Chamberlain v. State*, 50 Ark. 132; *Baughner v. Rudd*, 53 Ark. 417; *Crosby v. Patch*, 18 Cal. 439; *Whitaker v. Haynes*, 49 Cal. 596; *Wood v. Board of Election Com'rs*, 58 Cal. 561; *People v. Clunie*, 70 Cal. 504; *Home for Inebriates v. Reis*, 95 Cal. 142; *Schwenke v. Union Depot, etc.*, Co., 7 Colo. 512; *Coe v. Meriden*, 45 Conn. 156; *Beach v. Meriden*, 46 Conn. 502; *Luke v. State*, 5 Fla. 185; *Haywood v. Savannah*, 12 Ga. 404; *Erwin v. Moore*, 15 Ga. 361; *Pausch v. Guerrard*, 67 Ga. 319; *Montezuma v. Minor*, 70 Ga. 191; *Ottawa v. La Salle Co.*, 12 Ill. 339; *Spring v. Olney*, 78 Ill. 101; *Covington v. East St. Louis*, 78 Ill. 548; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Allen v. People*, 84 Ill. 504; *Gunnarssohn v. Sterling*, 92 Ill. 569; *East St. Louis v. Maxwell*, 99 Ill. 439; *Holton v. Daly*, 106 Ill. 139; *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 141; *Butz v. Kerr*, 123 Ill. 659; *Pana v. Lippincott*, 2 Ill. App. 473; *Braceville v. Doherty*, 30 Ill. App. 645; *Rushville v. Rushville*, 32 Ill. App. 320; 39 Ill. App. 504; *Blain v. Bailey*, 25 Ind. 165; *Waterworks Co. v. Burkhardt*, 41 Ind. 381; *Evansville v. Summers*, 108 Ind. 189; *Walter v. State*, 105 Ind. 589; *Cole v. Jackson County*, 11 Iowa 552; *Burlington v. Leebrick*, 43 Iowa 252; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Tyler v. Elizabethtown, etc.*, R. Co., 9 Bush (Ky.) 510; *Com. v. Cain*, 14 Bush (Ky.) 525; *Adams Express Co. v. Owensboro*, 85 Ky. 265; *Bank of Louisiana v. Farrar*, 1 La. Ann. 49; *De Armas' Case*, 10 Martin (La.) 172; *State v. Kitty*, 12 La. Ann. 805; *Beridon v. Barbin*, 13 La. Ann. 458; *St. Martin v. New Orleans*, 14 La. Ann. 113; *Bond v. Hiestand*, 20 La. Ann. 140; *Third Ward School Dist. v. School Directors*, 23 La. Ann. 158; *State v. Labatut*, 39 La. Ann. 513; *State v. Buckner*, 42 La. Ann. 74; *State v. Northern Cent. R. Co.*, 44 Md. 167; *Garrett v. Janes*, 65 Md. 260; *Nichols*

*v. Bertram*, 3 Pick. (Mass.) 342; *Gage v. Currier*, 4 Pick. (Mass.) 399; *Brown v. Lowell*, 8 Met. (Mass.) 172; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *Calder v. Haynes*, 7 Allen (Mass.) 387; *Crane v. Reeder*, 22 Mich. 322; *State v. Archibald*, 43 Minn. 328; *Mauro v. Buffington*, 26 Mo. 184; *State v. McDonald*, 38 Mo. 529; *State v. Bishop*, 41 Mo. 16; *State v. Macon County Ct.*, 41 Mo. 459; *State v. Draper*, 47 Mo. 29; *State v. Fiala*, 47 Mo. 310; *McVey v. McVey*, 51 Mo. 406; *Kansas City v. Johnson*, 78 Mo. 661; *State v. Green*, 87 Mo. 583; *Manker v. Faulhaber*, 94 Mo. 430; *State v. Frazier*, 98 Mo. 426; *St. Joseph, etc., R. Co. v. Cudmore*, 103 Mo. 634; *Blanchard v. Wolff*, 1 Mo. App. 538; *State v. Wesleyan Cemetery Assoc.*, 11 Mo. App. 570; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 163; *State v. Fitzporter*, 17 Mo. App. 271; *State v. Willard*, 39 Mo. App. 251; *Jackson v. Washington County*, 34 Neb. 680; *Stonington Sav. Bank v. Davis*, 14 N. J. Eq. 290; *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Branin*, 23 N. J. L. 484; *State v. Mellick*, 25 N. J. L. 563; *State v. Jersey City*, 29 N. J. L. 170; *State v. Morristown*, 33 N. J. L. 57; *State v. Mills*, 34 N. J. L. 177; *State v. Trenton*, 36 N. J. L. 201; *State v. Com'rs*, 38 N. J. L. 472; *North Hudson R. Co. v. Hoboken*, 41 N. J. L. 78; *State v. Hill*, 42 N. J. L. 351; *State v. Williamson*, 44 N. J. L. 165; *State v. Stevenson*, 44 N. J. L. 371; *In re Evergreens*, 47 N. Y. 216; *In re Central Park Com'rs*, 50 N. Y. 493; *People v. Quigg*, 59 N. Y. 83; *Van Denburgh v. Greenbush*, 66 N. Y. 1; *People v. Brinkerhoff*, 68 N. Y. 259; *In re Delaware, etc., Canal Co.*, 69 N. Y. 209; *People v. Essex County*, 70 N. Y. 228; *Whipple v. Christian*, 80 N. Y. 523; *McKenna v. Edmundstone*, 91 N. Y. 231; *Graf v. Cunningham*, 109 N. Y. 369; *Buffalo Cemetery Assoc. v. Buffalo*, 118 N. Y. 61; *People v. Moran*, 123 N. Y. 254; 20 Am. St. Rep. 732; *Deposit v. Vail*, 5 Hun (N. Y.) 315; *Deposit v. Devereux*, 8 Hun (N. Y.) 317; *People v. Westchester County*, 40 Hun (N. Y.) 353; *New York, etc., R. Co. v. Delaware County*, 67 How. Pr. (N. Y.) 5; *People v. Edison*, 52 N. Y. Super. Ct. 64; *People v. Myers*, 33 N. Y. St. Rep. 18; *Bergman v. Wolff*, 33 N. Y. St. Rep. 499; *McRae v. Wessel*, 6 Ired. (N. Car.) 153; *Robbins v. State*, 8 Ohio St. 191; *State v. Roosa*, 11 Ohio St. 16; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Shunk v. First Nat. Bank*, 22

Ohio St. 515; *State v. Newton*, 26 Ohio St. 206; *Com'rs v. Board of Public Works*, 39 Ohio St. 628; *State v. Darke County*, 43 Ohio St. 315; *State v. Sturgess*, 10 Oregon 58; *Brown v. County Com'rs*, 21 Pa. St. 39; *Omit v. Com.*, 21 Pa. St. 426; *Dyer v. Covington Tp.*, 28 Pa. St. 186; *Jefferson County v. Reitz*, 56 Pa. St. 44; *Bounty Accounts*, 70 Pa. St. 92; *Rounds v. Waymart*, 81 Pa. St. 395; *Kilgore v. Com.*, 94 Pa. St. 495; *Com. v. Erie R. Co.*, 98 Pa. St. 127; *Rhein Bldg. Assoc. v. Lea*, 100 Pa. St. 210; *Selfried v. Com.*, 101 Pa. St. 200; *Com. v. Judges*, 102 Pa. St. 228; *Harrisburg v. Sheck*, 104 Pa. St. 53; *Lackawanna County v. Stevens*, 105 Pa. St. 465; *Dick's Appeal*, 106 Pa. St. 589; *Dunlap v. Com.*, 108 Pa. St. 607; *Mallory v. Reinhard*, 115 Pa. St. 25; *Evans v. Phillipi*, 117 Pa. St. 226; 2 Am. St. Rep. 655; *Rymer v. Luzerne County*, 142 Pa. St. 108; *Providence v. Union R. Co.*, 12 R. I. 473; *State v. Young*, 30 S. Car. 399; *Ellis v. Batts*, 26 Tex. 703; *Cascades R. Co. v. Sohns*, 1 Wash. Ter. 557; *Tacoma Land Co. v. Pierce County*, 1 Wash. 485; *Northern Pac. R. Co. v. Haas*, 2 Wash. 376; *Conley v. Calhoun County*, 2 W. Va. 420; *Chesapeake, etc., R. Co. v. Hoard*, 16 W. Va. 270; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Powell v. Parkersburg*, 28 W. Va. 698; *Sturm v. Fleming*, 31 W. Va. 701; *Mead v. Bag-nall*, 15 Wis. 156; *Walworth County v. Whitewater*, 17 Wis. 193; *Janesville v. Markoe*, 18 Wis. 351.

In *Foster's Case*, 11 Rep. 63a, it was said: "It must be known that, foras-much as acts of Parliament are estab-lished with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the common-wealth, they ought not, by any con-strained construction out of the general and ambiguous words of a subsequent act, to be abrogated."

In *Lyn v. Wyn, Bridg.* 127, it was said that, "The law will not allow the exposition to revoke or alter by con-struction of general words any particular statute, where the words may have their proper operation without it."

The general principle to be applied to the construction of a statute is, that a general act is not to be construed to re-peal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless the two acts are necessarily in-consistent. *Thorpe v. Adams*, L. R., 6 C. P. 125.

In *Seward v. The Vera Cruz*, 10 App. Cas. 68, *Selborne, L. C.*, said: "If anything be certain, it is this, that where there are general words in a later act capable of reasonable and sensible ap-plication without extending them to a subject specially dealt with by earlier legislation, you are not to hold that ear-lier and special legislation indirectly re-pealed, altered or derogated from, mere-ly by force of such general words, with-out any indication of a particular inten-tion to do so."

Where there is an act of Parliament which deals in a special way with a particular subject-matter, and that is fol-lowed by a general act of Parliament which deals in a general way with the subject-matter of the previous legisla-tion, the court ought not to hold that general words in such a general act ef-fect a repeal of the prior and special legislation, unless it can find some refer-ence in the general act to the prior and special legislation, or unless effect can-not be given the provisions of the gen-eral act without holding that there was such repeal. *In re Smith's Estate*, 35 Ch. Div. 595.

The reasons of this rule are well stated in *Fitzgerald v. Champneys*, 2 Johns. & H. 54, per Wood, V. C.: "In passing a special act, the legislature had their attention directed to the special case which the act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done, they are not to be con-sidered by a general enactment, passed subsequently, and making no mention of any such intention, to have intended to derogate from that which by their own special act they had thus carefully supervised and regulated."

Where a privilege has been granted by an act of Parliament, it cannot be taken away without a direct repeal of that act, or inference from another so strong of intention to take it away as to authorize the court to say the two acts cannot stand together. *Walsall v. Lon-don, etc., R. Co.*, 4 App. Cas. 467.

Mere general words in a subsequent affirmative statute, not referring ex-pressly to a former specific statute, are not sufficient to effect a repeal of the former statute, if both statutes can stand together; nor will the mere mention in a subsequent statute of an intention to repeal a former special statute, operate, by implication, to repeal the former statute; in order to accomplish such re-peal, there must be a clause to that ef-



fect in the later statute. *Mahoney v. Wright*, 10 Ir. C. L., N. S. 420.

In *State v. Stoll*, 17 Wall. (U. S.) 425, it was said by Hunt, J.: "The provisions of the special charter or special authority derived from the legislature, are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case."

A special act is not modified or controlled by a subsequent general act upon the same subject, unless the latter clearly manifests on its face such an intention. *Mobile, etc., R. Co. v. State*, 29 Ala. 573.

Laws of local and special application are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of an intent to that effect by language showing that the attention of the legislature was called to the special act, and that the general act was intended to embrace the special cases; and the mere fact that the general act contains a clause repealing acts inconsistent with it, does not diminish the force of this rule. *Home for Inebriates v. Reis*, 95 Cal. 142.

A special statute providing for a particular case or application to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, if taken strictly and but for the special law, include the cases provided for by it. *Van Denburgh v. Greenbush*, 66 N. Y. 1, affirming 4 Hun (N. Y.) 795. Especially is this true where both acts were before the legislature at the same time and passed at the same session. *Deposit v. Vail*, 5 Hun (N. Y.) 315; *Mead v. Bagnall*, 15 Wis. 156.

It is a well-settled rule that "a statute general in its terms and without negative words will not be construed to repeal, by implication, the particular provisions of a former one which are special in their application to a particular case, or class of cases, unless the repugnancy be so glaring and irreconcilable as to indicate the legislative intention to repeal." *Robbins v. State*, 8 Ohio St. 191.

In *Seifried v. Com.*, 101 Pa. St. 200, Trunkey, J., said: "It is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which

the local circumstances of one county has made necessary."

Rarely, if ever, does a case arise where it can justly be held that a general statute repeals a local act by mere implication. *Mallory v. Reinhard*, 115 Pa. St. 25.

The repeal of a special statute passed for a special purpose must be either express, or the manifestation of the legislative intent to repeal must be so clear as to be equivalent to an express direction. *Com. v. Richmond, etc., R. Co.*, 81 Va. 355.

In *Chesapeake, etc., R. v. Hoard*, 16 W. Va. 279, Moore, J., said: "It appears to be well settled that a statute, general in its terms and without negative words, will not be construed to repeal, by implication, the particular provisions of a former one, which are special in their application to a particular case, or class of cases, unless the repugnancy be so glaring and irreconcilable as to indicate the legislative intention to repeal."

**Illustrations**—A partial exemption from the payment of rates for borough improvement purposes, conceded by a local act, was not taken away by the mere passing of general public acts for similar purposes. *Walsall v. London, etc., R. Co.*, 4 App. Cas. 467.

Where a statute authorized the county commissioners to build and keep in repair county buildings, and to borrow money under certain conditions for that purpose, and a subsequent statute provided for issuing county bonds to aid in building railroads and other works of internal improvement, it was held that although courthouses are works of internal improvement, yet inasmuch as their erection had been provided for by the first-named act, they were not embraced within the general terms of the latter. *Lewis v. Sherman County*, 1 McCrary (U. S.) 377.

The provision of the *Missouri* constitution defining the qualifications of voters, but making no reference to registration, did not repeal that part of a special act incorporating a city, which provided for the registration of voters at city elections. *State v. Frazier*, 98 Mo. 426.

Where an act provides for a municipal government and the creation of a special jurisdiction, and every part of the enactment is designed to make a part of the complete whole, and all together constituting an entire system perfect in itself, such act is not affected

But where the later general act is necessarily inconsistent with the prior special act, or with the special provisions of an earlier act, the legislature must be deemed to have intended to repeal the special law.<sup>1</sup> Particular or specific words or provisions will

by a later statute describing the jurisdiction of an appellate court by general rules having no reference to special and particular enactments covering special cases. *In re Central Park Com'rs*, 50 N. Y. 497.

A special act passed for the benefit of a municipality, authorizing it to bring actions for penalties for violation of the provisions of the act as to the sale of liquor, is not repealed, by implication, by a general act passed at the same session of the legislature for the suppression of intemperance, directing that the overseers of the poor shall sue to recover penalties provided for in the general act. *Deposit v. Vail*, 5 Hun (N. Y.) 310.

In *England* it seems to be well settled that a general act will not supersede a particular custom. *Rex v. Pugh*, Dougl. 188; *Simon v. Moss*, 2 B. & Ald. 543; *Leicester v. Burgess*, 5 B. & Ad. 246; 27 E. C. L. 75; *Rex v. St. James' Church*, 5 Ad. & El. 391; 31 E. C. L. 362; *Green v. Reg.*, 1 App. Cas. 513. But see *contra Rex v. Hogg*, 1 T. R. 721; *Dunbar v. Roxburgh*, 3 C. & F. 354.

In several cases, too, certain customs of London have been held to be superseded by general laws. See *Salters Co. v. Jay*, 3 Q. B. 109; 43 E. C. L. 654; *Reg. v. London*, 13 Q. B. 1; 66 E. C. L. 1; *Merchant Tailors v. Truscott*, 11 Exch. 855. This rule has no application in the *United States*, as these customs seem to be unknown to American law.

For the application of this rule to charters of municipal corporations, see *MUNICIPAL CORPORATIONS*, vol. 15, p. 974.

1. *Rex v. Poor Law Com'rs*, 6 Ad. & El. 48; 33 E. C. L. 11; *Great Cent. Gas. Consumers' Co. v. Clarke*, 13 C. B. N. S. 838; 106 E. C. L. 837; *Parry v. Croyden Commercial, etc., Gas Co.*, 11 C. B. N. S. 579; 103 E. C. L. 578; *affirmed* on appeal, 15 C. B. N. S. 568; 109 E. C. L. 566; *Duncan v. Scottish, etc., R. Co.*, 2 Sc. App. 20; *Stuart v. Jones*, 1 El. & Bl. 23; 72 E. C. L. 22; *Bramston v. Colchester*, 6 El. & Bl. 246; *Thorpe v. Adams*, L. R., 6 C. P. 125; *Reg. v. Champneys*, L. R., 6 C. P. 394; *Luckcraft v. Pridham*, 6 Ch. Div. 205; *In re*

*Williams*, 36 Ch. Div. 577; *Garnett v. Bradley*, 3 App. Cas. 944; *Mersey Docks v. Lucas*, 8 App. Cas. 891; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516; *Louisville Water Co. v. Clark*, 143 U. S. 11; *Maxwell v. State*, 89 Ala. 150; *Davis v. Railway*, 53 Ark. 117; *State v. Conkling*, 19 Cal. 501; *People v. Burt*, 43 Cal. 560; *People v. Sargent*, 44 Cal. 430; *Fraser v. Alexander*, 75 Cal. 147; *People v. Henshaw*, 76 Cal. 436; *Ex parte Ah You*, 82 Cal. 339; *Kennedy v. Board of Education*, 82 Cal. 483; *McGivney v. Pierce*, 87 Cal. 124; *Pausch v. Guerrard*, 67 Ga. 319; *Montezuma v. Minor*, 70 Ga. 191; *Spring v. Olney*, 78 Ill. 101; *Allen v. People*, 84 Ill. 502; *Water Com'rs v. Conkling*, 113 Ill. 340; *Dutton v. Aurora*, 114 Ill. 138; *Culbertson v. Fulton*, 127 Ill. 41; *Waterworks Co. v. Burkhart*, 41 Ind. 381; *De Armas' Case*, 10 Martin (La.) 172; *State v. Kitty*, 12 La. Ann. 805; *Beridon v. Barbin*, 13 La. Ann. 458; *Bond v. Hiestand*, 20 La. Ann. 140; *State v. Labatut*, 39 La. Ann. 513; *State v. Buckner*, 42 La. Ann. 74; *Starbird v. Brown*, 84 Me. 238; *Frederick v. Groshon*, 30 Md. 436; *State v. Northern Cent. R. Co.*, 44 Md. 131; *Willing v. Bozman*, 52 Md. 44; *State v. Falkenham*, 73 Md. 463; *Howe v. Starkweather*, 17 Mass. 240; *Brown v. Lowell*, 8 Met. (Mass.) 172; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *State v. Pearcy*, 44 Mo. 159; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Severance*, 55 Mo. 378; *State v. Dallas County Ct.*, 72 Mo. 329; *Manker v. Faulhaber*, 94 Mo. 430; *State v. Frazier*, 98 Mo. 426; *Pool v. Brown*, 98 Mo. 675; *State v. Bennett*, 102 Mo. 356; *St. Joseph, etc., R. Co. v. Cudmore*, 103 Mo. 634; *Blanchard v. Wolff*, 1 Mo. App. 528; *State v. Wesleyan Cemetery Assoc.*, 11 Mo. App. 570; *State v. Fitzporter*, 17 Mo. App. 271; *Mechanics', etc., Bank v. Bridges*, 30 N. J. L. 112; *State v. Miller*, 30 N. J. L. 368; 86 Am. Dec. 188; *State v. Mills*, 34 N. J. L. 177; *State v. Com'rs*, 37 N. J. L. 228; *State v. Williamson*, 44 N. J. L. 165; *Brown v. Mullica Tp.*, 48 N. J. L. 449; *State v. Camden*, 50 N. J. L. 87; *State v. East Orange*, 50 N. J. L. 354; *Haynes v. Cape May*, 52 N. J. L. 180; *State v. Harrington Tp.* (N. J. 1892), 23

Atl. Rep. 666; *Harrington v. Trustees*, 10 Wend. (N. Y.) 547; *People v. Essex County*, 70 N. Y. 228; *McKenna v. Edmundstone*, 91 N. Y. 231; *People v. Jaehne*, 103 N. Y. 182; *People v. Westchester County*, 40 Hun (N. Y.) 353; *New York, etc., R. Co. v. Delaware County*, 67 How. Pr. (N. Y.) 5; *Robbins v. State*, 8 Ohio St. 191; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Knox County v. McComb*, 19 Ohio St. 320; *Shunk v. First Nat. Bank*, 22 Ohio St. 515; *Ex parte Van Hagan*, 25 Ohio St. 426; *State v. Newton*, 26 Ohio St. 206; *Nusser v. Com.*, 25 Pa. St. 126; *Keller v. Com.*, 71 Pa. St. 413; *Seifried v. Com.*, 101 Pa. St. 200; *Cumru Tp. v. Poor Directors*, 112 Pa. St. 268; *Com. v. McCandless* (Pa. 1888), 12 Atl. Rep. 440; *Cascades R. Co. v. Sohns*, 1 Wash. Ter. 557; *Tacoma Land Co. v. Pierce County*, 1 Wash. 485; *Northern Pac. R. Co. v. Haas*, 2 Wash. 376; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Sturm v. Fleming*, 31 W. Va. 701; *Kellogg v. Oshkosh*, 14 Wis. 623.

In *Garnett v. Bradley*, 3 App. Cas. 952, Lord Hatherley said: "When an act of Parliament repeals a preceding act which relates to certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or it may be, affected adversely by a particular clause of the enactment, then the legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent statute was passed; and if there was a general act subsequently passed, the generality of which was large enough, so far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the act, persons who are not in any way mentioned or specified by the subsequent general act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the court, in construing the subsequent general act of Parliament, would expect to find something or other pointing out that the intention of the legislature had been turned towards the former special enactment, and, in passing the general act, that it had made the new enact-

ment with the view of embracing every case (including that special case) embraced within the provisions of the previous act. That is to say, it does not necessarily follow that the previous act is to remain standing notwithstanding the general provision in a subsequent act, if it is found on the consideration of the acts that such is not the intention of the legislature." See also, *In re Williams*, 36 Ch. Div. 577.

In *People v. Jaehne*, 103 N. Y. 182, it was said, by Andrews, J.: "It will be found, I think, on examining the cases in which courts have held that a special law was not repealed by a subsequent general law on the same subject, that they are, as a general rule, cases where the legislature was not dealing directly with the subject of the prior law, and it was not in the mind of the legislature when the general law was enacted, or where the special law was part of the system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special act, notwithstanding the enactment of a subsequent general rule covering the same subject." Accordingly the court held, *Rapallo and Earle, J.J.*, dissenting, that section 72 of the Penal Code, punishing the crime of bribery, repealed section 58 of the New York City Consolidation act providing for the same offense within the city of New York.

A general law applicable to the entire state will not modify or repeal a special act, unless by express words, or necessary implication. But there is no rule of law prohibiting a repeal of a special act by a general one, nor is there any principle forbidding such repeal without use of express words declaratory of the legislative intent to repeal the prior law. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general enactment, is sufficiently manifested when the provisions of both cannot stand together. *State v. Williamson*, 44 N. J. L. 167; *State v. Comr's*, 37 N. J. L. 228.

A general law, enacted to carry out a constitutional provision, supersedes, and by implication repeals, every private or special law inconsistent therewith. *Cumru Tp. v. Poor Directors*, 112 Pa. St. 268 (opinion of trial judge).

**Illustrations.**—The provisions of the *New Jersey* act of March 24, 1885, regarding the building of main sewers

control also the general words or provisions of the same act.<sup>1</sup> And the rule is the same when the general terms occur in another

by cities and the condemnation of lands therefor, supersede special provisions in city charters on the same subject, except in so far as they are retained or adopted by the act. *State v. Jersey City*, 54 N. J. L. 49.

A general act, prescribing the punishment of a specific offense throughout the state, operates as a repeal of a public local act prescribing a different penalty for a particular locality. *Nusser v. Com.*, 25 Pa. St. 126.

1. *Standon v. Oxford University*, W. Jones 17, 26; *Rex v. Archbishop of Armagh*, 8 Mod. 8; *De Winton v. Brecon*, 26 Beav. 533; *Taylor v. Oldham*, 4 Ch. Div. 395; *Attv. Gen'l v. Lamplough*, 3 Exch. Div. 214; *Pennington v. Cox*, 2 Cranch (U. S.) 52; *Adams v. Woods*, 2 Cranch (U. S.) 341; *U. S. v. Buffalo Park*, 16 Blatchf. (U. S.) 190; *Seeley v. Koox*, 2 Woods (U. S.) 370; *U. S. v. Garretson*, 42 Fed. Rep. 22; *People v. Wells*, 11 Cal. 329; *Pittsburgh, etc., R. Co. v. Vining*, 27 Ind. 518; *Covington v. McMickle*, 18 B. Mon. (Ky.) 262; *Rogers v. Beiller*, 3 Martin (La.) 672; *St. Martin v. New Orleans*, 14 La. Ann. 114; *Stockett v. Bird*, 18 Md. 484; *State v. Green*, 24 Mo. App. 227; *McCann v. McLennan*, 2 Neb. 286; *Albertson v. State*, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311; *People v. Krank*, 46 Hun (N. Y.) 636; *State v. Trenton*, 38 N. J. L. 64; *Hoey v. Gilroy*, 129 N. Y. 132; *Felt v. Felt*, 19 Wis. 193; *State v. Goetze*, 22 Wis. 350.

If a particular thing be given or limited in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words. *Standon v. Oxford University*, W. Jones 26.

Where an act expresses a general intention, and also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *Churchill v. Crease*, 5 Bing. 180; 15 E. C. L. 409.

In *De Winton v. Brecon*, 26 Beav. 533, the master of the rolls held that, "where an act of Parliament contains two sets of provisions, one giving specific and precise directions to do particular things, and the other, in general terms, prohibiting certain acts which would, in the general sense of the words used, include the particular acts before authorized, then the general clause does

not control the specific enactments; as, if an act of Parliament authorized a corporation to sell a particular piece of land, and by a subsequent general clause in the act it was declared that nothing therein contained should authorize the company to sell any land, the general clause would not control the particular enactment, which would take effect notwithstanding the prior exception was not clearly and distinctly expressed in the general clause." Quoted in *State v. Trenton*, 38 N. J. L. 67, where Van Syckel, J., added: "When the intention of the law-giver which is to be sought after in the interpretation of the statute, is specifically declared in a prior section as to a particular matter, it must prevail over a subsequent clause in general terms which might, by construction, conflict with it. The legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms."

General provisions in an act of Parliament do not override special provisions. So that where an act contains special provisions as to particular property, they must be read as exceptions to the general provisions, whether contained in the same or any other act. *Taylor v. Oldham*, 4 Ch. Div. 395.

Where special words are followed by general words in any statute, any subject-matter which is aptly described by the special words comes within the purview of the statute by force of the special words and not of the general words. If, therefore, special words are repealed, the subject-matter ceases to be within the purview of the statute, though aptly described by the general words in the absence of the special words. *Attv. Gen'l v. Lamplough*, 3 Exch. Div. 214. The facts of this case well illustrate the point: A statute imposed a stamp duty on a number of articles specifically named in the schedule, and, among others, "on waters, *videlicet*, all artificial mineral waters, and all waters impregnated . . . with carbonic-acid gas, and all compositions in a liquid or solid state, to be used for the purpose of 'compounding or making any of' such waters; and also by a general clause at the end of the schedule, on 'all other . . . waters' to be used as medicine.

statute,<sup>1</sup> regardless of priority of enactment.<sup>2</sup> For example, in construing revenue laws, general provisions imposing duties, though sufficiently broad to cover an article specifically taxed, will not affect the specific provision, when contained in the same

A later statute repealed so much of the former act as was contained in the words commencing "waters, *videlicet*." It was held that a composition sold in solid state and containing three ingredients, one of which was a medicine, and the other two being added to evolve carbonic-acid gas when it was dissolved in water, was taxable as such by the special clause, and, on repeal thereof, did not become taxable under the general clause.

In *Hoey v. Gilroy*, 129 N. Y. 138, O'Brien, J., said: "When a statute contains two distinct provisions, one being specific, with precise directions to do a particular thing or permit it to be done, and the other generally prohibiting certain acts which in their general sense include the particular thing authorized by the direction, the general prohibitive clause does not control the specific authority. When a general intention is expressed, and also a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of an exception."

In construing a statute containing a general enactment and also a particular enactment, the effort must be, in the first instance, to harmonize all the provisions of the statute by construing all parts together; and it is only when, on such construction, the repugnancy of specific provisions to the general language is plainly manifested that the intent of the legislature, as declared in the general enacting part, is superseded. *State v. Com'rs*, 37 N. J. L. 228.

In *Felt v. Felt*, 19 Wis. 193, it was held that a section which covered a justice's jurisdiction in an action upon a note given for more than one hundred dollars, "which has been reduced by credits or payments indorsed thereon to an amount not exceeding one hundred dollars," should control another provision in the same act, which gave to justices general jurisdiction in actions upon contracts where the debt or balance due, or damages claimed, do not exceed one hundred dollars; following the settled rule of construction, that specific provisions relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law, which

might otherwise be broad enough to include it.

1. *Churchill v. Crease*, 5 Bing. 180; 15 E. C. L. 409; *Mahoney v. Wright*, 10 Ir. C. L. N. S. 420; *Newcastle v. Morris*, L. R., 4 H. L. 661; *Taylor v. Oldham*, 4 Ch. Div. 395; *Doggett v. Walter*, 15 Fla. 355; *Gunnarssohn v. Sterling*, 92 Ill. 569; *Titcomb v. Union Marine, etc., Ins. Co.*, 8 Mass. 326; *Finney v. Brant*, 19 Mo. 42; *St. Louis v. Alexander*, 23 Mo. 508; *Albertson v. State*, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311.

A particular provision of the Bankruptcy act of 1849 rendered traders, having privilege of Parliament, liable to the bankruptcy laws, but the privilege of freedom from personal arrest was expressly reserved to them. The act of 1861 made all debtors (non-traders as well as traders) liable to the bankruptcy laws, but nothing was said in the act to reserve to debtors, who had privilege of Parliament, their freedom from personal arrest. It was held that the provision of the Bankruptcy act of 1849, reserving freedom from personal arrest, applied to the persons designated by the act of 1861. *Newcastle v. Morris*, L. R., 4 H. L. 661.

2. General and specific provisions in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general. *Townsend v. Little*, 109 U. S. 504.

A general affirmative statute does not repeal a prior particular statute, or particular provisions of a prior statute, upon the same subject, unless negative words are used, or unless there would be an invincible repugnancy between the two. In the absence of such repugnancy or negative words, the more specific statute, or provision, would control the general, without regard to their order and dates, and the two acts may be interpreted as operating together, the specific provisions qualifying or furnishing exceptions to those which are general. *Chamberlain v. State*, 50 Ark. 132.

In *Com'rs v. Board of Public Works*, 39 Ohio St. 632, it was said: "The decided weight of authority supports the proposition that when there is a general,

act,<sup>1</sup> or repeal it when contained in an earlier act,<sup>2</sup> and this rule is applicable both to statutes decreasing and statutes increasing duties.<sup>3</sup>

A general act will be repealed *pro tanto* by a subsequent special act when the two acts cannot stand together.<sup>4</sup>

and also one local and special, law on the same subject in conflicting terms, neither necessarily abrogates the other, but both are permitted to stand together, and it is immaterial which is of the later date."

1. *Homer v. Austin*, 1 Wall. (U. S.) 486; *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Rheims*, 96 U. S. 143; *Arthur v. Stephani*, 96 U. S. 125; *Robertson v. Glendenning*, 132 U. S. 158; *Seeberger v. Cahn*, 137 U. S. 97; *American Net, etc., Co. v. Worthington*, 141 U. S. 468; *Chung Yune v. Kelly*, 14 Fed. Rep. 643.

2. *Movins v. Arthur*, 95 U. S. 144; *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Rheims*, 96 U. S. 143; *Vietor v. Arthur*, 104 U. S. 498; *Barber v. Schell*, 107 U. S. 617; *Chung Yune v. Kelly*, 14 Fed. Rep. 643.

3. *Arthur v. Rheims*, 96 U. S. 143.

4. *Ex parte Kelly*, 9 Ir. R. C. L. 114; *Hill v. Hall*, 1 Exch. Div. 411; *Yarmouth v. Simmons*, 10 Ch. Div. 528; *Kankakee County v. Aetna L. Ins. Co.*, 106 U. S. 668; *U. S. v. 10,000 Cigars, Woolw.* (U. S.) 123; *Brinson v. State*, 89 Ala. 105; *Pierpont v. Crouch*, 10 Cal. 315; *Ex parte Smith*, 40 Cal. 419; *Talcott v. Harbor Com'rs*, 53 Cal. 199; *Macon v. Macon, etc., R. Co.*, 7 Ga. 221; *Garden v. People*, 20 Ill. 431; *Berry v. People*, 36 Ill. 423; *Fant v. People*, 45 Ill. 259; *Siebold v. People*, 86 Ill. 33; *Com. v. Pointer*, 5 Bush (Ky.) 301; *Adams Express Co. v. Owensboro*, 85 Ky. 265; *Hussey v. Manufacturers', etc., Bank*, 10 Pick. (Mass.) 421; *Howell v. Cassopolis*, 35 Mich. 471; *Dewey v. Central Car, etc., Co.*, 42 Mich. 399; *Tierney v. Dodge*, 9 Minn. 166; *Shelton v. Baldwin*, 26 Miss. 439; *Baldwin v. Green*, 10 Mo. 410; *Dunscumb v. Maddox*, 21 Mo. 144; *Deters v. Renick*, 37 Mo. 599; *State v. Clarke*, 54 Mo. 17; 14 Am. Rep. 471; *Smith v. Clark County*, 54 Mo. 69; *State v. Greene County*, 54 Mo. 550; *State v. De Bar*, 58 Mo. 395; *State v. Lewis*, 5 Mo. App. 465; *State v. Clarke*, 25 N. J. L. 54; *State v. Kelly*, 34 N. J. L. 75; *McGavisk v. State*, 34 N. J. L. 509; *Bowen v. Lease*, 5 Hill (N. Y.) 221; *Excise Com'rs v. Burtis*, 103 N. Y. 136; *Egypt Street*, 2 Grant's Cas.

(Pa.) 454; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *In re Snell*, 58 Vt. 207; *Wells v. Austin*, 59 Vt. 159; *Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731; *McConiha v. Guthrie*, 21 W. Va. 134.

**Illustrations of Repeal.**—Where a local act imposed a penalty of £200 on any gas or other company for suffering any impure matter to flow into any stream, to be sued for by a common informer, and a subsequent general act imposed a like penalty for the same offense, such penalty to be recovered by the person into whose water such substance should be conveyed, or whose water should be fouled by any such act, it was held that the later provision was *pro tanto* a repeal of the former. *Parry v. Croydon, etc., Commercial Gas, etc., Co.*, 11 C. B. N. S. 579; 103 E. C. L. 578; *affirmed on appeal*, 15 C. B. N. S. 568; 109 E. C. L. 566.

Where a gas company was, by its act of incorporation, restricted to a specified charge, and by a subsequent public act for the supply of gas to the metropolis, an increased standard of purity in the illuminating power was required from the companies electing to adopt the provisions of that act as to price, purity, and illuminating power, and an increased charge permitted to be made by such companies, it was held that the company, after electing to adopt such provisions, was no longer subject to the restriction contained in its private act. *Great Cent. Gas Consumers' Co. v. Clark*, 13 C. B. N. S. 838; 106 E. C. L. 837.

Where there is a general law prescribing and defining the powers, duties, and mode of procedure of a public board, and a special law is passed relating to the particular matter coming within the general scope of the powers of the board, the two laws are to be read together. The general law is applicable to the particular matter, except in so far as the provision is made in the special law conferring powers or prescribing duties or modes of procedure different from those mentioned in the general law. *Talcott v. Harbor Com'rs*, 53 Cal. 199. The charter of an incorporated vil-

The English rule that a private act will not repeal an earlier private act, except by express enactment,<sup>1</sup> has not been followed

lage authorizing it to "regulate" its victual houses, repeals, by implication, the general law authorizing the selectmen of a town to license persons to keep such houses, and confers upon the village power to license. *St. Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731.

Where a prior statute is general in its terms, and prohibits the taking of a certain species of property in any case whatever, and a subsequent statute is limited or special in its terms, and authorizes the taking of such property in certain described localities only, the latter will be held to be a limitation or qualification of the former, and the prohibition will apply to all cases except to the localities thus specified in the subsequent statute. *McConiha v. Guthrie*, 21 W. Va. 134.

**Cases Where It Was Held that No Repeal Was Intended.**—Where a general act prescribed the manner in which, and the material of which, chimneys were to be built, and a subsequent local statute enacted that in a certain borough the chimneys of every new building were to be constructed as determined or approved by the corporation, and, if no direction should be given by the corporation, prescribing different directions from those contained in the general act, it was held that the subsequent local statute had not repealed the prior general law within that borough. *Hill v. Hall*, 1 Exch. Div. 411.

A charter of a railway company authorizing townships, corporate towns and cities along its line to subscribe to the capital stock of such company, does not limit the operation of the general laws of the state authorizing counties to subscribe for stock in the company and issue bonds therefor. *Kankakee County v. Ætna L. Ins. Co.*, 106 U. S. 668.

A special law admitting interested parties to testify in a certain contingency, does not repeal an earlier general law admitting interested parties to testify as witnesses in all cases. *U. S. v. 10,000 Cigars, Woolw.* (U. S.) 123.

An act incorporating a town and investing the authorities of the town with certain powers, does not divest the state or county courts of powers vested in them by a general law, unless the act of incorporation declares the powers vested in the corporation to be exclusive. *Baldwin v. Green*, 10 Mo. 410.

An interpretation of a special law, having for its object the collection of a special poll tax, should not be adopted if it will interfere with the purpose of the general law, unless there is the clearest language to justify it. *State v. Douglass*, 33 N. J. L. 363.

An amendment to a city charter creating a board of charities and police, with the powers of overseers of the poor in towns, did not give such board the power to sue for penalties incurred for violation of the excise law; but such penalties are to be recovered in the name of the board of commissioners of excise, under the general provisions of the laws of 1878, that where there is no overseer of the poor, such penalty shall be sued for and recovered by, and in the name of, such board of excise commissioners. *Excise Com'rs v. Burtis*, 103 N. Y. 136.

A general law forbidding the opening of a road or street through any burial ground is not repealed or suspended by a subsequent special act extending the boundaries of a borough, and authorizing commissioners to lay out, mark, etc., such streets as they shall deem necessary. It was held that such roads could not encroach upon a cemetery; as the grounds were protected by a general law. The court held that the laws were not inconsistent. *Egypt Street, 2 Grant's Cas. (Pa.)* 455.

Where there has been a general enactment covering any subject in general terms which included a particular case, and a subsequent enactment makes a rule for that particular case, the latter is deemed to be all that the legislature finally intended for the regulation of that case. *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422.

In *Isham v. Bennington Iron Co.*, 19 Vt. 240, Redfield, J., said: "I know of no rule of construction of statutes of more uniform application than that later or more specific statutes do, as a general rule, supersede former and more general statutes so far as the new and specific provisions go."

A village charter authorizing it to restrain all kinds of gaming, repeals by implication an earlier general statute empowering the selectmen of towns to permit or forbid the use of billiard tables. *In re Snell*, 58 Vt. 207.

1. *Jenkins 198; Birkenhead Docks v.*

in the *United States*, the general rules as to repeal by implication being held applicable in such cases.<sup>1</sup> Where a special act refers to or incorporates a general one, the provisions of the special act will prevail over those of the general one conflicting therewith.<sup>2</sup> In such case, the repeal or amendment of the general law does not affect the special law,<sup>3</sup> and on repeal of the special law, the general law is revived.<sup>4</sup>

*b.* ADOPTED STATUTES.—Congress or a state legislature, in

Laird, 4 De G. M. & G. 732; Purcell v. Wolverhampton New Water Works Co., 10 C. B., N. S. 587; 100 E. C. L. 586. See also London, etc., R. Co. v. Limehouse Board, 3 K. & J. 123. But in Daw v. Metropolitan Board of Works, 12 C. B., N. S. 161; 104 E. C. L. 161, it was held that where two special statutes gave authority to two public bodies to exercise powers which could not consistently with the object of the legislature co-exist, the earlier was necessarily repealed by the later statute.

In the eleventh case in Jenkins 198 it was held that "a special statute does not derogate from a special statute without express words of abrogation."

Wherever the legislature has, by a special act, conferred powers on a corporation or body of commissioners for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers in terms which, from their generality, would seem to overrule the powers given by the former act. London, etc., R. Co. v. Limehouse Board, 3 K. & J. 123. See also New Haven v. New Haven Water Co., 44 Conn. 105.

1. Red Rock v. Henry, 106 U. S. 596; Savannah v. Kelly, 108 U. S. 184; *Ex parte* Trapnall, 6 Ark. 9; McDonough County v. Campbell, 42 Ill. 490; People v. Barr, 44 Ill. 198; Cumberland v. Magruder, 34 Md. 381; *In re* Martz's Election, 110 Pa. St. 502; Schneider v. Staples, 66 Wis. 167. See, however, New Haven v. New Haven Water Co., 44 Conn. 105.

Where two acts are passed, one to authorize the towns in a certain group of counties to aid in the construction of one line of railroad, and the other to authorize the towns in another group of counties to aid in the construction of another line of road, and one county is common to both groups, the later act does not repeal the other act, either totally or partially, as to such county. Red Rock v. Henry, 106 U. S. 596.

An act to authorize a city to obtain money on a loan for the purpose of contributing to works of internal improvement, was held not repealed by a subsequent act which provided that all bonds theretofore issued by the city should be valid and which gave the city power to cause other bonds to be issued for purposes of internal improvement. Savannah v. Kelly, 108 U. S. 184.

Where all the essential provisions of a special act of assembly are supplied by a later special act, the former will be deemed to have been repealed by implication, although there be no repealing clause. *In re* Martz's Election, 110 Pa. St. 502.

2. Purcell v. Wolverhampton, New Water Works Co., 10 C. B., N. S. 576; 100 E. C. L. 575; *In re* Westminster Estate, 4 De G. J. & S. 232; Simpson v. South Staffordshire Water Works Co., 4 De G. J. & S. 678; Atty. Gen'l v. Great Eastern R. Co., L. R., 7 Ch. 475; *affirmed* on appeal, L. R., 6 H. L. 367; London, etc., R. Co. v. Wandsworth, L. R., 8 C. P. 185; Metropolitan Dist. R. Co. v. Sharpe, 5 App. Cas. 425.

3. Schwenke v. Union Depot, etc., Co., 7 Colo. 512; Nunes v. Wellisch, 12 Bush (Ky.) 363; Darmstaetter v. Moloney, 45 Mich. 621; Gloversville v. Howell, 70 N. Y. 287.

A village charter passed after the general excise law, providing that actions for penalties for violation of the excise laws in said village shall be brought in the corporate name of the village, is not affected by an amendment to the general law vesting the power of suing for penalties in the overseers of the poor of the county. Gloversville v. Howell, 70 N. Y. 287.

4. London, etc., R. Co. v. Wandsworth, L. R., 8 C. P. 185; People v. Hunt, 41 Cal. 435. *Compare* McConiha v. Guthrie, 21 W. Va. 134. But see State v. Lewis, 5 Mo. App. 465, in which it was held that the repeal of the provision of the charter of St. Louis which repealed the general laws providing for



adopting an English statute, is deemed to have adopted also the construction put thereon by the English courts.<sup>1</sup> The same rule applies where the statute of one state has been adopted by the legislature of another<sup>2</sup>—the construction of the statute by the

the suppression of prostitution in the city of St. Louis, did not revive the general law.

1. *Pennock v. Dialogue*, 2 Pet. (U. S.) 1; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Taylor v. Thomson*, 5 Pet. (U. S.) 358; *Ken. all v. U. S.*, 12 Pet. (U. S.) 625; *Ex parte Wells*, 18 How. (U. S.) 311; *McDonald v. Hovey*, 110 U. S. 628; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263; *Kirkpatrick v. Gibson*, 2 Brock. (U. S.) 391; *Ullman v. Meyer*, 10 Fed. Rep. 242; *Kennedy v. Kennedy*, 2 Ala. 571; *Alsop v. Nichols*, 9 Conn. 364; *State v. Rowley*, 12 Conn. 101; *Grattan v. Grattan*, 18 Ill. 171; 65 Am. Dec. 726; *Tyler v. Tyler*, 19 Ill. 151; *Fisher v. Deering*, 60 Ill. 114; *Hopkins v. Medley*, 97 Ill. 402; *Fall v. Hazelrigg*, 45 Ind. 586; 15 Am. Rep. 278; *Johnson v. Johnson*, 106 Ind. 475; *Maltby v. Cooper*, 1 Morr. (Iowa) 60; *Sheffield v. Lovering*, 12 Mass. 494; *Com. v. Hartnett*, 3 Gray (Mass.) 450; *Bigelow v. Morong*, 103 Mass. 289; *Com. v. Taylor*, 132 Mass. 262; *Ryalls v. Mechanics' Mills*, 150 Mass. 191; *Ingraham v. Regan*, 23 Miss. 213; *Marqueze v. Caldwell*, 48 Miss. 23; *Skouten v. Wood*, 57 Mo. 380; *Skrainka v. Allen*, 76 Mo. 384; *Waterford, etc., Turnpike v. People*, 9 Barb. (N.Y.) 161; *Burgett v. Burgett*, 1 Ohio 473; 13 Am. Dec. 634; *Brice v. Myers*, 5 Ohio 124; *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582; *Adams v. Field*, 21 Vt. 256.

In *Pennock v. Dialogue*, 2 Pet. (U. S.) 18, Story, J., in construing a patent law, said: "Where English statutes—such, for instance, as the Statute of Frauds and the Statute of Limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority. Strictly speaking, that is not the case in respect to the English statute of monopolies, which contains an exception in which grants of patents for inventions have issued in that country. The language of that clause of the statute is not . . . identical with ours, but the construction of it adopted by the English courts and the principles in

practice which have long regulated the grants of their patents as they must have been known and are tacitly referred to in some of the provisions of our own statutes, afford material to illustrate it." See also *Griswold v. Seligman*, 72 Mo. 123.

In *Carthart v. Robinson*, 5 Pet. (U. S.) 280, Marshall, C. J., said: "The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of these states. By adopting them, they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in *England* at the time they are admitted to operate in this country—indeed, to the time of our separation from the British empire—may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to two countries, we do not hold ourselves bound to fluctuate with them." But see *Hogg v. Emerson*, 6 How. (U. S.) 483.

So far as Congress in the act to regulate commerce adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language, and intended to incorporate it into the statute. *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263.

In *Adams v. Field*, 21 Vt. 266, the court, per Bennett, J., said: "When our Statute of Wills was enacted, the statute of Charles II had received a long, fixed, and well-known construction. But when we adopt an English statute, we take it with the construction which it had received—and this upon the ground that such was the implied intention of the legislature."

2. *Allen v. St. Louis Nat. Bank*, 120 U. S. 34; *Coulam v. Doull*, 133 U. S.

216; *Stutsman County v. Wallace*, 142 U. S. 293; *Coulter v. Stafford*, 48 Fed. Rep. 266; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Taylor v. Palmer*, 31 Cal. 254; *People v. Webb*, 38 Cal. 477; *Lux v. Haggin*, 69 Cal. 384; *Omaha, etc., Smelting Co. v. Tabor*, 13 Colo. 58; 16 Am. St. Rep. 185; *White v. Chicago, etc., R. Co.*, 5 Dakota 508; *Campbell v. Quinlin*, 4 Ill. 288; *Little v. Smith*, 5 Ill. 402; *Ballance v. Rankin*, 12 Ill. 420; 54 Am. Dec. 412; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; *Grattan v. Grattan*, 18 Ill. 171; 65 Am. Dec. 726; *Tyler v. Tyler*, 19 Ill. 151; *Potter v. Potter*, 41 Ill. 84; *Streeter v. People*, 69 Ill. 598; *Freese v. Tripp*, 70 Ill. 496; *Gage v. Smith*, 79 Ill. 219; *Martin v. Judd*, 81 Ill. 488; *Cole v. People*, 84 Ill. 216; *Hudson v. King*, 23 Ill. App. 118; *Cole v. Bentley*, 26 Ill. App. 260; *Glaubenskle v. Low*, 29 Ill. App. 408; *Harrison v. Hill*, 37 Ill. App. 32; *Langdon v. Applegate*, 5 Ind. 327; *Clark v. Jeffersonville, etc., R. Co.*, 44 Ind. 263; *Fall v. Hazelrigg*, 45 Ind. 585; 15 Am. Rep. 278; *Eldridge v. Kuehl*, 27 Iowa 163; *Fairfield v. McNany*, 37 Iowa 77; *Jamison v. Burton*, 43 Iowa 282; *Bemis v. Becker*, 1 Kan. 226; *Stebbins v. Guthrie*, 4 Kan. 353; *Doyle v. Boyle*, 19 Kan. 171; *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 80; *Holden v. Garrett*, 23 Kan. 111; *Dille v. McGregor*, 24 Kan. 362; *Hamilton v. Hannibal, etc., R. Co.*, 39 Kan. 56; *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 504; *Carney v. Hampton*, 3 T. B. Mon. (Ky.) 231; *Com. v. Hartnett*, 3 Gray (Mass.) 450; *Bigelow v. Morong*, 103 Mass. 289; *Pratt v. American Bell Tel. Co.*, 141 Mass. 225; 55 Am. Dec. 465; *Drennan v. People*, 10 Mich. 175; *Shaw v. Hoffman*, 25 Mich. 162; *Harrison v. Sager*, 27 Mich. 476; *Greiner v. Klein*, 28 Mich. 12; *Daniels v. Clegg*, 28 Mich. 32; *In re St. Paul, etc., R. Co.*, 37 Minn. 169; *Nicolett Nat. Bank v. City Bank*, 38 Minn. 85; 8 Am. St. Rep. 643; *Daily v. Swope*, 47 Miss. 367; *Marqueze v. Caldwell*, 48 Miss. 31; *State v. Macon County Ct.*, 41 Mo. 463; *Skouten v. Wood*, 57 Mo. 380; *Griswold v. Seligman*, 72 Mo. 110; *Skrainka v. Allen*, 76 Mo. 384; *Bowers v. Smith* (Mo.), 16 L. R. A. 754; *Collins v. Wilhoit*, 35 Mo. App. 585; *Lindley v. Davis*, 6 Mont. 453; *First Nat. Bank v. Bell, etc., Min. Co.*, 8 Mont. 32; *Hess v. Pegg*, 7 Nev. 23; *Frankel v. Creditors*, 20 Nev. 49; *Burgett v. Burgett*, 1 Ohio 473; 13 Am. Dec. 634; *Gray v. Askew*, 3 Ohio 480; *Irwin v.*

*Bank of Bellefontaine*, 6 Ohio St. 88; *Favorite v. Booher*, 17 Ohio St. 554; *Trabant v. Rummell*, 14 Oregon 17; *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582; *Doswell v. Buchanan*, 3 Leigh (Va.) 365; 23 Am. Dec. 280; *Danville v. Pace*, 25 Gratt. (Va.) 1; 18 Am. Rep. 663; *Atty. Gen'l v. Brunst*, 3 Wis. 787; *Ableman v. Booth*, 11 Wis. 524, note by Dixon, C. J.; *Draper v. Emerson*, 22 Wis. 150; *Perkins v. Simonds*, 28 Wis. 94; *Poertuer v. Russel*, 33 Wis. 201; *State v. Brophy*, 38 Wis. 426; *Wiesner v. Zaun*, 39 Wis. 219; *Westcott v. Miller*, 42 Wis. 461; *Kilkelly v. State*, 43 Wis. 609.

**Constitution.**—When the *California* constitutional convention, in framing the organic law of the state, thought proper to borrow provisions from the constitutions of other states, which provisions had already received a judicial construction, they adopted them in view of such construction, and acquiesced in its correctness. *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 580. See also *Hess v. Pegg*, 7 Nev. 23; *Langdon v. Applegate*, 5 Ind. 327.

**This rule is to be taken with some limitation**; for example, where a statute of *Massachusetts* was substantially followed by the legislature of *California*, and as enacted in *California* was followed in *Utah*, and in *Massachusetts* it received a construction by the supreme judicial court which the Supreme Court of *California* had, before the adoption of the statute in *Utah*, declined to follow, the court of *Utah* was at liberty to adopt the construction which was in accordance with its own judgment, and it was not obliged to follow the construction given to it by the *California* court. *Coulam v. Doull*, 133 U. S. 216.

The rule that the known and settled construction of a statute of one state shall be regarded as accompanying its adoption by another, is not applicable where that construction had not been announced when the statute was adopted, nor when the statute is changed in the adoption. *Stutsman County v. Wallace*, 142 U. S. 293.

In *Little v. Smith*, 5 Ill. 402, the court, speaking of this rule of construction, said that in the matter of practice this rule was not inflexible, as a construction which may be adapted to the general system of practice in another state may not be very well suited to the system in operation in *Illinois*.

And in *Rigg v. Wilton*, 13 Ill. 18; 54

courts of the former is adopted with the statute; and so where a statute is adopted by Congress.<sup>1</sup>

c. PROVISOS, EXCEPTIONS, AND SAVING CLAUSES.—A proviso is something engrafted upon an enactment, and is used for the purpose of taking special cases out of the general act and providing specially for them.<sup>2</sup> An exception is a clause similar to the

Am. Dec. 419, the same court said that where a statute adopted from another state "has there received a definite construction, and one that is consistent with the spirit and policy of our laws, it may with propriety be applied to the statute" to be construed.

An act adopted from another state stands on the same footing, and is subject to the same rules of construction, as all other legislative enactments, though the construction placed upon the law by the courts of the country in which it was first enacted is entitled to very great consideration, and very strong reasons should exist to warrant a departure therefrom. *Ingraham v. Regan*, 23 Miss. 213.

In interpreting a statute adopted from another state "it must be remembered that its adoption here brings it into subordination to the fundamental law of *Missouri*, and that prior decisions elsewhere construing enactments on the same general topic cannot properly be followed if inconsistent with that fundamental law." *Bowers v. Smith* (Mo. 1892), 16 L. R. A. 758.

The Insolvency act in *Nevada* was borrowed from *California*. The construction put thereon by the *California* courts was based on the policy of the laws of that state to procure the discharge of insolvent debtors. The *Nevada* court held that as the main purpose of the *Nevada* law was the ratable distribution of the insolvent's property among his creditors, the reasons for the *California* law did not exist in *Nevada*, and that the adoption of the statute was not an adoption of the construction. *Frankel v. Creditors*, 20 Nev. 49.

In *Snoddy v. Cage*, 5 Tex. 106, decided in 1849, it was held that the enactment of a law in terms similar to the provisions of a statute of a foreign country did not involve the adoption of the construction which the courts of that country might have given to the provisions of the statute. But see *Munson v. Hallowell*, 26 Tex. 475, where the general rule is acquiesced in.

As to limitations of this rule, see further *Gray v. Askew*, 3 Ohio 466.

1. *Metropolitan R. Co. v. Moore*, 121 U. S. 558; *Sanger v. Flow*, 48 Fed. Rep. 152.

The provisions of an act of Congress which recognized the judicial system of the *District of Columbia* by abolishing the old courts and by establishing the present supreme court of the District with its general and special terms, and which were adopted from the *New York* statutes in substantially the same language, are to be construed in the sense in which they were understood at the time in the system from which they were taken. *Metropolitan R. Co. v. Moore*, 121 U. S. 558.

2. *Potter's Dwaris* 118; *In re Webb*, 24 How. Pr. (N. Y.) 247; *Boon v. Juliet*, 2 Ill. 258; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 237; *Bank for Savings v. Field*, 3 Wall. (U. S.) 495; *Minis v. U. S.*, 15 Pet. (U. S.) 445; *Treasurer v. Clark*, 19 Vt. 129; *Walsh v. Van Horn*, 22 Ill. App. 170.

It is not the office of a proviso to confer power, but to except something from the enacting clause. *Chicago v. Phoenix Ins. Co.*, 126 Ill. 276. See also *In re Webb*, 24 How. Pr. (N. Y.) 247; *The Irresistible*, 7 Wheat. (U. S.) 551.

The office of the proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. *Minis v. U. S.*, 15 Pet. (U. S.) 445. See also *Beaumont v. Irvin*, 2 Sneed (Tenn.) 301.

In *Wayman v. Southard*, 10 Wheat. (U. S.) 30, Marshall, C. J., said: "The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." See also *McRae v. Holcomb*, 46 Ark. 306.

The proviso is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that one shall not operate or the other be exercised unless in the case pro-

proviso, exempting from the operation of an enactment that which but for it would have been included.<sup>1</sup> A saving clause in a statute is an exception of a special thing out of general things mentioned in the statute;<sup>2</sup> it is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result from unrestricted repeal.<sup>3</sup>

The particular intent expressed in a proviso or exception will control the general intent of the enactment.<sup>4</sup>

The proviso should be confined to what immediately precedes, unless the contrary intent clearly appears;<sup>5</sup> and should be construed with the section with which it is connected.<sup>6</sup> This rule is not, however, absolute, and if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment.<sup>7</sup>

vided. *Voorhees v. Jackson*, 10 Pet. (U. S.) 471.

1. *Bouvier's L. Dict.*, tit. *Proviso*; *Bish. Stat. Cr.*, § 58. See *Voorhees v. Jackson*, 10 Pet. (U. S.) 449; *McRae v. Holcomb*, 46 Ark. 306; *Mullins v. Surrey County*, 5 Q. B. Div. 170.

2. *Potter's Dwarris* 117; *Hollowell v. Corporation of Bridgewater*, 2 And. Rep. 192.

Where a new statute adopted on the same subject as a prior one, repeals the former law, with a saving clause in the repealing section as to existing suits or litigation, the saving in such case is in legal effect a limitation on the repealing clause, and operates to continue in force the old law as to existing suits and proceedings. *Dobbins v. First Nat. Bank*, 112 Ill. 553.

3. *Com. v. Marshall*, 11 Pick. (Mass.) 350; 22 Am. Dec. 377; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Com. v. Edwards*, 4 Gray (Mass.) 1; *Com. v. Bennett*, 108 Mass. 30; 11 Am. Rep. 304; *The Irresistible*, 7 Wheat. (U. S.) 551; *U. S. v. Helen*, 6 Cranch (U. S.) 203; *U. S. v. Kohnstamm*, 5 Blatchf. (U. S.) 222; *Taylor v. State*, 7 Blackf. (Ind.) 93; *Governor v. Howard*, 1 Murphy (N. Car.) 465; *Smith v. Banker*, 3 How. Pr. (N. Y.) 142; *People v. Gill*, 7 Cal. 356; *Rex v. Justices of London*, 3 Burr. 1456; *Cochran v. Taylor*, 13 Ohio St. 382; *Files v. Fuller*, 44 Ark. 273; *Gilleland v. Schuyler*, 9 Kan. 569; *Beatty v. People*, 6 Colo. 538; *Harris v. Townshend*, 56 Vt. 716.

4. *State v. Goetze*, 22 Wis. 363; *Ihmsen v. Monongahela Nav. Co.*, 32 Pa. St. 153; *Gregory's Case*, 6 Rep. 19b. See also *Foster's Case*, 11 Co. 56b.

5. *Bank for Savings v. Field*, 3 Wall. (U. S.) 495; *Dollar Sav. Bank v. U. S.*,

19 Wall. (U. S.) 227; *Pearce v. Bank of Mobile*, 33 Ala. 693; *Gast v. Board of Assessors*, 43 La. Ann. 1104; *Wolf v. Banereis*, 72 Md. 481; *Ex parte Partington*, 6 Q. B. 649; 51 E. C. L. 648; *Rex v. Newark-upon-Trent*, 3 B. & C. 59; 10 E. C. L. 17.

In *Rawls v. Doe*, 23 Ala. 248, it was said: "As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, we think upon sound principles of construction it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter. In the present case, we can perceive no good reason why the limitation of the proviso should be extended to the third section. On the contrary the effect of such an application would be to give to that section a partially retrospective operation which, although allowed, is not a construction favored by our courts."

6. *Callaway v. Harding*, 23 Gratt. (Va.) 547; *Spring v. Olney*, 78 Ill. 101; *Lehigh County v. Meyer*, 102 Pa. St. 479; *Cushing v. Worrick*, 9 Gray (Mass.) 382; *Mechanics', etc., Bank's Appeal*, 31 Conn. 63; *Rogers v. Bass*, 6 Iowa 405.

**Effect of Repeal of Enacting Clause.**—So intimate is the connection between the proviso and the enacting clause, that the repeal of the latter necessarily repeals the former, which is not continued in force as an independent enactment. *Church v. Stadler*, 16 Ind. 463.

7. *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. Car. 208; *Wartensteben v. Halthcock*, 80 Ala. 565; *Rex v. Thelkeld*, 4 B. & Ad. 245; 24 E. C. L. 50; *Wells v. Iggulden*, 3 B. & C. 189; 10 E. C. L. 48; *U. S. v. Babbitt*, 1

When the legislature has attached a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the statute would have included the subject-matter of the proviso.<sup>1</sup> But where it is clear that the language of the enacting clause does not include the subject-matter of the proviso, a strained construction to that language has been refused, although the refusal rendered the proviso of no effect.<sup>2</sup>

A proviso which restricts an enacting clause which is general in its scope, is to be strictly construed.<sup>3</sup> In statutes which are strictly construed, however, as, for example, penal statutes, provisos must be liberally construed.<sup>4</sup>

Statutes providing that the repeal of an act shall not affect any rights which have accrued under it, any duty imposed, any penalty incurred, nor any proceeding commenced, etc., are not infrequent. Such statutes are in the nature of general saving clauses; and though, of course, not binding upon a subsequent legislature,

Black (U. S.) 55; Mechanics', etc., Bank's Appeal, 31 Conn. 63; Friedman v. Sullivan, 48 Ark. 213; Cumberland v. Magruder, 34 Md. 381.

So the word "proviso" instead of limiting a preceding section may introduce an independent paragraph. Georgia R., etc., Co. v. Smith, 128 U. S. 174.

In *State v. Eskridge*, 1 Swan (Tenn.) 415, it was held that where by a declaratory provision, the legislature enacted that a thing might be done which before that time was lawful, and added a proviso that nothing therein was to be so construed as to permit some matter embraced in the general provision to be done, this was an implied prohibition of such act, though before that time it was lawful.

The territorial act of Iowa, 1839, defined the crime of murder, and prescribed the penalty; the act of 1843 repealed the act of 1839, with a proviso, that any person who had committed any crime punishable by it, should be prosecuted and punished according to it, the same as if the repealing act had not been passed; the code of 1851 repealed all acts passed prior to it, with a saving, that crimes committed under any act repealed by it, should not be affected by the repeal: *Held*, that there is no law in force for punishing the offense of murder committed in 1840; that the code of 1851 only repealed the act of 1843, and did not repeal the act of 1839, for it had before been repealed, and hence there was no saving clause in the code providing for the punishment of crimes committed under the last-named act. *Jones v. State*, 1 Iowa 395.

1. *Mullins v. Surrey County*, 5 Q. B. Div. 173; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 191; *Tinkham v. Tapscott*, 17 N. Y. 152. See also *Downs v. Huntington*, 35 Conn. 591.

In *Brown v. Maryland*, 12 Wheat. (U. S.) 438, Marshall, C. J., for the court, said: "If it be the rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments."

2. *Mullins v. Surrey County*, 5 Q. B. Div. 173. See also *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *Tinkham v. Tapscott*, 17 N. Y. 152.

3. *U. S. v. Dickson*, 15 Pet. (U. S.) 141; *Bragg v. Clark*, 50 Ala. 363; *Bird v. Jones*, 37 Ark. 195; *McRae v. Holcomb*, 46 Ark. 306; *Nolan v. Harden*, 43 Ark. 307; *Wassell v. Armstrong*, 35 Ark. 247; *Blood v. Fairbanks*, 50 Cal. 420; *Willingham v. Smith*, 48 Ga. 580; *McRae v. Holcomb*, 46 Ark. 306; *Epps v. Epps*, 17 Ill. App. 106; *Butts v. Vicksburg, etc., R. Co.*, 63 Miss. 462; *Looker v. Davis*, 47 Mo. 140; *Cumberland v. Magruder*, 34 Md. 381; *Roberts v. Yarbboro*, 41 Tex. 449; *Southgate v. Goldthwaite*, 1 Bailey (S. Car.) 367. See *Potter v. National Bank*, 102 U. S. 163; *Clark's Appeal*, 58 Conn. 207. Compare *Foster v. Pritchard*, 2 H. & N. 151; *Rogers v. Vass*, 6 Iowa 405.

4. *Bank for Savings v. Field*, 3 Wall. (U. S.) 495; *In re Ankrum*, 3 McLean

yet courts, in construing the repealing act, will adhere to them, unless a contrary intent of the legislature plainly appears.<sup>1</sup>

The rule that all parts of a statute are to be construed together and effect given to the whole, if possible, is to be observed in the construction of provisos and saving clauses.<sup>2</sup> But a distinction has been made where the proviso or saving clause is totally repugnant to the purview, or enacting part of the statute. In cases of

(U. S.) 285. For provisos in penal statutes, see *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Dull v. People*, 4 Den. (N. Y.) 91; *Sneed v. Com.*, 6 Dana (Ky.) 339; *Sanders v. State*, 77 Ind. 227; *People v. Gill*, 7 Cal. 356; *White v. Nashville*, etc., R. Co., 7 Heisk. (Tenn.) 518; *Jackson v. Moye*, 33 Ga. 296.

1. *Com. v. Sullivan*, 150 Mass. 316; *Com. v. Desmond*, 123 Mass. 407; *U. S. v. Reisinger*, 128 U. S. 398; *U. S. v. Barr*, 4 Sawy. (U. S.) 254; *U. S. v. Keokuk*, etc., *Bridge Co.*, 45 Fed. Rep. 178; *State v. Kansas City R. Co.*, 32 Fed. Rep. 722; *Gilleland v. Schuyler*, 9 Kan. 580; *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 Kan. 32; *Willetts v. Jeffries*, 5 Kan. 473; *Harris v. Townshend*, 56 Vt. 716; *Pratt v. Jones*, 25 Vt. 303; *Grace v. Donovan*, 12 Minn. 580; *Brisbin v. Farmer*, 16 Minn. 215; *People v. Quinn*, 18 Cal. 121; *Jordan v. State*, 38 Ga. 585; *Volmer v. State*, 34 Ark. 487; *Sanders v. State*, 77 Ind. 227; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Acree v. Com.*, 13 Bush (Ky.) 353; *Com. v. Sherman*, 85 Ky. 686; *State v. Shaffer*, 21 Iowa 486; *Tipton v. Carrigan*, 10 Ill. App. 318; *Farmer v. People*, 77 Ill. 322; *State v. Ross*, 49 Mo. 416; *Rogers v. Pacific R. Co.*, 35 Mo. 153; *Lakeman v. Moore*, 32 N. H. 410; *Hall v. Hall*, 64 N. H. 295; *State v. Proctor*, 90 Mo. 334; *Garland v. Hickey*, 75 Wis. 178; *National Bank v. Lemke* (N. Dak. 1893), 54 N. W. Rep. 921. See also *Ex parte Larkins* (Okl. 1891), 25 Pac. Rep. 745.

In *People v. McNulty*, 93 Cal. 437, it was said: "It is quite clear that a general saving clause, if it be clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute. This proposition is too plain to need the support of authority, but there are authorities directly to the point."

In *Mongeon v. People*, 55 N. Y. 613, the court refused to apply the provision of the general repealing act of 1828, providing that "No offense committed, or penalty incurred, previous to the

time when any statutory provision shall be repealed shall be affected by such repeal," to subsequent legislation, saying, "The legislature could not declare in advance the intent of subsequent legislatures, or the effect of subsequent legislation upon existing statutes." See also *Nash v. White's Bank*, 105 N. Y. 245.

In *Files v. Fuller*, 44 Ark. 280, the court, in speaking of such a statute, said: "This statute has very little importance save in hermeneutics, and has been rarely invoked, for no legislature has power to prescribe to the courts rules of interpretation, or to fix for future legislatures any limits of power as to the effect of their action. Any subsequent legislature might make its repealing action operate in pending suits, as effectually as if no such statute existed, and the courts are quite free to consider what the subsequent legislature did in fact intend, or had power to do. Still it has kept its place on the statute books, and it is persuasive at least, that subsequent legislatures meant to keep in harmony with it, and in their legislation supposed it would go without saying, that when a repeal was made, all rights in suits pending under the old statutes would be preserved."

As to what is included under the term "proceeding" in such a clause, see *Beatty v. People*, 6 Colo. 538; *Gordon v. State*, 4 Kan. 489; *PROCEEDING*, vol. 19, p. 220.

2. *Rex v. Archbishop of Armagh*, 8 Mod. 8; *Savings Inst. v. Makin*, 23 Me. 360.

"The true principle undoubtedly is, that the sound interpretation and meaning of the statute on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand under the restriction of the saving clause, or proviso, the same is not to be held void for repugnancy." 1 Kent's Com. 463, note, commenting upon *Savings Inst. v. Makin*, 23 Me. 360.

such repugnance, it has been held that the saving clause is void, and the purview of the statute will prevail<sup>1</sup>; but that the proviso will stand as the later expression of the legislative will, and the purview must give way.<sup>2</sup> This distinction has been criticized by eminent writers as unsound, on the ground that the whole of an act is now passed at the same time, and it cannot fairly be said that any part of it expresses the last intention of the legislature, and on the further ground that there is, in this regard, really no essential difference between a saving clause and a proviso, both being employed to limit the operation of the purview, or enacting part of the statute.<sup>3</sup> And it has been held that both should be kept within their legitimate bounds, and neither should be allowed to render the body of the statute entirely inoperative.<sup>4</sup>

*d. INCONSISTENT CLAUSES AND STATUTES.*—See *infra*, this title, *In Pari Materia*; *Repeal*; *Context*.

**10. Associated Words**—*a. NOSCITUR A SOCIIS.*—It is a fundamental principle in the construction of statutes that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated.<sup>5</sup> The rule is embodied in the familiar maxim *noscitur a sociis*. To illustrate: a statute prohibiting the “having or keeping” gun-

1. Wood's Case, 1 Rep. 47; Walsingham's Case, 2 Plowd. 565; Farmers' Bank v. Hale, 59 N. Y. 59; Yarmouth v. Simmons, 10 Ch. Div. 518.

In 1 Black. Com. 89, it is said: “A saving totally repugnant to the body of the act, is void. If, therefore, an act of Parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A in the king, saving the right of A; in either of these cases the saving is totally repugnant to the body of the statute, and, if good, would render the statute of no effect or operation, and, therefore, the saving is void, and the land vests absolutely in the king.”

2. Atty. Gen'l v. Chelsea Water Works, Fitzg. 19; Rex v. Middlesex, 2 B. & Ad. 818; 22 E. C. L. 190; Bac. Abr., tit. Statutes (1); Townsend v. Brown, 24 N. J. L. 80; Farmers' Bank v. Hale, 59 N. Y. 59; White v. Nashville, etc., R. Co., 7 Heisk. (Tenn.) 534. See also Packer v. Sunbury, etc., R. Co., 19 Pa. St. 219; Ryan v. State, 5 Neb. 276; Gibbons v. Brittenum, 56 Miss. 232.

3. 1 Kent's Com. 463; Bish. Stat. Cr. (2d ed.), §§ 63-65; Potter's Dwaris 118.

4. Jackson v. Moye, 33 Ga. 302, where it was held that a proviso was repugnant to the body of the act, and was therefore void. Mason v. Boom Co., 3 Wall. Jr. (U. S.) 252.

In Dugan v. Bridge Co., 27 Pa. St. 309; 67 Am. Dec. 464, it is said that it is a general principle in the construction of statutes, that a proviso, or saving clause, which is directly repugnant to the purview or body of the act, is not to have effect.

In 1 Kent's Com. 463, the learned author said: “But it may be remarked upon this case of Fitzg. (Atty. Gen'l v. Chelsea Water Works, Fitzg. 19), that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to say why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected.”

5. Rex v. Jones, 7 Exch. 586; Reg. v. Brown, 17 Q. B. 833; 79 E. C. L. 833; Sewell v. Taylor, 7 C. B. N. S. 160; 97 E. C. L. 160; Skinner v. Usher, L. R., 7 Q. B. 423; De Londo's Case, 2 East P. C. 1098; Wiseman v. Cotton, 1 Lev. 80; Crespigny v. Wittenoom, 4 T. R. 790; Rex v. Manchester Water Works, 1 B. & C. 630; 8 E. C. L. 266; Woodward v. London R. Co., 3 Exch. Div. 121; Arthur v. Moller, 97 U. S. 368; U. S. v. Weise, 2 Wall. Jr. (U. S.) 72; Com. v. Monongahela Nav. Co., 66 Pa. St. 81; Hilke v. Eisinbeis, 104 Pa. St.

powder, does not apply to a person who has gunpowder for a temporary use only, a carrier for instance; the kind of "having" contemplated by the act being made manifest by the word "keeping" with which it is associated.<sup>1</sup> And a statute declaring a fraudulent "gift, delivery, or transfer" of property to be an act of bankruptcy, does not apply to a "delivery" to a bailee for safe custody; the reference being obviously to such deliveries or transfers as are of the nature of a gift—in other words, to such only as change the ownership of the property.<sup>2</sup> Again, where a statute prohibited the "taking or destroying" the spawn of fish, it was held not to embrace a "taking" for the purpose of removal to another bed, as the word "destroying" with which "taking" was associated indicated that the "taking" inhibited was of a mischievous or dishonest character.<sup>3</sup> The terms "equity of redemption," "improvements," "voluntary," and others equally familiar, have, by force of the words with which they were associated, been given a meaning different from their strict legal sense.<sup>4</sup>

514; *Holman's Appeal*, 106 Pa. St. 502; *Carter v. Peak*, 138 Mass. 439.

This, it has been observed in reference to *Rex v. Mellings*, 1 Vent. 225, was a rule adopted by Lord Hale, and was no pedantic or inconsiderate expression in falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgments. *Broom's Leg. Max.* (8th ed.) 588.

The statute 1 Vict., ch. 85, made it felony to "shoot, cut, stab, or wound," and the latter term was held to be restricted, by the words which preceded it, to injuries inflicted by an instrument, and hence to bite off a finger or a nose, or to burn the face with vitriol, was not a wound within the meaning of the act. *Reg. v. Harris*, 7 C. & P. 446; 32 E. C. L. 578; *Rex v. Stevens*, 1 Moo. C. C. 409.

In a statute concerning houses of "public refreshment, resort, and entertainment," the word "entertainment" was construed to mean something contributing to the enjoyment of the refreshment, and not a theatrical, musical, or other similar performance. *Muir v. Keay*, L. R., 10 Q. B. 594.

An act which exempted "magnates and noblemen" from tithes, was held not to extend to an ecclesiastical magnate, such as a dean, but to include only magnates of a noble kind. *Warden v. Dean of St. Paul's*, 4 Price 65.

The statute 5 & 6 Wm. IV, ch. 75, § 9, made the receipt of "parochial relief or other alms" a disqualification for the municipal franchise. It was held that the words "other alms," referred to

parochial alms and did not include alms received from a charitable institution. *Reg. v. Litchfield*, 2 Q. B. 870; 42 E. C. L. 870.

1. *Biggs v. Mitchell*, 2 B. & S. 523; 110 E. C. L. 523.

So where an act prohibited the "having or conveying" anything suspected of being stolen and not satisfactorily accounted for, the former expression was held to be limited by the latter, and did not, therefore, apply to the possession in a house. *Hadley v. Perks*, L. R., 1 Q. B. 444.

2. *Isitt v. Beeston*, 4 Exch. 159; *Cotton v. James*, Mov. & Mal. 273.

3. *Bridger v. Richardson*, 2 M. & S. 568. And under an act making it penal to "take or kill" fish without the permission of the proprietor of the fishery, a similar kind of taking was held to have been intended. *Rex v. Mallinson*, 2 Burr. 679.

4. "Equity of Redemption."—*Pennsylvania* act, April 22, 1856 (2 Bright. Purd. 1064, par. 14), is in the following language: "No right of entry shall accrue or actions be maintained for a specific performance of any contract for the sale of any real estate, or for damages for non-compliance with any such contract, or to enforce any equity of redemption, after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued, with the right of entry, unless such contract shall give a longer time for its performance, or there has been, in part, a



The most frequent application of this rule is found where specific and generic terms of the same nature are employed in the same act, the latter following the former. While, in the abstract, general terms are to be given their natural and full signification,<sup>1</sup> yet where they follow specific words of a like nature they take their meaning from the latter, and are presumed to embrace only things or persons of the kind designated by them.<sup>2</sup> Thus, an act declaring that certain affidavits shall not be invalidated by "cleri-

substantial performance, or such contract, equity of redemption, or trust, shall have been acknowledged, by writing, to subsist, by the party to be charged therewith, within the same period." It was held that the words "to enforce an equity of redemption" construed—as they must be—in connection with the words "after re-entry made for any condition broken," could not refer to a mortgagor's right in the premises mortgaged, but only to cases such as those arising upon the rights of a purchaser under a ground-rent deed, after re-entry by the grantor for non-payment of rent; and, therefore, that the provision in no wise affected the rights of mortgagors, nor made any change in the rule previously existing, allowing a deed absolute on its face to be shown by parol to be a mortgage. *Harper's Appeal*, 64 Pa. St. 315; *Ballentine v. White*, 77 Pa. St. 20.

"Improvements."—In *Schenley's Appeal*, 70 Pa. St. 98, the question was the existence of a mechanics' lien upon an ordinary dwelling house under the *Pennsylvania* act, Feb. 17, 1858 (2 Bright, *Purd.* 1029, pl. 23), providing for a mechanics' lien on all "improvements, engines, pumps, machinery, screens and fixtures erected, repaired or put in by mechanics, machinists, persons or material-men entering liens thereon;" and *Agnew, J.*, in delivering the opinion of the court, said: "Though the word 'improvements' is large enough, under ordinary circumstances, to include a house or private dwelling, it is manifest by its connection in this act with the words engine, pumps, machinery, screens and fixtures . . . that this word was not intended to authorize the creation of liens upon ordinary houses or dwellings of tenants independently of the works indicated by the other expressions used in connection with the word 'improvements.' These words have clear reference to the work erected on colliery leases, which are quite numerous, and are of great value and importance in

the counties of Luzerne and Schuylkill;"—the two counties to which the statute was originally made applicable.

"Right."—20 & 21 Vict., ch. 147, § 53, after authorizing the construction of jetties in a certain river, contained the proviso that it should not take away any "right," claim, privilege, franchise or immunity to which the occupiers of land on the banks were entitled. It was held that the word "right" was, on account of the associated words, limited to vested rights of property, and did not include the right of navigation which the occupiers enjoyed not otherwise than the public generally. *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388; 95 E. C. L. 386.

"Right of Common."—Under the Statute, 2 & 3 Wm. IV, ch. 71, the phrase "any right of common" is restricted by the words which follow, "or other profit or benefit to be taken and enjoyed from or upon any land," so as not to embrace rights in gross, but only those ordinary rights of common and *profit à prendre* which are in some way appurtenant to the land and limited to the wants of a dominant tenant. *Shuttleworth v. LeFleming*, 19 C. B. N. S. 687; 11 E. C. L. 687.

"Voluntary."—An annuity act excepted from its general provisions any "voluntary annuity granted without regard to pecuniary consideration." The word "voluntary" was held to be employed, not in its common legal sense, as without consideration, but as without pecuniary consideration. *Crespigny v. Wittenoom*, 4 T. R. 790.

1. For example, the language "any bond or other specialty," in a statute limiting the time for instituting actions, includes every kind of specialty. *Cork, etc., R. Co. v. Goode*, 13 C. B. 836; 76 E. C. L. 835.

So the grant of a right to shoot, hunt and fish, embraces all things usually the subject of such sport. *Jeffreys v. Evans*, 19 C. B. N. S. 264; 115 E. C. L. 263.

2. This branch of the subject is fully

cal or other defects," refers to clerical or formal defects of like description only.<sup>1</sup> So an act exempting from execution the tools, etc., of any "mechanic, miner, or other person," does not include a judgment debtor who is a farmer.<sup>2</sup>

But the object of the rule in question being not to defeat, but to ascertain and effectuate the legislative intent, it will not be applied where the application would be in the face of the evident meaning of the framers of the law.<sup>3</sup> Accordingly, where the obvious purpose of an act was to prevent a desecration of the Sabbath by restraining the doing of those things which are offensive to a Christian community, the prohibition against "horse racing, cock fighting, or playing cards, or games of any kind" on Sunday, was held to embrace baseball.<sup>4</sup> Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently

treated under the titles *OTHER*, vol. 17, p. 278; *OTHERWISE*, vol. 17, p. 285, where a large collection of cases, and many illustrations, will be found.

1. *Duanesburgh v. Jenkins*, 40 Barb. (N. Y.) 574.

2. *Bevitt v. Crandall*, 19 Wis. 581.

3. *State v. Williams*, 2 Strobh. (S. Car.) 474; *Com. v. Percival*, 4 Leigh (Va.) 150; *Foster v. Blount*, 18 Ala. 687. In this latter case it was said that the rule is one of construction to ascertain the intention of the legislature, and when that is clear the courts are bound by it. If they were to restrict the meaning of general words when the framers of the law by the use of them intended to embrace other persons or things not embraced by the particular words, they annul the law instead of executing it.

In *Willis v. Mabon*, 48 Minn. 140, it was held that the *Minnesota* laws of 1889, ch. 30, § 1, amending the insolvent laws of 1881, and providing that the "release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation. And in the opinion, it is said that the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of the statute within narrower limits than intended by the law-maker. The general object of an act sometimes requires that the final general terms shall not be restricted in meaning by its more specific predecessors.

Where the question was whether a forfeit bond given to secure the running of a horse race was within a statute which read that "all notes and bonds for the payment of money won by gaming or playing at cards, dice, or any game or games, shall be void and of no effect," it was held that the intention of the legislature to use general words sufficient to embrace all modes of gaming was made evident by the words "or any other game or games" following "or playing at cards or dice;" thereby intending to prohibit all fashions and modes of gaming. *Shropshire v. Glascock*, 4 Mo. 536. This case has been approved in *Boynton v. Curle*, 4 Mo. 599; *Eubanks v. State*, 5 Mo. 450; *Hayden v. Little*, 35 Mo. 418.

Section 9 of *Ohio* act, March 8, 1831, provides "That if any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable or other officer in the execution of his office," etc. It was contended that the words "or other officer" should be restricted, on account of the connection in which they were used, in their meaning to officers connected with the administration of justice under the direction of the courts. But the court held that the words, considering the mischief sought to be remedied—to wit, abuse of, or resistance to, public officers engaged in the execution of their offices—should be construed to embrace ministerial as well as judicial officers generally, other than those named in the statute, and, therefore, a supervisor of roads and highways. *Woodworth v. State*, 26 Ohio St. 196.

4. *State v. Williams*, 35 Mo. App. 541.

add one more variety; in such case, the general term must receive its natural and wide meaning. For example, where an act forbade the conveyance into any prison, with intent to facilitate the escape of a prisoner, of "any mask, dress, or other disguise, or any letter, or any other article or thing," the last general terms were held to include anything whatsoever that might aid a prisoner in escaping—a crowbar.<sup>1</sup> Nor does it apply when the particular words exhaust a whole *genus*; in that case the general term is held to refer to a larger class.<sup>2</sup>

*b. INFERIOR DOES NOT INCLUDE SUPERIOR.*—Statutes which treat of persons or things of an inferior degree cannot, by any general words, be extended to those of a superior degree.<sup>3</sup> For instance, a statute treating of "deans, parsons, vicars, and others having spiritual promotion," does not extend to bishops—deans being the highest persons named, and bishops being of a still higher rank.<sup>4</sup> So an act levying duties upon "copper, brass, pewter, tin, and all other metals not enumerated," includes under the general expression only metals inferior to those mentioned, and not gold or silver, which are commonly known as "precious" metals.<sup>5</sup> Again, a statute relating to indictments before justices of the peace and "others having power to take indictments," does not apply to the superior courts.<sup>6</sup> Where, however, the consequence of thus restricting the general words would be that they would have no effect at all, they must be construed to extend to persons or things superior in degree to those enumerated. Upon this principle, a statute limiting the time for the institution of "every possessory, ancestral, mixed, or other action," has been held to include a real action.<sup>7</sup>

1. *Reg. v. Payne*, L. R., 1 C. C. 27.

2. *Fenwick v. Schmalz*, 3 C. P. 316; *Ellis v. Murray*, 28 Miss. 129. See *infra*, this title, *Inferior Does Not Include Superior*.

3. *Hall v. Byrne*, 2 Ill. 140; *Lyndon v. Standbridge*, 2 H. & N. 51; *Ailesbury v. Pattison*, 1 Dougl. 28; *Woodworth v. Paine*, 1 Ill. 374; 1 Bl. Com. 88; *Broom's Legal Maxims* (8th ed.) 650.

Statute 31 Hen. VIII, ch. 3, exempting from tithes all lands which should come to the crown by "dissolution, renouncing, relinquishing, forfeiture, giving up, or by any other means," had the effect of exempting lands which came to the crown by these or any other inferior means, but not those which came to the crown by an act of Parliament, which is the highest manner of conveyance that can be. 2 Insts. 457.

The statute which prohibited salmon fishing in the waters of certain enumerated streams, and "all other waters

wherein salmon is taken," was construed as including by these general words, only rivers inferior to those mentioned, and, therefore, as not including the river Thames. 2 Insts. 478.

4. *Archbishop of Canterbury's Case*, 2 Rep. 46b; *Copland v. Powell*, 1 Bing. 373; 8 E. C. L. 552.

5. *Per Parke, B.*, in *Casher v. Holmes*, 2 B. & Ad. 592; 22 E. C. L. 146.

6. 2 Insts. 478.

7. *Chapman v. Woodruff*, 34 Ga. 98; *Ellis v. Murray*, 28 Miss. 129. In the latter case it was contended that as real actions were omitted from the statute, and were of higher dignity than those actions enumerated, they could not be included in the words "other action." But the court held otherwise, and said: "Though it is generally true that a statute which treats of things or persons of an inferior degree cannot, by any general words, be extended to those of a superior degree, yet when all those of an inferior degree are embraced by the

c. REDDENDA SINGULA SINGULIS.—Words or clauses in a statute, where the sense requires it, and in furtherance of the legislative intention, are to be taken distributively, *reddenda singula singulis*.<sup>1</sup> They are thus applied to the subject-matter to which they appear by the context most properly to relate, and to which they are indeed most applicable. Thus, in the construction of the words, “for money or other good consideration, paid or given,” the word “paid” must be referred to “money,” and “given,” to “consideration.”<sup>2</sup> Other illustrations of the maxim will be found in the notes.<sup>3</sup>

express words used and there are still general words, they must be applied to things of a higher degree than those enumerated, for otherwise there would be nothing for the general words to operate upon, and effect could not be given to all the words. Here, there are no inferior actions to those embraced in the words ‘possessory, ancestral or mixed actions,’ except, perhaps, the proceeding of unlawful detainer or forcible entry and detainer, the limitation to which is regulated by another statute. Unless the words ‘other action’ embrace those of a higher degree than those enumerated, they become nugatory; and a construction producing such a result cannot be given, upon well settled and familiar principles.”

The statute 52 Hen. III, ch. 19, speaks of “courts baron or other courts,” and it was held that the words “the courts” embraced the courts of record at Westminster, for otherwise they would be given no effect, there being no courts inferior to those enumerated. 2 Insts. 137.

In Bishop on Stat. Cr. (8th ed.), § 246b, the author observes that the rule first stated above accords with the workings of the human mind; that a writer who specifies certain things, adding a general clause, mentions, as of course, the highest things, and some of each class within those which he had in contemplation. Any one can, by experiment, ascertain that his own mind will commonly work so. We reasonably assume, therefore, in construing his language that he did not intend to include things higher than any mentioned, nor of a class outside of those specified; yet the mind does not necessarily in every instance move in this way, and when the court can discern that the mind of the maker of a statute moved otherwise, it should not apply to his work this rule of interpretation.

1. A clause in a statute is said to be construed *reddenda singula singulis*

(“giving each to each”) when one of two provisions in one sentence is appropriated to one of two objects in another sentence, and the other provision is similarly appropriated to the other object. Sweet’s L. Dict.; Anderson’s L. Dict.

In McIntyre v. Ingraham, 35 Miss. 25, it is said that it is one of the best settled rules of construction that words in different parts of a statute must be referred to their appropriate connection, giving to each in its place its proper force, *reddenda singula singulis*, and if possible rendering none of them useless or superfluous.

The words “according to the provisions of the said act and of this act” obviously import that the requisitions of two acts (that act itself and another act thereinbefore mentioned), in their respective particulars are to be duly complied with as if the one under its circumstances requires signature to an instrument only, and the other that it be under seal. Potter’s Dwarries 230.

In Reg. v. Cumberworth Hall, 5 Q. B. 484; 48 E. C. L. 482, where the words were “the feeding of a cow by and on the lands,” Patterson, J., said: “I think we must say *reddendo singula singulis* that the feeding was to be ‘on’ the land while there was food on it and by the owner of the land with pay at other times.”

2. Potter’s Dwarries 230.

3. Massachusetts Stat. of 1884, ch. 212, § 1, provides that “whoever sells or offers for sale, or has in his possession” a lobster less than a certain length “shall forfeit five dollars for every such lobster; and in all prosecutions under this section the possession of any lobster not of the required length shall be *prima facie* evidence to convict.” And where on the trial of a complaint for having in possession lobsters of less than the required length, it was contended by the defendant that no prosecution

could be maintained upon propositions which can be read *uno flatu* declaring that possession shall cause a penalty to be incurred, and that possession shall be *prima facie* evidence to convict; that these two propositions became law at the same instant of time, and that there is no resource except to declare the whole section, so far as it relates to the offense of possession, as unmeaning and incapable of enforcement. But this contention was negatived, and Devens, J., for the court, said: "The different portions of a sentence or different sentences are to be referred, respectively, to the other portions or sentences to which we can see they respectively relate. Even if strict grammatical construction should demand otherwise, the maxim of construction *reddenda singula singulis* is well established, and if the latter clause be construed *respective et distributive* it will be found that it relates to the first two offenses described in the section and not to the third."

Act of Congress, March 3, 1801, p. 287, § 2, supplementing the Act of Feb. 27, 1801, p. 268, provides that all fines, penalties, and forfeitures accruing under the laws of the states of *Maryland* and *Virginia*, which by adoption have become the laws of this district (*District of Columbia*), shall be recovered with costs, by indictment or information in the name of the *United States*, or by action of debt in the name of the *United States* and of the informer. It was held that the act must be construed *reddenda singula singulis*; that is, where the mode of prosecution under the state laws was by indictment, or information in the name of the commonwealth, it should in future be by indictment or information in the name of the *United States*; and where by the state laws the mode of prosecution was an action *qui tam*, or an action of debt in the name of the informer, it should, in future, be an action *qui tam* in the name of the *United States* and of the informer, or an action of debt in the name of the informer alone. *U. S. v. Simms*, 1 Cranch (U. S.) 253.

Statute 3 & 4 Wm. IV, ch. 22, § 44, enacts that "the property of, and in all lands, tenements, hereditaments, buildings and erections, works and other things, which shall have been, or shall hereafter be, purchased, obtained and erected, constructed or made, by or by order of, or which shall be within or under the view, cognizance, or management of any commissioners of

sewers, with the several conveniences, etc., shall be and the same are hereby vested in the commissioners of sewers." Adopting this rule of construction, the court held that this section had not the effect of vesting in the commissioners the property in all lands under their view, cognizance, or management, but only vested in them the property in lands purchased by them, and in works and other things under their view, cognizance, and management. *Stracey v. Nelson*, 12 M. & W. 533.

The first section of *Pennsylvania* Act May 16, 1861, relating to bankers and brokers, requires a return to be made of the business done, and the second section requires a report of the names composing the firm, or of the individuals engaged in the business. The third section provides that "every banker or broker who shall neglect or refuse to make the return and report required by the first and second sections of this act shall for every such neglect or refusal be subject to a penalty" named. And Agnew, J., in delivering the opinion of the court, said: "Adhering, then, to the words of the law, to what did the legislature refer when it said 'shall for every such neglect or refusal be subject to a penalty?' It is to be observed it is the language of reference, and we are therefore, by the words themselves, sent to inquire for the delinquencies referred to. But the moment we start off on this errand, we discover that the reference is to a return, to be found only in the first section, and to a report, provided for only in the second, and that they differ widely. Each is indispensable—the report, that it may be known to the commonwealth who is liable to taxation; the return, that the means of assessing the tax may be furnished. The report is once for all time the party may continue in business; the returns annually until he ceases. It is clear that the offenses being different in kind, independent in act, and distinct in time, each is liable to a punishment. When the legislature therefore said, every such neglect or refusal should be the subject of a penalty, it becomes very plain it did not refer to a joint neglect of several acts impossible of simultaneous performance. Had the word 'every' been omitted, the language might have been dubious, but with it before us, as a part of the very letter of the act, we are admonished by the reference to resort to separate sections to ascertain the neglect or refusal

*d. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.*—The maxim, the expression of one thing is the exclusion of another, is of frequent application in the construction of statutes.<sup>1</sup> Thus, the enumeration of the cases in which creditors are allowed to receive interest excludes other cases;<sup>2</sup> a grant to corporations of the power to lend money on personal security, precludes them from making loans on any other kind of security;<sup>3</sup> a requirement that a license shall be obtained for the sale of specified liquors implies that others may be sold without license;<sup>4</sup> an expression of the cases in which a married woman may sue, limits her to those

referred to, and thus compelled to give the distributive word 'every' a reference to each, *reddendum singula singulis.*" *Com. v. Cooke*, 50 Pa. St. 201.

*Massachusetts Stat.* 1825, ch. 114, § 1, providing for a session of the supreme judicial court at Nantucket, recites that the term shall be holden by one or more of the justices of said court, and the court so holden shall have cognizance of all causes, civil and criminal, and of all other matters and things which by law are cognizable by said court, when holden by one or more justices thereof, in any county. *Shaw, C. J.*, for the court, said: "We think this section is to be construed conformably to the maxim *reddenda singula singulis*, and that when in fact the court is held by one of the justices it shall have cognizance of all matters cognizable by the court when so held in any other county; and when in fact held by three or more, it shall have cognizance of all matters cognizable by the full court in other counties." *Coffin v. Hussey*, 12 Pick. (Mass.) 289. See also *Com. v. Jordan*, 18 Pick. (Mass.) 228.

A statute enacted, "It shall and may be lawful for the directors of the Bristol Dock Company, and they are hereby authorized and required, to make a new common sewer, and also to alter and reconstruct all or any of the sewers of the said city, and also to make such other alterations and amendments in the sewers of the city as may or shall be necessary," etc. Applying the maxim in question, the court held that the statute made it obligatory upon the directors to make a new common sewer, but simply empowered, and did not compel, them to alter and reconstruct the other sewers. *Rex v. Bristol Dock Co.*, 6 B. & C. 181; 13 E. C. L. 139.

1. Where the statute enumerated the cases in which the board of county commissioners of roads were authorized to set aside the report of viewers, the court said: "Applying the familiar

maxim '*expressio unius est exclusio alterius*,' we must hold that there are no others in which it can be implied." *Doctor v. Hartman*, 74 Ind. 221.

The Stat. 2 Wm. IV, ch. 45, § 27, gave the right of voting in boroughs to every person who occupied either as owner or tenant "any house, warehouse, counting house, shop, or other building, being either separately or jointly with any land" within such city or borough, etc. It was held that under this section two distinct buildings could not be joined together in order to constitute a borough qualification. *Tindal, C. J.*, observed: "The rule *expressio unius est exclusio alterius* is, I think, applicable here. I cannot see why the legislature should have provided for the joint occupation of a building and land, and not for that of two different buildings if it had been intended that the latter should confer the franchise." *Dewhurst v. Fielden*, 7 M. & G. 182; 49 E. C. L. 181.

The provisions of the *Missouri* statute (*Wagner's Sts.* 328, § 5), authorizing the joinder as defendants of those persons living in the same county or circuit in proceedings to condemn lands for railroads, is equivalent to saying that other persons not residing in said county or circuit cannot be joined with them. *Quincy, etc., R. Co. v. Kellogg*, 54 Mo. 334. See further *Estate of Weeks*, 1 Civ. Pro. Rep. (N. Y.) 164; *Scovern v. State*, 6 Ohio St. 288; *Brockett v. Ohio, etc., R. Co.*, 14 Pa. St. 241; *Page v. Allen*, 58 Pa. St. 338; 98 Am. Dec. 272; *Philadelphia v. Davis*, 6 W. & S. (Pa.) 278; *Koch v. Bridges*, 45 Miss. 247; *Watson v. Corey*, 6 Utah 150. See *supra*, this title, *Special Classes—Private and Special*, and *infra*, this title, *Repeal*.

2. *Watkins v. Wassell*, 20 Ark. 410.

3. *Fowler v. Scully*, 72 Pa. St. 456; 13 Am. Rep. 699.

4. *Feldman v. Morrison*, 1 Ill. App. 460.

cases;<sup>1</sup> subjecting coal mines to the poor rate is a virtual exclusion of other mines;<sup>2</sup> and a special provision in an act for levying a tax of a fixed *per centum* excludes the levy of a higher, although necessary, tax;<sup>3</sup> so a statute expressly exempting from distress for taxes "arms and accoutrements" makes all other property liable to the distress.<sup>4</sup> And when a statute defining an offense, designates one class of persons as subject to its penalties, all others are to be deemed as exonerated.<sup>5</sup>

But this maxim is not of universal application; it is always subject to the intention of the legislature as the chief guide to the construction.<sup>6</sup> Moreover, where the language of the statute may fairly embrace many different cases, and some only are expressly mentioned merely by way of example, others of a similar nature are not thereby excluded.<sup>7</sup> And if there is some special reason for mentioning one or more things, and none for mentioning others, which are otherwise within the statute, the failure to mention the latter will not necessarily exclude them.<sup>8</sup> And, again, where the words of the law-maker are general and the statute is merely declaratory of the common law, it may extend to persons and things other than those actually named.<sup>9</sup> Indeed it has been said that the maxim is too general, and subject to too many exceptions in its application, to govern the construction of criminal statutes.<sup>10</sup> And *e converso*, the exclusion of one subject or thing in a statute, is, as a general rule, the inclusion of all others. For example, the exclusion of the power of a court to impose a fine of less than a specified amount, gives, by implication, the power to impose a fine for more than that sum.<sup>11</sup>

11. **Retrospective Laws**—(See also CONSTITUTIONAL LAW, vol. 3, p. 670; EX POST FACTO LAWS, vol. 7, p. 525; VESTED RIGHTS) —*a.* **DEFINITION.**—A retrospective or retroactive law is one which operates upon matters which occurred, or rights and obligations which existed, before the time of enactment.<sup>12</sup> Strictly speaking,

1. *Miller v. Miller*, 44 Pa. St. 170.

2. *Reg. v. Cunningham*, 5 East 478. In *Potter's Dwaris* 221, it is said: "Where certain specific things are taxed, or subjected to any charge, it seems probable that it was intended to exclude everything else, even of a similar nature; and *a fortiori*, all things different in *genus* and description from those which are enumerated."

3. *U. S. v. Macon County*, 99 U.S. 582.

4. *Sherwin v. Bugbee*, 16 Vt. 439.

The 32d section of the *Pennsylvania* Act of April 29, 1844, declares that all offices, posts of profit, professions, trades and occupations, except the "occupation of farmers," shall be valued and assessed, and subject to taxation. And it was held that this exception excluded all other exceptions. *Miller v. Kirkpatrick*, 29 Pa. St. 226. See also *Olive*

*Cemetery Co. v. Philadelphia*, 93 Pa. St. 129; 39 Am. Rep. 732.

5. *Howell v. Stewart*, 54 Mo. 400; *State v. Jaeger*, 63 Mo. 403.

6. *Broom's Leg. Max.* (8th ed.) 652.

7. *Scaggs v. Baltimore, etc., R. Co.*, 10 Md. 268; *Broom's Leg. Max.* (8th ed.) 652.

8. *Brown v. Buzan*, 24 Ind. 194.

9. 2 Insts. 256; *Potter's Dwaris* 221.

10. *State v. Connor*, 7 La. Ann. 379.

11. *Hawkins v. People*, 106 Ill. 628; *Chiles v. State*, 2 Tex. App. 36; *Drake v. State*, 5 Tex. App. 649.

12. In *Society, etc. v. Wheeler*, 2 Gall. (U. S.) 105, Story, J., said: "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to

penal laws are retrospective laws as well as those which affect civil and property rights only; but penal laws constitute a specific class known as *ex post facto* laws, which are discussed elsewhere.<sup>1</sup> Questions of constitutional limitations upon the legislative power to enact laws impairing the obligation of contracts or divesting vested rights are not within the scope of the subject under discussion,<sup>2</sup> which will be limited to the construction and operation of retrospective laws.<sup>3</sup>

*b. RULES OF CONSTRUCTION.*—It may be laid down as a fundamental rule in construing statutes so worded as to admit of a construction which would render them retrospective as well as prospective, that a prospective operation only is to be given, unless a legislative intent to the contrary is declared, or necessarily implied from the circumstances or the language used.<sup>4</sup> In *England*, where the Parliament has the power to enact retrospective laws, this rule of construction is applied perhaps more rigorously

transactions or considerations already past, must be deemed retrospective."

1. See *EX POST FACTO LAWS*, vol. 7, p. 525.

2. See *CONSTITUTIONAL LAW*, vol. 3, p. 670; *VESTED RIGHTS*.

3. See *CONSTITUTIONAL LAW*, vol. 3, p. 760, for a discussion of the various classes of valid retrospective laws.

4. *State v. Sloss*, 83 Ala. 93; *Engelhardt v. State*, 88 Ala. 100; *Parsons v. Paine*, 26 Ark. 124; *Webber v. Clarke*, 74 Cal. 11; *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121, and note; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Perkins v. Perkins*, 7 Conn. 558; 18 Am. Dec. 120; *McCarthy v. Havis*, 23 Fla. 508; *State v. Bradford*, 36 Ga. 422; *Garrett v. Doe*, 2 Ill. 335; *In re Tuller*, 79 Ill. 99; 22 Am. Rep. 164; *Russell, etc., Drainage Dist. v. Benson*, 125 Ill. 490; *Jemison v. Adams County*, 130 Ill. 558; *Aurora, etc., Turnpike Co. v. Holthouse*, 7 Ind. 59; *Lucas v. Tucker*, 17 Ind. 41; *Hopkins v. Jones*, 22 Ind. 310; *Niklaus v. Conkling*, 118 Ind. 289; *Maxwell v. Fulton County*, 119 Ind. 20; *Bartruff v. Remy*, 15 Iowa 257; *Knoulton v. Redenbaugh*, 40 Iowa 114; *State v. Crawford*, 11 Kan. 32; *O'Donoghue v. Akin*, 2 Duv. (Ky.) 480; *Cumberland, etc., R. Co. v. Washington County Ct.*, 10 Bush (Ky.) 564; *State v. Bermudez*, 12 La. 352; *Eugenie v. Preval*, 2 La. Ann. 121; *Reed v. His Creditors*, 39 La. Ann. 115; *Torrey v. Corliss*, 33 Me. 333; *Preston v. Drew*, 33 Me. 558; 54 Am. Dec. 639; *Rogers v. Greenbush*, 58 Me. 395; 4 Am. Rep. 202; *Deake's Appeal*, 80 Me. 50; *McGruder v. Carroll*, 4 Md. 335; *State v.*

*Norwood*, 12 Md. 195; *Williar v. Baltimore Butchers', etc., Assoc.*, 45 Md. 546; *Grinder v. Nelson*, 9 Gill (Md.) 209; *Clark v. Baltimore*, 29 Md. 283; *Davis v. Clabaugh*, 30 Md. 508; *Williams v. Johnson*, 30 Md. 500; 96 Am. Dec. 613; *Herbert v. Gray*, 38 Md. 529; *Somerset v. Dighton*, 12 Mass. 383; *Abington v. Duxbury*, 105 Mass. 287; *Phillips v. New Buffalo*, 68 Mich. 217; *Kerlinger v. Barnes*, 14 Minn. 526; *Davidson v. Gaston*, 16 Minn. 230; *Giles v. Giles*, 22 Minn. 348; *Brown v. Wilcox*, 14 Smed. & M. (Miss.) 127; *Gayden v. Bates, Walker (Miss.)* 209; *Easten v. Van Dorn, Walker (Miss.)* 14; *Hooker v. Hooker*, 10 Smed. & M. (Miss.) 599; *Stewart v. Davidson*, 10 Smed. & M. (Miss.) 351; *Garrett v. Beaumont*, 24 Miss. 377; *Carson v. Carson*, 40 Miss. 349; *State v. Thompson*, 41 Mo. 25; *Williamson v. New Jersey, etc., R. Co.*, 29 N. J. Eq. 311; *Elizabeth v. Hill*, 39 N. J. L. 555; *Stilphen v. Stilphen*, 65 N. H. 126; *Amsbry v. Hinds*, 48 N. Y. 57; *Johnson v. Burrell*, 2 Hill (N. Y.) 238; *Fairbanks v. Woods*, 17 Wend. (N. Y.) 329; *Wood v. Oakley*, 11 Paige (N. Y.) 400; *Quinn v. New York*, 63 Barb. (N. Y.) 595; *Wilson v. Baptist Education Soc.*, 10 Barb. (N. Y.) 308; *Quackenbush v. Danks*, 1 Den. (N. Y.) 128; 1 N. Y. 129; *State v. Roosa*, 11 Ohio St. 16; *Price v. Mott*, 52 Pa. St. 315; *Dewart v. Purdy*, 29 Pa. St. 113; *Ellet v. Paxson*, 2 W. & S. (Pa.) 418; *Taylor v. Mitchell*, 57 Pa. St. 209; *Jordan v. Gower*, 57 Tenn. 103; *Collins v. East Tennessee, etc., R. Co.*, 9 Heisk. (Tenn.) 841; *Orr v. Rhine*, 45 Tex. 345; *Rockwall Co. v. Kaufman*



than in the states of the Union, and particularly if vested rights would be disturbed by giving to the statute a retrospective operation.<sup>1</sup>

The time of taking effect, and not the time of enactment, is the time to be taken in determining whether a statute is prospective or retrospective.<sup>2</sup> Retrospective legislation is prohibited by the constitutions of some of the states.<sup>3</sup> There is authority for the view that constitutions operate prospectively unless an intent to the contrary appears.<sup>4</sup>

c. DECLARATORY STATUTES.—The power to interpret and construe statutes rests with the courts and not with the legislature. Courts have resisted constantly legislative efforts to invade the judicial prerogative by means of expository statutes designed to

Co., 69 Tex. 172; Farrel v. Pingree, 5 Utah 443; Richmond v. Henrico County, 83 Va. 204; Murdock v. Franklin Ins. Co., 33 W. Va. 407; Stewart v. Vandervort, 34 W. Va. 524; Fowler v. Lewis, 36 W. Va. 112; Finney v. Ackerman, 21 Wis. 268; Scamans v. Carter, 15 Wis. 548; 82 Am. Dec. 696; Schenck v. Peay, Woolw. (U. S.) 175; U. S. v. Arredondo, 6 Pet. (U. S.) 736; Osborne v. Detroit, 32 Fed. Rep. 36; Gardner v. U. S., 25 Ct. of Cl. 24; Harvey v. Tyler, 2 Wall. (U. S.) 328; Locke v. New Orleans, 4 Wall. (U. S.) 172; McEwen v. Den, 24 How. (U. S.) 242; Chew Heong v. U. S., 112 U. S. 536; Twenty Per Cent. Cases, 20 Wall. (U. S.) 179.

1. Young v. Hughes, 4 H. & N. 76; Williams v. Smith, 4 H. & N. 559; Burn v. Carvalho, 4 Nev. & M. 889; Moon v. Durden, 2 Exch. 22; Grosset v. Ogilvie, 5 Bro. P. C. 527; Couch v. Jeffries, 4 Burr. 2460; College of Physicians v. Harrison, 9 B. & C. 524; 17 E. C. L. 433; Pettamberdass v. Thackoor-sevdass, 5 Moore Ind. App. 109; 7 Moore. P. C. C. 239; 15 Jur. 257; Thompson v. Lack, 3 C. B. 540; Hickson v. Darlow, 52 L. J. Ch. Div. 454; 31 W. R. 362; affirmed 23 Ch. Div. 690; 48 L. T. 449; Evans v. Williams, 2 D. & S. 324; Marsh v. Higgins, 9 C. B. 551; The Ironsides, Lush. 458; Quilter v. Mapleson, 9 Q. B. Div. 672; Marsh v. Higgins, 9 C. B. 551; Evans v. Williams, 2 D. & S. 324; Hickson v. Darlow, 52 L. J. Ch. 454; 31 W. R. 362; 23 Ch. Div. 690; Thompson v. Lack, 3 C. B. 540; 54 E. C. L. 540.

2. Dewart v. Purdy, 29 Pa. St. 113; Barlow v. Gregory, 31 Conn. 261; Medford v. Learned, 16 Mass. 215; State v. Messmore, 14 Wis. 163; Paddon v. Bartlett, 3 Ad. & El. 884; 4 N. & M. 321; 30

E. C. L. 252, 373; Galveston, etc., R. Co. v. State, 81 Tex. 572.

3. See the various state constitutions. As to the *New Hampshire* constitution, see *Woart v. Winnick*, 3 N. H. 473; 14 Am. Dec. 384; *Clark v. Clark*, 10 N. H. 380; 34 Am. Dec. 165; *Willard v. Harvey*, 24 N. H. 344; *Rich v. Flanders*, 39 N. H. 304; *Simpson v. Savings Bank*, 56 N. H. 466; as to the *Texas* constitution, see *De Cordova v. Galveston*, 4 Tex. 470; as to the *Missouri* constitution, see *State v. Heman*, 70 Mo. 441; *State v. Greer*, 78 Mo. 188; *State v. Johnson*, 81 Mo. 60; *State v. St. Louis*, etc., R. Co., 79 Mo. 420. See also *Denver*, etc., R. Co. v. Woodward, 4 Colo. 162; *Lundin v. Kansas Pac. R. Co.*, 4 Colo. 433; *Willoughby v. George*, 5 Colo. 80; *Thomas v. Scott*, 23 La. Ann. 689; *Goshorn v. Purcell*, 11 Ohio St. 641; *State v. Richland Tp.*, 20 Ohio St. 369; *Railroad v. Pounds*, 11 Lea (Tenn.) 127; *Fisher's Negroes v. Dabbs*, 6 Yerg. (Tenn.) 119; *Pickett v. Boyd*, 11 Lea (Tenn.) 498; *Officer v. Young*, 5 Yerg. (Tenn.) 320; 26 Am. Dec. 268.

4. Cooley's Const. Lim., p. 77, where it is said: "We shall venture also to express the opinion that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. . . . And we are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to constitutions." Judge Cooley cites in support of this proposition *Allbyer v. State*, 10 Ohio St. 588; *State v. Barbee*, 3 Ind. 258; *Evans v. Phillippi*, 117 Pa. St. 226; 2 Am. St. Rep. 655; *Pecot v. Police Jury*, 41 La. Ann. 706; and refers also to *State v. Thompson*, 2 Kan. 432; *Slack v. Maysville*, etc., R. Co., 13 B.

have a retroactive operation. While the legislature by a declaratory statute may change an existing law,<sup>1</sup> it cannot by such a statute reverse judicial decisions<sup>2</sup> or inject into an existing statute a meaning which the courts have declared that it did not possess.<sup>3</sup>

*d. STATUTES AFFECTING JUDICIAL PROCEDURE.*—Statutes which are designed to change the mode of judicial procedure, where such change relates to the method of enforcing a right, and

Mon. (Ky.) 1; State v. Macon County Ct., 41 Mo. 153; New Central Coal Co. v. George's Creek Coal, etc., Co., 37 Md. 557; and criticises as *obiter* the language used by the court in Dash v. Van Kleeck, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291, from which a contrary rule might be inferred. See also Indiana County v. Agricultural Soc., 85 Pa. St. 357; Lehigh Iron Co. v. Lower Macungie Township, 81 Pa. St. 482; Brown v. State, 23 Md. 503; State v. Macon County Ct., 41 Mo. 453; Douglass v. Harrisville, 9 W. Va. 162; 27 Am. Rep. 548.

1. Union Iron Co. v. Pierce, 4 Biss. (U. S.) 327.

2. Weaver v. Lapsley, 43 Ala. 224; Sanders v. Cabaniss, 43 Ala. 173; People v. Frisbie, 26 Cal. 135; Young v. State Bank, 4 Ind. 301; 58 Am. Dec. 630; Beebe v. State, 6 Ind. 501; 63 Am. Dec. 391; Lanier v. Gallatas, 13 La. Ann. 175; Lewis v. Webb, 3 Me. 326; Durham v. Lewiston, 4 Me. 140; Atkinson v. Dunlap, 50 Me. 111; Baltimore v. Horn, 26 Md. 194; Moser v. White, 29 Mich. 59; Lawson v. Jeffries, 47 Miss. 686; 12 Am. Rep. 342; Merrill v. Sherburne, 1 N. H. 199; De Chastellux v. Fairchild, 15 Pa. St. 18; Bates v. Kimball, 2 Chlp. (Vt.) 77; Stanford v. Barry, 1 Aik. (Vt.) 314; 15 Am. Dec. 691; Ratcliff v. Anderson, 31 Gratt. (Va.) 105; 31 Am. Rep. 716; Syndor v. Palmer, 32 Wis. 406. But see Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, where it was held that an act of Congress declaring a bridge over the Ohio River to be a lawful structure, superseded a previous decree of the court declaring it an obstruction to navigation and ordering its removal.

3. Greenough v. Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; Reiser v. William Tell Sav., etc., Association, 39 Pa. St. 137; Haley v. Philadelphia, 68 Pa. St. 45; 8 Am. Rep. 153; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291; Salters v. Tobias, 3 Paige (N. Y.) 338; James v. Rowland, 52 Md. 462;

Calhoun v. McLendon, 42 Ga. 405; McNichol v. United States, etc., Agency, 74 Mo. 457. See also Postmaster-Gen'l v. Early, 12 Wheat. (U. S.) 148; Todd v. Clapp, 118 Mass. 495.

In Salters v. Tobias, 3 Paige (N. Y.) 338, Walworth, Ch., said: "In England, where there is no constitutional limit to the powers of Parliament, a declaratory law forms a new rule of decision, and is valid and binding upon the courts, not only as to cases which may subsequently occur, but also as to pre-existing and vested rights. But even there the courts will not give a statute a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to pre-existing law. Courts will treat such laws with all the respect which is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it."

In Dash v. Van Kleeck, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291, Kent, C. J., after a careful review of the ancient and modern authorities on retrospective laws in their relation to vested rights, said: "It is equally inadmissible to consider the act as declaring how the former statutes were to be construed, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect as any other newly created statute. But if it be considered as an exposition of the former acts for the information and government of the

does not affect the right itself, are construed to apply to causes of action which accrued before enactment as well as to those to accrue thereafter.<sup>1</sup> And such statutes are generally held to apply also to actions pending at the time of enactment,<sup>2</sup> although it

courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not possibly have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well-settled axiom that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion."

In *Reiser v. William Tell Sav., etc., Association*, 39 Pa. St. 137, it appeared that the legislature of *Pennsylvania* passed an act in 1859 by which they assumed to interpret an act of the legislature of the same state passed in the year 1850. The act of 1859 came before the court for construction, and, in the course of the opinion, Lowrie, C. J., said: "It is therefore, in its very terms, an expository act. It is an interpretation by one legislature of a statute written by another legislature nine years before; and therefore an adjudication of the private rights which have arisen under it. And yet the former legislature said nothing like this, and nothing from which this could be inferred. The legislature have certainly no such authority over us as to change the laws of language. If given language does not express a given meaning, they may give us other language that does; but this will not change the meaning of the former language. In the very nature of language that is impossible. It is with, and by virtue of the new expressions, that we get the new meaning; and the meaning of the law being the law itself, the law can be no older than the effectual expression of it. We speak, of course, only of statute laws, for customary or common law must be in actual operation before it can be authoritatively ascertained and expressed. . . . We have no expressions in the act of 1850, to justify the interpretation put upon it by the act of 1859. Yet we understand the legislature of 1859 is directing us to adopt this interpretation, and therefore to abandon the interpretation which the judiciary department of the government has declared to be the true one, and to decide according to the act of 1859, the private rights which have arisen under the act of 1850. This we cannot do."

But in *Gray v. Chicago, etc., R. Co.*,

10 Wall. (U. S.) 454, it was held that an act of Congress to legalize a bridge across a navigable river, passed pending a suit to remove the bridge as a nuisance, gave the rule of decision for the court at the final hearing.

1. *Wright v. Hale*, 6 H. & N. 227; *Costa Rica v. Erlanger*, 3 Ch. Div. 69; *The Dumfries, Swab*, 63; *Atty. Gen'l v. Sillem*, 10 H. L. 704; *Warner v. Murdoch*, 4 Ch. Div. 752; *Cornish v. Hockin*, 1 El. & Bl. 602; 72 E. C. L. 602; *Kimbray v. Draper, L. R.*, 3 Q. B. 163; *Warne v. Beresford*, 2 M. & W. 848; *The Alexander Larsen*, 1 W. Rob. 288; *The Ironsides, Lush*, 458; *Boodle v. Davis*, 8 Exch. 351; *Binns v. Hey*, 1 D. & L. 66; *Brooks v. Bockett*, 9 Q. B. 847; 58 E. C. L. 846; *Scadding v. Eyles*, 9 Q. B. 858; 58 E. C. L. 856; *Watton v. Watton, L. R.*, 1 P. & M. 227; *Weldon v. Winslow, L. R.*, 13 Q. B. Div. 784; *Gardner v. Lucas*, 3 App. Cas. 582; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Buckingham v. Moss*, 40 Conn. 461; *Rowen v. New York, etc., R. Co.*, 59 Conn. 364; *Logan v. Logan*, 77 Ind. 558; *Collier v. State*, 10 Ind. 58; *Dobbins v. First Nat. Bank*, 112 Ill. 553; *Winslow v. People*, 117 Ill. 152; *Harlan v. Sigler*, 1 Morr. (Iowa) 39; *Kossuth County v. Wallace*, 60 Iowa 508; *State v. Shreves*, 81 Iowa 615; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29; *Morton v. Valentine*, 15 La. Ann. 150; *Wood v. Westborough*, 140 Mass. 403; *Com. v. Hall*, 97 Mass. 570; *Berry v. Clary*, 77 Me. 482; *Excelsior Mfg. Co. v. Keyser*, 62 Miss. 155; *Jones v. Davis*, 6 Neb. 33; *Lawrence R. Co. v. Mahoning County*, 35 Ohio St. 1; *People v. Ulster County*, 63 Barb. (N. Y.) 85; *Ball v. Bullard*, 52 Barb. (N. Y.) 141; *Underhill v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y.) 478; *Judkins v. Taffe (Oregon, 1891)*, 27 Pac. Rep. 221; *Bennett v. Taffe (Oregon, 1891)*, 27 Pac. Rep. 223; *Lane v. White*, 140 Pa. St. 99; *Lane v. Nelson*, 79 Pa. St. 407; *Richardson v. Cook*, 37 Vt. 599; 88 Am. Dec. 622; *Murray v. Mattison*, 63 Vt. 479; *Bredenburg v. Bardin (S. Car. 1892)*, 15 S. E. Rep. 372; *Sampeyreac v. U. S.*, 7 Pet. (U. S.) 222.

2. *Bensley v. Ellis*, 39 Cal. 309; *People v. Mortimer*, 46 Cal. 114; *Willis v. Finch*

has been held that such actions are presumed to be exempt from their operation unless the contrary intent appears.<sup>1</sup>

So statutes changing forms of actions,<sup>2</sup> making new rules as to parties and pleadings,<sup>3</sup> and changing the rules of evidence in civil causes,<sup>4</sup> will, in the absence of a constitutional prohibition of retrospective legislation, be construed liberally.

c. REMEDIAL AND CURATIVE STATUTES.—In the construction of remedial and curative acts, such, for example, as are intended to correct the mistakes of public officials or private individuals, the rule that statutes are to have prospective operation only unless the contrary intent appears, serves as the general rule of construction, although the courts apply the rule to such statutes with somewhat less strictness than to others.<sup>5</sup> And where the language plainly shows the legislative intent that the statute should have a retrospective operation, and the omission to be cured is some act with which the legislature might have dispensed by a prior statute, the courts will so construe the act as to give it the retrospective operation intended.<sup>6</sup> But it has been held that statutes, which are remedial in their nature and do not disturb

er, 68 Ga. 444; *Indianapolis v. Imberry*, 17 Ind. 175; *Slocum v. Fayette County*, 61 Iowa 169; *State v. Shreves*, 81 Iowa 615; *Walston v. Com.*, 16 B. Mon. (Ky.) 15; *Gill v. Wells*, 59 Md. 402; *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388; *Underhill v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y.) 478; *Judkins v. Taffe* (Oregon, 1891), 27 Pac. Rep. 221; *Bennett v. Taffe* (Oregon, 1891), 27 Pac. Rep. 223; *Lane v. White*, 140 Pa. St. 99; *In re Koch's Estate*, 5 Rawle (Pa.) 338; *State v. Manning*, 14 Tex. 403; *Murray v. Mattison*, 63 Vt. 479; *Lee v. Buckheit*, 49 Wis. 54; *Rosenthal v. Wehe*, 58 Wis. 621; *Larkin v. Saffarans*, 15 Fed. Rep. 147; *Untermeyer v. Freund*, 50 Fed. Rep. 77; *Singer v. Hasson*, 50 L. T. N. S. 326.

1. *State v. Smith*, 38 Conn. 397; *Rowell v. B.*, etc., R. Co., 59 N. H. 35; *Trist v. Cabenas*, 18 Abb. Pr. (N. Y.) 143; *Merwin v. Ballard*, 66 N. Car. 398; *Stiles v. Murphy*, 4 Ohio St. 92; *Mabry v. Baxter*, 11 Heisk. (Tenn.) 682.

2. *In re Protestant Episcopal.*, etc., School, 58 Barb. (N. Y.) 161; *Broadhus v. Broadhus*, 10 Bush (Ky.) 299; *Baldwin v. Newark*, 38 N. J. L. 158; *Thayer v. Seavey*, 11 Me. 284.

3. *Augusta v. Bank of Augusta*, 49 Me. 507; *Lockett v. Usry*, 28 Ga. 345; *Hepburn v. Curtis*, 7 Watts (Pa.) 300; 32 Am. Dec. 760; *Palmore v. State*, 29 Ark. 248; *Grinder v. Nelson*, 9 Gill (Md.) 299; *Crawford v. Branch Bank*, 7 How. (U. S.) 279.

4. *Holmes v. Hunt*, 122 Mass. 505; 23 Am. Rep. 381; *Goshen v. Richmond*, 4 Allen (Mass.) 458; *Monson v. Palmer*, 8 Allen (Mass.) 551; *Howard v. Moot*, 64 N. Y. 262; *Belcher v. Mhoon*, 47 Miss. 613; *Rutland v. Copes*, 15 Rich. (S. Car.) 84; *Rich v. Flanders*, 39 N. H. 304; *Fales v. Wadsworth*, 23 Me. 553; *Foster v. Gray*, 22 Pa. St. 9; *Mann v. Eckford*, 15 Wend. (N. Y.) 502; *McCurtie v. Stevens*, 13 Wend. (N. Y.) 527; *Ralston v. Lothain*, 18 Ind. 303; *West v. Creditors*, 1 La. Ann. 365.

5. *Journey v. Gibson*, 56 Pa. St. 57; *Lambertson v. Hogan*, 2 Pa. St. 22; *Cunningham's Appeal*, 108 Pa. St. 546; *White v. Crawford*, 84 Pa. St. 433; *Chalker v. Ives*, 55 Pa. St. 81; *Hastings v. Lane*, 15 Me. 134; *Shallow v. Salem*, 136 Mass. 136; *Forster v. Forster*, 129 Mass. 559; *Gerry v. Stoneham*, 1 Allen (Mass.) 319; *James v. Rowland*, 52 Md. 462; *Moser v. White*, 29 Mich. 59; *People v. Moore*, 1 Idaho N. S. 662; *Marsh v. Chesnut*, 14 Ill. 223; *Parsons v. Paine*, 26 Ark. 124; *Dean v. Charlton*, 27 Wis. 522; *Bernier v. Becker*, 37 Ohio St. 72; *Citizens' Gas Light Co. v. State*, 44 N. J. L. 648; *Linn v. Scott*, 3 Tex. 67; *People v. Ulster County*, 63 Barb. (N. Y.) 83; *Quinn v. New York*, 63 Barb. (N. Y.) 595.

6. *Palmer v. Fitts*, 51 Ala. 489; *Rele v. Graff*, 51 Cal. 86; *Payne v. Treadwell*, 16 Cal. 220; *Grogan v. San Francisco*, 18 Cal. 590; *King v. Course*, 25 Ind. 202; *People v. Chicago*, 51 Ill. 17; 2

vested rights, are to be construed liberally, even though retrospective in their operation, in order to accomplish the beneficent purpose for which they were enacted.<sup>1</sup>

**12. Mandatory or Directory—*a.* IN GENERAL.**—When a statute requires that an act shall be performed, or performed in a particular manner, without expressly declaring what shall be the consequence of non-compliance, the question arises what intention is to be attributed by inference to the legislature. Of course, where

Am. Rep. 278; *Bennett v. Fisher*, 26 Iowa 497; *Newman v. Samuels*, 17 Iowa 528; *Jones v. Berkshire*, 15 Iowa 248; 83 Am. Dec. 412; *McMillan v. Boyles*, 6 Iowa 304; *Police Jury v. Shreveport*, 5 La. Ann. 661; *People v. Detroit*, 28 Mich. 228; 15 Am. Rep. 202; *People v. Ingham County*, 20 Mich. 95; *Portage County v. Wisconsin Cent. R. Co.*, 121 Mass. 460; *State v. Union*, 33 N. J. L. 350; *State v. Guttenberg*, 38 N. J. L. 419; *People v. Mitchell*, 35 N. Y. 551; *People v. Ingersoll*, 58 N. Y. 1; 17 Am. Rep. 178; *People v. McDonald*, 69 N. Y. 362; *People v. Batchellor*, 53 N. Y. 128; 13 Am. Rep. 480; *Belo v. Forsyth County*, 76 N. Car. 489; *Butler v. Toledo*, 5 Ohio St. 225; *Journeay v. Gibson*, 56 Pa. St. 57; *Blount v. Janesville*, 31 Wis. 648; *Single v. Marathon County*, 38 Wis. 363; *State v. Tappen*, 29 Wis. 664; *Mills v. Charleton*, 29 Wis. 400; 9 Am. Rep. 578.

**Irregularities in Exercise of the Power of Taxation.**—*Musselman v. Logansport*, 29 Ind. 533; *Zanesville v. Richards*, 5 Ohio St. 589; *Boardman v. Beckwith*, 18 Iowa 292; *Cowgill v. Long*, 15 Ill. 202; *Lennon v. New York*, 55 N. Y. 361; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *People v. Todd*, 23 Cal. 181; *Iowa Railroad Land Co. v. Soper*, 39 Iowa 112; *Wilson v. Buckman*, 13 Minn. 441; *McCoy v. Michew*, 7 W. & S. (Pa.) 386; *Montgomery v. Meredith*, 17 Pa. St. 42; *Stewart v. Shoenfelt*, 13 S. & R. (Pa.) 360; *Williston v. Colkett*, 9 Pa. St. 38; *Brevoort v. Detroit*, 24 Mich. 322; *May v. Holdridge*, 23 Wis. 93; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *State v. Newark*, 27 N. J. L. 185; *Barnet v. Barnet*, 15 S. & R. (Pa.) 72; *Beach v. Walker*, 6 Conn. 190; *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Brewster v. Syracuse*, 19 N. Y. 116; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 456; *DePauw v. New Albany*, 22 Ind. 204; *New Orleans v. Poutze*, 14 La. Ann. 866; *New Orleans v. Courdeville*, 13 La.

Ann. 268; *New Orleans v. Locke*, 14 La. Ann. 867; *Litchfield v. McComber*, 42 Barb. (N. Y.) 288; *Stockdale v. Atlantic Ins. Co.*, 20 Wall. (U. S.) 323.

The legislature may authorize taxation to meet expenses which were unauthorized when they were incurred. *Weister v. Hade*, 52 Pa. St. 474; *People v. Mitchell*, 35 N. Y. 551; *Ritchie v. Franklin County*, 22 Wall. (U. S.) 67; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477; *Steines v. Franklin County*, 48 Mo. 167; *Hannibal, etc., R. Co. v. Marion County*, 36 Mo. 294; *Barton County Co. v. Walser*, 47 Mo. 189; *Johnson v. Campbell*, 49 Ill. 316. See also *State v. Harris*, 17 Ohio St. 608; *State v. Demarest*, 32 N. J. L. 528; *State v. Jackson*, 31 N. J. L. 189; *State v. Reed*, 31 N. J. L. 133; *Stewart v. Warren*, 37 Conn. 225; *Bartholomew v. Harwinton*, 33 Conn. 408; *Kunkle v. Franklin*, 13 Minn. 127; 97 Am. Dec. 226; *Comer v. Folson*, 13 Minn. 219.

Acts of municipal corporations which require legislative consent may be made valid by retrospective acts. *Flak v. Kenosha*, 26 Wis. 23; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Bartholomew County v. Bright*, 18 Ind. 93; *Walpole v. Elliott*, 18 Ind. 258; 81 Am. Dec. 358; *Brown v. New York*, 63 N. Y. 239.

1. In *Ex parte Buckley*, 53 Ala. 55, the court, after referring to laws which impair vested rights, said: "There are other statutes which when operating retrospectively, have not incurred judicial condemnation, and to which a liberal construction for the consummation of the just and beneficent purposes in view has been freely accorded. Such statutes are intended to remedy a mischief, promote public justice, correct innocent mistakes into which parties may have fallen, cure irregularities, or give effect to the acts and contracts of individuals fairly done and made."

In *People v. Ulster County*, 63 Barb. (N. Y.) 83, the court, after stating the general rule, said: "The only exception to this rule is that referred to by

the aim and purpose of the law-making power would be plainly defeated if the command to do the thing in a particular manner did not imply an inhibition to do it in any other, no doubt can be entertained as to the mandatory character of the statute.<sup>1</sup> And where compliance is made in terms a condition precedent to the validity of what is done, the neglect of the statutory requirement would obviously be fatal.<sup>2</sup> But there are statutes containing no such indication of the intention of the legislature, in many of which the forms, conditions, and other attendant circumstances prescribed by the statute have been adjudged essential to the act or thing regulated by it; while in others such prescriptions have been deemed simply directory, the neglect of which did not affect its legality nor involve any other consequence than a liability to penalty, if any were imposed, for breach of the statute; and, generally speaking, the fact that there is no remedy for non-compli-

Chancellor Kent (1 Com. 455, 2d ed.), in which he says: 'But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, and adding to the means of enforcing existing obligations.' As authority for this exception, he cites *Underwood v. Lilly* (10 S. & R. (Pa.) 101); *Tate v. Stooltzfoos* (16 S. & R. (Pa.) 35; 16 Am. Dec. 546); *Bleakney v. Farmers', etc., Bank* (17 S. & R. (Pa.) 64; 17 Am. Dec. 635); *Foster v. Essex Bank* (16 Mass. 245; 8 Am. Dec. 135); *Locke v. Dane* (9 Mass. 360)." After reviewing and criticising the cases cited by Chancellor Kent, the court continued: "In all such cases, the acts must, of necessity, be interpreted retrospectively. But upon the authority of the cases cited, in this state and in *England*, unless the act contains, in terms or by necessary implication, language of intent to apply retrospectively, must be held to apply prospectively only. It thus appears, from the cases reviewed, that even remedial statutes are not excepted from the general rule, except in those cases where no other construction can be given without leaving the enactment of no effect; or where such a retrospective construction is a necessary implication from the language employed."

1. The provision of the statute, 18 & 19 Vict., ch. 122 (known as the Metropolitan Building act), that the walls of buildings shall be constructed of brick, stone or other incombustible mate-

rial, though containing no prohibitory terms, clearly prohibits by implication, and makes illegal, their construction with any other material. *Stevens v. Gourley*, 7 C. B. N. S. 99; 97 E. C. L. 97.

And under a law which required the governor to receive written sealed bids until a certain day, it was held that all bids received after that day must be rejected. *Webster v. French*, 12 Ill. 302.

Where a special act in relation to the presentation of certain claims against the state, otherwise not allowable, required them to be presented within a certain time, and therefore made a distinction between such claims and ordinary ones as to the time of presentation, it was held that the presumption was that such limitation as to time was material, and necessary to be followed. *Corbett v. Bradley*, 7 Nev. 106.

2. *Verona's Appeal*, 108 Pa. St. 83. As when, for example, the deed of a married woman was to take effect when the certificate of her acknowledgment of it was filed. *Jolly v. Hancock*, 7 Exch. 820. Or where it was provided that no appeal should be entertained unless certain rules were conformed to. *In re Dickinson*, 51 L. J. Ch. D. 736.

So, when a statute provides, that when a city council shall deem an improvement necessary, they shall so declare by resolution, the declaration of the necessity for the improvement is a condition precedent to subsequent action, and not simply a step in the course of the proceedings, prescribed with a view to a regular, orderly, and prompt transaction of the business in the prog-

ance, is no impediment to such a construction.<sup>1</sup> Although the propriety of ever treating the provisions of any statute as directory merely has been sometimes questioned, nevertheless the right of courts to do so seems justifiable in principle, and is abundantly established by authority.<sup>2</sup>

*b. AFFIRMATIVE AND NEGATIVE TERMS.*—It is, in general, true that negative terms in a statute show a legislative intent to make the provision imperative, requiring a strict performance in respect of both time and manner.<sup>3</sup> Yet as a rule of universal application, this cannot be relied upon, as provisions framed in

ress of which such step is to be taken. *Hoyt v. East Saginaw*, 19 Mich. 39.

1. Thus, the statutes in reference to the times and places of holding quarter sessions are construed to be directory. *Rex v. Leicester*, 7 B. & C. 6; 14 E. C. L. 3. Yet it would be difficult to say that there would be any remedy against the justices for holding them at any other times or places than those prescribed by the statutes. Baron Parke in *Gwynne v. Burnell*, 2 Bing. N. Cas. 7; 29 E. C. L. 228.

2. In *Koch v. Bridges*, 45 Miss. 247, it was said that getting rid of a statutory provision by calling it directory is not only unsatisfactory on account of the rule itself, but it is the exercise of a dispensing power by the courts which approaches so near legislative discretion that it ought to be exercised with reluctance, and only in extraordinary cases where great public mischief would otherwise occur or important private interests demand the application of the rule. There is no more propriety in dispensing with one positive requirement than another; a whole statute may be thus dispensed with when in the way of the caprice or will of a judge. And, besides, it vests a discretionary power in the ministerial officers of the law which is dangerous to private rights; and the public inconvenience, occasioned by the want of uniformity in the mode of exercising a power, is a strong reason for bridling this discretion. And in *Bowman v. Blythe*, 7 El. & Bl. 47; 90 E. C. L. 46, Baron Martin, in concurring in the opinion of the court, said: "I will only add that, though I do not question that, in construing acts, language, seemingly positive, may sometimes be read as directory, yet such a construction is not to be lightly adopted, and never, when as in this case, it would really be to make a new law instead of that made by the legislature."

Mr. Justice Hebard, in *Briggs v.*

*Georgia*, 15 Vt. 72, very justly observes: "I am not well satisfied with the summary mode of getting rid of a statutory provision by calling it directory. If one positive requirement and provision of a statute may be avoided in that way, we see no reason why another may not."

And in *Hoyt v. East Saginaw*, 19 Mich. 39, Chief Justice Cooley says: "The courts in their anxiety to sustain the action of public officers, where irregularities have occurred without the intervention of bad faith, have gone to the extreme in holding legislative enactments to be merely directory, and have perhaps sometimes made decisions which dispensed with those things which the legislature intended as essentials. The duty of the courts is to examine the statute carefully with a view to giving the legislative intention effect; and they ought to sustain defective proceedings only in those cases where it is fairly inferable that they observed that intent more nearly by sustaining them than by setting them aside on account of the omitted formality."

The difficulty in fixing any settled, discriminate point between a mandatory and directory statute, led Lord Penzance, in *Howard v. Bodington*, 2 P. Div. 203, to observe: "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory."

3. *Stayton v. Hulings*, 7 Ind. 144; *Pond v. Negus*, 3 Mass. 230; 3 Am. Dec. 131; *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Koch v. Bridges*, 45 Miss. 247; *Hurford v. Omaha*, 4 Neb. 336.

"It has been asked," observes Lord

Tenterden, in *Rex v. Leicester*, 7 B. & C. 12; 14 E. C. L. 3, "what language will make a statute imperative, if the 54 Geo. III, ch. 84, be not so? Negative words would have given it that effect, but those used here are in the affirmative." And Taunton, J., in *Pearse v. Morrice*, 2 Ad. & El. 94; 29 E. C. L. 42, says: "I understand the distinction between directory and imperative statutes to be, that a clause is directory when the provisions contain mere matter of direction and nothing more; but not so, where they are followed by such words as are used here, viz., that anything done contrary to such provisions shall be 'null and void to all intents.' These words give a direct, positive and absolute prohibition. If they are not obligatory, I cannot conceive to myself any words which can have a prohibitory force."

In *Reg. v. Sneyd*, 9 Dowl. P. C. 1001, where the statute under consideration required overseers to be appointed by the justices within a certain time, Coleridge, J., in giving judgment, says: "Although the appointment is required to be made by the 54 Geo. III, ch. 91, within fourteen days after the 25th of March, yet the general rule is that where such a provision is introduced, unless there are negative words in the statute providing that the appointment shall not take place afterwards, such a provision is to be taken as directory. That was the construction put upon 43 Eliz., ch. 3, and writs of mandamus have been issued requiring magistrates to make appointments of overseers, the issue of which writs must have proceeded on the ground that the words of the statute were directory. No negative words are introduced into this statute; therefore, its language must be regarded merely as directory." A similar consequence was held by Tindal, C. J., in *Cole v. Green*, 6 M. & G. 872, to result from the absence of negative or prohibitory words in a local paving act.

The provision of the charter of the city of New York, *New York Laws*, 1857, ch. 446, § 7, that "All resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public money or the taxing or assessing the citizens of the city, shall be published immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation, and shall not be

passed until after notice has been published at least two days," was held to be mandatory, rendering void an ordinance or resolution not so published, and an assessment in pursuance thereof. *Petition of Douglas*, 46 N. Y. 42; 12 Abb. Pr. N. S. (N. Y.) 161; *reversing* 58 Barb. (N. Y.) 174; 9 Abb. Pr. N. S. (N. Y.) 84; 40 How. Pr. (N. Y.) 201.

The board of health of Philadelphia was authorized to appoint officers and fix their compensation. One B. was appointed clerk in 1858. The board in 1855 fixed the clerk's compensation at two thousand dollars after January, 1856. The council appropriated for the payment of the clerk's salary only fourteen hundred dollars per annum. The *Pennsylvania* act of April 21, 1858, directed that no debt, etc., should be binding on the city unless authorized by law or ordinance, and there being a sufficient previous appropriation made by council, it was held that B. could not recover beyond fourteen hundred dollars. *Bladen v. Philadelphia*, 60 Pa. St. 464.

The provisions of the *Wisconsin Registry Law* (§ 7, ch. 445, *Wisconsin Laws* of 1864), which forbid the vote of any person to be received at any annual election in that state unless his name be on the register, made on a previous day, or unless he shall furnish the board of inspectors a certain affidavit and certain specified proof of his residence in the district, are imperative, and all votes received in violation of these provisions will be rejected by the court in an action to try title to an office. *State v. Hilmantel*, 21 Wis. 574. In delivering the opinion of the court in this case, Dixon, C. J., said: "And next it is to be observed that it is a negative statute. It has been said on very high authority that negative words will make a statute imperative. *Dwarris* on Statutes 715. The words of the act are 'no vote shall be received at any annual election in this state, unless,' etc. It is difficult to conceive any language more strongly imperative than this." This ruling was followed in *State v. Stumpf*, 23 Wis. 630.

And in *Re Election of McDonough*, 105 Pa. St. 488, the provisions of the *Pennsylvania Registry Law* of January 30, 1874. Pamph. Laws 31, that the election officers shall permit no man to vote who is unregistered until he produces the required proof of residence, etc., and that such person shall produce the required proof at the time he offers to vote, was held to be mandatory.



negative language have been adjudged to be directory merely.<sup>1</sup> Nevertheless, it is undoubtedly true that a design to make a provision merely directory is more rarely to be found under negative words.<sup>2</sup> On the other hand, the absence of negative words from a statute is not always conclusive of an intention that the provision is to be regarded as directory simply, as affirmative words, if absolute, explicit, and peremptory, showing that no discretion was intended to be given, may, and often have been held to, render the statute mandatory.<sup>3</sup> And it seems to be agreed that affirmative expressions that introduce a new rule imply a negative of all that is not within the purview.<sup>4</sup>

1. Potter's Dwarria, p. 224.

In *Dale v. Irwin*, 78 Ill. 170, the statute provided in substance, that no vote shall be received at any state election if the name of the person offering to vote be not on the register, unless such person shall furnish to the judges of election his affidavit that he is an inhabitant of the district, and entitled to vote therein, and prove by the oath of a householder and registered voter of the district that he knows such person to be an inhabitant of the district. It was held, however, that the statute in this regard was directory, and that a vote of a registered voter received by the judges of election on his own affidavit, will not be rejected because the other proof of his qualification was made by a person not a householder and registered voter. This ruling was followed in *Clark v. Robinson*, 88 Ill. 498.

It should be observed that similar statutes have been, in other states, held to be mandatory. See last note.

And in *Margate Pier Co. v. Hannan*, 3 B. & A. 266, it was held by the king's bench that the usual provision in the commission of the peace that no magistrate named in it shall be capable of acting or authorized to act unless he shall have taken the oath required by law, would lead to intolerable inconvenience and injustice, if it were imperative and struck with invalidity every act of an unqualified justice. It was pointed out that if his acts were held void, all persons who acted in the execution of a warrant issued by him would act without authority. A constable who arrested, and a jailer who received an arrested person under it, would be trespassers. Resistance to them would be lawful; everything done by them would be unlawful; and a constable and the persons aiding him might become amenable even to a charge of murder for acting under an authority which

they reasonably considered themselves bound to obey, and of the invalidity of which they were wholly ignorant. Such consequences could not reasonably have been supposed to have been intended. The interests of the public require that the acts should be sustained, and the just conclusion was that the legislature intended by the prohibition only to impose a penalty for its infringement.

2. Bishop Stat. Cr., § 255a.

3. *Koch v. Bridges*, 45 Miss. 247; *District Tp. v. Dubuque*, 7 Iowa 276; *Bryan v. Sundberg*, 5 Tex. 418.

In *Cooley's Const. Lim.* (6th ed.) 89, it is said: "There are cases where whether a statute was to be regarded as merely directory or not, was made to depend upon the employing or failing to employ negative words plainly importing that the act should be done in a particular manner or time, and not otherwise. The use of such words is often conclusive of an intent to impose a limitation, but their absence is by no means equally conclusive that the statute was not designed to be mandatory."

Where the language of the statute was that "the forms of proceedings set forth in the schedule annexed shall be used," Lord Kenyon observed: "I cannot say that these words are merely directory," and a material variance from the forms prescribed was held fatal. *Davidson v. Gill*, 1 East 64.

And in *Cohen v. Hoff*, 2 Treadw. Const. (S. Car.) 661, Nott, J., said that "affirmative words may and often do imply a negative of what is not affirmed as strongly as if expressed."

When the statute fixing the salary of a public officer, declared it to be a county charge and that the supervisors "shall audit and allow it" as it fell due, it was held to be imperative, leaving no discretion in the matter to the supervisors. *Morris v. People*, 3 Den. (N.Y.) 381.

4. *Stradling v. Morgan*, Hob. 298;

c. *STATUTES PRESCRIBING TIME AND MODE OF PROCEEDING BY PUBLIC OFFICERS.*—Statutory prescriptions in regard to the time, form, and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity, and dispatch in the conduct of public business.<sup>1</sup> This rule, however, must be taken subject to the principles stated in the foregoing section.

Statutes requiring a sheriff upon a sale of real estate to file a

Plowd. 206; 9 Bacon's Abr. *Statutes* (G); District Tp. v. Dubuque, 7 Iowa 276; U. S. v. Case of Hair Pencils, 1 Paine (U. S.) 406.

1. *Rex v. Ingram*, 2 Salk. 593; *Smith v. Jones*, 1 B. & Ad. 334; *Reg. v. Ingall*, 2 Q. B. Div. 199; *Nowell v. Worcester*, 9 Exch. 467; *Bonar v. Mitchell*, 5 Exch. 415; *Whitney v. Emmett*, 1 Baldw. (U. S.) 303; *Shaw v. Orr*, 30 Iowa 355; *Wilson v. Bank of Alabama*, 3 La. Ann. 196; *New Orleans v. St. Romes*, 9 La. Ann. 573; *Bell v. Taylor*, 37 La. Ann. 56; *Com'rs v. Chase*, 6 Barb. (N. Y.) 37; *Ex parte Heath*, 3 Hill (N. Y.) 41; *Ex parte Kellogg*, 3 Cow. (N. Y.) 372; *Ex parte Johnson*, 7 Cow. (N. Y.) 424; *Bloom v. Burdick*, 1 Hill (N. Y.) 130; 37 Am. Dec. 299; *Gilleland v. Schuyler*, 9 Kan. 587; *Gossard v. Vaught*, 10 Kan. 165; *St. Louis County Ct. v. Sparks*, 10 Mo. 119; 45 Am. Dec. 355; *McKune v. Weller*, 11 Cal. 54; *Hart v. Plum*, 14 Cal. 149; *People v. Murray*, 15 Cal. 221; *Tuohy v. Chase*, 30 Cal. 525; *People v. Lake County*, 33 Cal. 487; *State v. Click*, 2 Ala. 26; *Walker v. Chapman*, 22 Ala. 116; *Savage v. Walshe*, 26 Ala. 619; *Limestone County v. Rather*, 48 Ala. 433; *State v. Smith*, 67 Me. 328; *Wendel v. Durbin*, 26 Wis. 390; *Lackawana, etc., Coal Co. v. Little Wolfe*, 38 Wis. 152; *Fifield v. Marinette County*, 62 Wis. 532.

In *Holland v. Osgood*, 8 Vt. 276; *Corliss v. Corliss*, 8 Vt. 373; *People v. Cook*, 14 Barb. (N. Y.) 259, it is laid down as a rule that statutes directing the mode of proceeding by public officers are directory and are not to be regarded as essential to the validity of the proceedings themselves, "unless it be so declared in the statute." And in a subsequent part of the opinion, in the last case above cited, it is said: "And we have already seen by reference to the adjudications that statutes directing the mode of proceedings by public officers are regarded as directory unless there is

something in the statute itself which plainly shows a different intent."

In *Jones v. State*, 1 Kan. 259, Cobb, C. J., in delivering the opinion of the court, says, in reference to the foregoing: "The rule first mentioned appears to us inaccurate. The words 'unless it be so declared in the statute' seem to require an express declaration that the provision is essential however important and essential a just view of the policy of the statute may show such provision to be. The rule secondly stated contains probably all that the learned judge intended to say in the first, and as a general proposition is doubtless correct. But the intent to make such provision essential may appear as well by the general scope and policy of the statute as by direct averment. In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely. In statutes of this class as well as all others, the will of the legislature expressed in the statute is the law, and is to be ascertained by all legitimate methods of interpretation."

And this is in accord with the view entertained by Judge Cooley. He says: "This rule" (referring to *People v. Cook*, 14 Barb. (N. Y.) 290), "strikes us as very general and as likely to include within its scope, in many cases, things which are of the very essence of the proceedings." Cooley Const. Lim. (6th ed.) 89.

And on the same page he points out that in another case (*People v. Schermerhorn*, 19 Barb. (N. Y.) 540, 558), the same court observes: "Statutory requisitions are deemed directory only when they relate to some immaterial matter where a compliance is a matter of convenience rather than of substance."

Mr. Sedgwick states the rule in these

certificate of sale in the clerk's office,<sup>1</sup> a judge trying a case without a jury to render his decision,<sup>2</sup> a referee to make his report,<sup>3</sup> a county commissioner of schools to be appointed,<sup>4</sup> sealed proposals for state work to be deposited in the office of the secre-

terms: "Where the statute directs an act to be done in a certain way at a certain time, and a strict compliance as to time or form does not appear to the judicial mind to be essential, the proceedings are held valid, though the command of the statute has been disregarded. The statute in such a case is said to be directory." Sedgwick's Stat. & Const. Law 368. Nowhere is the correct rule more forcibly expressed than in *State v. Lean*, 9 Wis. 292, where the court said: "Where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before—no presumption that by allowing it to be so done it may work an injury or wrong—nothing in the act itself, or in other acts relating to the same subject-matter indicating that the legislature did not intend that it should rather be done after the time prescribed than not to be done at all; there the courts assume that the intention was that if not done within the time prescribed, it might be done afterwards. But when any of these reasons intervene there the limit is established."

"There is," said Lord Mansfield, in *Rex v. Loxdale*, 1 Burr. 44, "a known distinction between the circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory. The precise time in many instances is not of the essence."

1. *Jackson v. Young*, 5 Cow. (N. Y.) 267; 15 Am. Dec. 473.

A statute requiring that a certified copy of the proceedings of commissioners in condemnation proceedings to be delivered or transmitted to the clerk of the district court within twenty days from the rendition of the report, is directory to the clerk of the county court. *St. Louis, etc., R. Co. v. Wilder*, 17 Kan. 239.

By section 6 of *Michigan Laws* of 1865, p. 145, it is provided that the township clerks shall certify on or before the first Monday of October in each year to the supervisor of their township the amount of the town's indebtedness growing out of the payment of bounties, etc. Where the certificate was not given until after the first Monday but before the second Monday, it was held that the law

must be considered so far directory, and that the certificate was equally valid, given as it was after the first but before the second Monday. *Smith v. Crittenden*, 16 Mich. 152.

The provision of *New York Laws* 1865, ch. 381, § 4, requiring the Croton Aqueduct Board to file a copy of the map showing the plan of drainage of the sewerage districts in New York city with the clerk of the common council, in the absence of any provision prohibiting the contracting of the work until the filing of such copy, is only directory, and an omission so to do does not vitiate the assessment. *In re New York Protestant Episcopal Public School*, 47 N. Y. 556.

2. As, for example, that the judge shall give his decision on or before the first day of the term succeeding that in which the cause was submitted. *Rawsons v. Parsons*, 6 Mich. 400. Or before judgment pronounced. *Frazer v. Willey*, 2 Fla. 116.

And the provisions of a statute in regard to proceedings by attachment against non-resident debtors requiring the judge to make and file his report within twenty days and the trustees to have their appointment recorded within one month after it was made, are directory merely. *Wood v. Chapin*, 13 N. Y. 514; 67 Am. Dec. 62.

When a cause is submitted in term time by consent entered of record "for a decree in vacation under the statute," the chancellor may render his decree after the expiration of the ninety days prescribed by the statute. *Session Laws of Alabama* 1873, p. 58; Revised Code. §§ 717 & 3470; and such decree being valid he has no power to vacate and annul it at a subsequent term. *Ex parte Holding*, 56 Ala. 458.

3. *In re Empire City Bank*, 18 N. Y. 200.

4. *Neal v. Burrows*, 34 Ark. 49. In *Reg. v. Sneyd*, 9 Dowl. P. C. 101, the justices in petty sessions were required to appoint overseers within fourteen days after the 25th of March, and appointments made after the time prescribed were adjudged valid, the statute being regarded as directory in the point of time.

In *People v. Allen*, 6 Wend. (N. Y.)

tary of state,<sup>1</sup> the comptroller to institute suits against delinquent collectors<sup>2</sup>—within a specified time, have severally been adjudged directory. And a similar construction has been given to statutes requiring a sheriff to levy an attachment in the presence of two credible witnesses;<sup>3</sup> to exhaust the property of the principal before seizing that of the surety;<sup>4</sup> judges of certain courts to sign their minutes;<sup>5</sup> in certain cases to file their decisions in writing;<sup>6</sup> a clerk to advertise the time to which the court adjourns;<sup>7</sup> marriages to be solemnized before twelve witnesses,

486, the statute under consideration declared that "the commanding officer of each brigade of infantry shall on or before the first day of June in each year appoint a brigade court-martial." The appointment was made in July, and was held valid. And Marcy, J., for the court, after stating the general rule substantially as laid down in the text above, observed: "So it may be said of this case, that as there is nothing in the nature of the power showing that it might not be as effectually exercised after the first day of June as before, and as the act giving it contains no prohibition to exercise it after that period, the naming that day was a mere direction to the officer in relation to the manner of executing his duty. There is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that the time was mentioned as a limitation."

The provision of the second section of the act of Congress of 1860 in relation to the time within which selections of swamp lands are to be made by a state, is directory, and a state loses no rights by not complying strictly therewith. *Gaston v. Stott*, 5 Oregon 48.

1. *Free Press Assoc. v. Nichols*, 45 Vt. 8.

2. *Walker v. Chapman*, 22 Ala. 116. The statute, 13 Hen. IV. ch. 7, requiring justices to try rioters "within a month" after the riot, was held directory—not limiting the authority of the justices to that space of time. *Rex v. Ingram*, 2 Salk. 593.

3. *Davidson v. Kuhn*, 1 Disney (Ohio) 405.

4. *Atkinson v. Rhea*, 7 Humph. (Tenn.) 59; *Cheatham v. Brien*, 3 Head (Tenn.) 552.

The *Texas* statute (Paschal's Digest, art. 3775), which provides that if the defendant in execution shall fail or refuse to point out property when the same is in the county, the levy shall be made first on the personal or movable

property, and then on uncultivated lands, and lastly on improved lands, is directory, and though the failure to make the levy as required by statute might be sufficient in a proper case properly presented to set aside the levy or to render the officer liable in damages, yet the sale would not necessarily be void. *Pearson v. Flanagan*, 52 Tex. 266.

And a statute which requires the sale of land under execution, when it consists of known lots or parcels, to be made separately and not in gross, is directory; and though a sale made in gross is voidable at the instance of the party aggrieved, it is not void. *Cunningham v. Cassidy*, 17 N. Y. 276.

5. And the minutes, although not so signed, are to be considered valid until it is shown that they have been disapproved by the court. *Talbot County v. House*, 20 Ga. 328.

A statute requiring the court to so limit the time of sentence of a convict that his term of imprisonment in the state prison shall expire between March and November, is directory, and non-compliance with the requirement does not render the sentence void. *Miller v. Finkle*, 1 Parker Cr. (N. Y.) 374.

6. *Stewart v. Slater*, 6 Duer (N. Y.) 83.

7. *Wise v. State*, 34 Ga. 348. In this case it was held that § 3165 of the Code of *Georgia*, providing that the clerk of the superior court, when informed by the presiding judge that it is not possible for him to attend the regular term of said court, from some unavoidable cause, which shall be expressed in the order of the journal, shall adjourn such court to such time as the judge may direct, and shall advertise the same at the courthouse of the county in which said court is to be held, and one or more times in a public gazette, was directory to the clerk, and if not complied with by him, the court might still be held at the time fixed in the order of adjournment, and a party not prejudiced

and the certificates thereof registered, and the banns published;<sup>1</sup> the vote of a city council to be by ayes and nays;<sup>2</sup> the minutes of the board of supervisors to be read and signed;<sup>3</sup> overseers to prepare alphabetical lists of voters and sign the same;<sup>4</sup> certain officers to take deeds of trust on real estate to secure the repayment of loans of school funds;<sup>5</sup> an execution against a married woman to direct the levy and collection of the amount against her from her separate property and not otherwise;<sup>6</sup> prescribing the form and manner of docketing judgments so as to create a lien on real estate and a priority as to subsequent judgments;<sup>7</sup> providing that commissioners to locate a county seat shall meet at a time and place named, a majority to constitute a quorum,

by the omission of the clerk may not complain.

In *Marchant v. Langworthy*, 6 Hill (N. Y.) 646, it was held that an annual meeting of the inhabitants of a school district, is valid, notwithstanding the clerk omits to give notice of it, provided the time and place for holding it was duly fixed at the next preceding annual meeting, and the clerk acts in good faith. The foundation of the meeting is the order of the previous annual meeting, not the posting of the notice by the clerk. The former is indispensable; but not the latter.

1. *Rodebaugh v. Sanks*, 2 Watts (Pa.) 9. And in *Rex v. Birmingham*, 8 B. & C. 29; 2 M. & R. 230; 15 E. C. L. 151, where a marriage was solemnized by license, one of the contracting parties being a minor, whose father was living, and did not consent to the marriage, it was nevertheless held valid, the statute requiring consent being regarded as directory.

2. *Striker v. Kelly*, 7 Hill (N. Y.) 9.

3. *Arthur v. Adam*, 49 Miss. 404.

4. The statute was held directory, as to the signing, and it was said *obiter* that a departure from an alphabetical order would not invalidate the list. *Morgan v. Parry*, 17 C.B. 334; 84 E.C.L. 334.

And the same is true in regard to the time of preparing the list. To hold that an act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day under a penalty, made a list and delivery on a later day invalid would, in effect, put it in the power of the person charged with the duty of preparing it to disfranchise the electors; a conclusion too unreasonable for acceptance. *Reg. v. Rochester*, 7 El. & Bl. 910; 90 E. C. L. 909; *Hunt v. Hibbs*, 5 H. & N. 123; *Morgan v. Parry*, 17 C. B. 334; 84 E.

C. L. 334; *Brumfitt v. Bremmer*, 9 C. B. N. S. 1; 99 E. C. L. 1; *Reg. v. Loft-house*, L. R., 1 Q. B. 433; *Reg. v. In-gall*, 2 Q. B. Div. 199.

That portion of the third section of the *Louisiana* act of 1852 (an act providing for the subscription by parishes and municipal corporations of the state to the stock of corporations undertaking internal improvements) which requires that the police jury or municipal corporation shall cause to be furnished to the commissioners of election a proper certified list of the authorized voters, is directory merely, and a failure to furnish such a list cannot be regarded as a condition precedent to the validity of the subscription. *New Orleans v. St. Romes*, 9 La. Ann. 573.

5. *Gaines v. Faris*, 39 Miss. 403. In this case a note given for such loans, not secured by a deed of trust, was held valid.

So when the statute required a bond to secure the rent of a public bridge, a promissory note given in lieu thereof was adjudged valid. *Central Bank v. Kendrick*, *Dudley* (Ga.) 66.

6. *Thompson v. Sargent*, 15 Abb. Pr. (N. Y.) 452.

7. *Sears v. Burnham*, 17 N. Y. 448. In this case the statute required the clerk, at the time of filing the record, to enter in an alphabetical docket a statement of the judgment, containing, among other things, the hour and the day of entering such docket, and provided that "no judgment shall affect any land, tenements, real estate or chattels real, or have any preference as against other judgment creditors, purchasers or mortgagees, until the record thereof be filed and docketed as herein directed." The clerk in entering the transcript of a judgment in the docket, by an error, entered the judgment as of

and that they may adjourn to some other place and time, and may adjourn from day to day until the completion of the business before them.<sup>1</sup>

If a statute directing the issuing of a warrant against a defaulting collector is, in point of time, directory as to the principal, it is likewise directory in respect to those to be incidentally affected by it.<sup>2</sup>

Statutes prescribing the time and manner of summoning and selecting jurors;<sup>3</sup> the form of bonds of city, county, and municipal officers, and the time of giving same;<sup>4</sup> and the time of tak-

the 15th of March, 1842, instead of the 15th of March, 1841. It was held that the provisions of the statute were directory merely, and the judgment a valid lien upon the lands sought to be charged, and the judgment creditor did not lose his right of preference as against subsequent judgment creditors.

1. And in *Edwards v. Hall*, 30 Ark. 31, it was further held that the commissioners have the power to elect a chairman and empower him to fix the time of the next meeting.

2. *Looney v. Hughes*, 30 Barb. (N. Y.) 605; *affirmed* 26 N. Y. 516.

3. The *New York* statute relative to balloting for jurors (Sess. 49, ch. 309, § 4), is merely directory, and a violation thereof is no ground for moving to set aside a verdict, unless the verdict is objected to at the time, or there is some abuse or injury to the party moving. *Cole v. Perry*, 6 Cow. (N. Y.) 584. And to the same effect are *State v. Carney*, 20 Iowa 82; *State v. Gillick*, 7 Iowa 287. In this latter case the departure from the statute consisted in the clerk's placing the ballots, unfolded, in a hat without top or cover, instead of folded and in a box to be kept for the purpose, as required by law.

In *Johnson v. State*, 33 Miss. 363, the provision of the local act of *Mississippi*, 1856, which enacts that grand jurors "shall be summoned at least five days before the first day of the court" at which their attendance is required, was held directory to the sheriff, and for the convenience of the jurors, and not essential to be followed in order to constitute a legal grand jury. To the same effect are *Weeks v. State*, 31 Miss. 490; *State v. Pitts*, 58 Mo. 566.

A similar ruling was made on a statute requiring the jury to be selected on the first Monday of July, but which, however, was not chosen until the 8th of August. *Colt v. Eves*, 12 Conn. 243.

And where the statute required that

venires for grand jurors should be issued at least forty days before the second Monday of September annually, a venire issued after the expiration of that time, but in season for service by the proper officer, in accordance with the provision of the statute, was held valid. *State v. Smith*, 67 Me. 328.

The provisions of the *Arkansas* criminal code of practice for the protection of jurors from improper influences, viz., that the officer in charge of the jury shall be sworn to keep them together, and to suffer no person to communicate with them on any subject connected with the trial during the adjournment of court; that the court shall admonish them at its adjournment that it is their duty to permit no one to communicate with them on any matter connected with the trial, to hold no conversation among themselves on any subject connected with the trial, to form or express no opinion thereon until the cause is finally submitted to them, are merely directory and cautionary, and a failure to comply therewith will not absolutely or without some evidence of prejudice or injury to the defendant in consequence of the omission, vitiate the verdict or afford ground for a new trial. *Thompson v. State*, 26 Ark. 323. See *JURY AND JURY TRIAL*, vol. 12, p. 318, where the question is fully treated.

4. *McBee v. Hoke*, 2 Spears (S. Car.) 138; *Boykin v. State*, 50 Miss. 375.

The time so far as the validity of the bond is concerned is merely directory when the statute does not negative its validity if filed at a later time. The giving of a bond is mandatory; the time when it is to be given is directory. *Duntley v. Davis*, 42 Hun (N. Y.) 229; *State v. Churchill*, 41 Mo. 41.

And in *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182, it is said: "The essence of the thing to be done, that upon which the rights of the public depend, is

ing official oaths and the officers by whom they are to be administered,<sup>1</sup> are generally deemed directory.

Provisions concerning the conduct of elections, and the time for certifying the returns, will be held directory except where they are of such a character that a failure to comply therewith will have the effect of preventing or obstructing the complete expression of the popular will.<sup>2</sup>

the giving of the bond, not the precise manner in which it is done."

In *People v. Holley*, 12 Wend. (N. Y.) 481, it was held that the omission of the sheriff elect to execute his official bond within twenty days after receiving notification of his election as required by statute, did not subject him to the forfeiture of his office as the provision in regard to the time was directory.

But in *Texas*, it is held that the statute requiring a party elected to office to qualify within a prescribed time will be construed as directory only in a case where, from reasons beyond his control, he cannot qualify within the time allowed, but such construction will not be in any case of neglect or refusal to qualify. *Flatan v. State*, 56 Tex. 93. See *BONDS*, vol. 2, p. 448; *PUBLIC OFFICERS*, vol. 19, p. 378, where the question is discussed at length.

1. In *Howland v. Luce*, 16 Johns. (N. Y.) 135, it was held not to be necessary for the clerk of a school district to take the oath prescribed by law within fifteen days from the time of appointment; it is sufficient if he qualifies before any official act is done by him. See also *In re Mohawk*, etc., R. Co., 19 Wend. (N. Y.) 143.

And in *Canniff v. New York*, 4 E. D. Smith (N. Y.) 430, the provision of the charter of the city of New York that every person appointed to office under the city government, shall take an oath before the mayor, was held to be directory, and if the oath cannot be so taken, some other officer may administer it. See *OATH*, vol. 16, p. 1017; *PUBLIC OFFICERS*, vol. 19, p. 378, for a full treatment of the subject.

2. *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141; *Speed v. Hartwell*, 12 Mich. 508; *People v. Sackett*, 14 Mich. 320; *People v. Witherell*, 14 Mich. 48; *People v. Livingston*, 79 N. Y. 279; *Weil v. Calhoun*, 25 Fed. Rep. 865; *State v. Baltimore County*, 29 Md. 516; *Bowles v. Smith* (Mo. 1862), 20 S. W. Rep. 101; *Duncan v. Shenk*, 109 Ind. 26.

In *McCrary on Elections*, § 200, it is said that statutes concerning the

manner of conducting elections are generally directory, unless a non-compliance is expressly declared to be fatal to the validity of the election, or will change or render doubtful the result.

In *Holland v. Davies*, 36 Ark. 446, where the statute required the polls to be open until sundown, the closing thereof about two hours before that time was held not to be ground for setting aside the election, in the absence of proof of obstruction or impediment to a fair expression of the popular will. See also *Sweepston v. Barton*, 39 Ark. 549. And in *People v. Cook*, 8 N. Y. 69, the outer door of the room where the election was held was closed at sunset as required by statute, but voters already in the room were permitted to vote afterwards; and it was held that the provision in respect to the time of closing the polls was directory, and therefore the election must be deemed valid, in the absence of proof that legal voters were excluded by the closing of the door, or illegal votes were received after sundown. And it was further held that the requirement, that the inspectors, after taking the oath, should appoint two clerks, was directory, and if none could be procured, the election would still be valid—the duties ordinarily to be performed by the clerks, devolving upon the inspectors. That there were no register poll lists at an election; that the judges and clerks did not take any oath; and that there was not transmitted with the returns to the county auditor a list of the qualified voters of the election district, does not invalidate the election or the returns. *Taylor v. Taylor*, 10 Minn. 107. A statute specifying the manner in which ballots shall be kept after the election, is directory. *People v. Higgins*, 3 Mich. 233.

Where ward inspectors were required by statute to certify the result of the ward elections on the day subsequent to the closing of the poll, or sooner, a certificate not made until the second day thereafter was held valid. *Ex parte Heath*, 3 Hill (N. Y.) 41. See also

Statutes requiring the instructions of the court to be delivered to the jury in writing are in some jurisdictions deemed directory, in others, mandatory.<sup>1</sup>

Provisions in regard to the assessment and collection of taxes, and the measures preliminary thereto, which are intended for the protection of the tax-payer, to insure an equality of taxation, and

*People v. Peck*, 11 Wend. (N. Y.) 604; 27 Am. Dec. 104.

Sections 10, 18, 64, of the general election law of *Kansas* (Gen. Sts., ch. 36) relating to the challenging of persons offering to vote, right of candidate and electors to be present in the room where the vote is received, and prohibiting the keeping and selling of intoxicating liquors at the election polls, are directory, and a disregard of them will not necessarily vitiate an election. *Gilleland v. Schuyler*, 9 Kan. 569.

The board of canvassers may not reject the poll book on account of its being transmitted to the clerk through one not an elective officer. *Willeford v. State*, 43 Ark. 62.

In *Fry v. Booth*, 19 Ohio St. 25, the statute under consideration provided that at elections held thereunder, the polls should be opened between the hours of six and ten A. M., and closed at six P. M. of the same day. At a general election for state and county officers held under the act, the judges of election in several townships, at the hour of twelve at noon, after making proclamation to the voters present to that effect, adjourned the election, closed the polls, went away from the place of election to dinner, and after an absence of about one hour, returned to the place of election, reopened the polls, and kept them open during the residue of the day. And the court said: "It was no doubt the intention of the legislature that the polls should remain open during the entire day of the election, between the hours specified in the statute for opening and closing, and good policy as well as the convenience of the voters would seem to require that this legislative intent should be observed. But we are not prepared to say that the closing of the polls for the hour spent at dinner, by the officers of the election, in these three townships, under the circumstances disclosed in this record, is, in law, sufficient to invalidate the election, and disfranchise the voters who did deposit their ballots in the boxes. The statute in this respect may be regarded as directory, and a departure from the strict

observance of its provisions does not necessarily invalidate the election, where it appears that no fraud has been practiced and no substantial right violated." See *ELECTIONS*, vol. 6, p. 255.

1. In *Reid v. Reid*, 11 Tex. 585; *Boone v. Thompson*, 17 Tex. 606; *Chapman v. Sneed*, 17 Tex. 428; *Galveston, etc., R. Co. v. Dunlavy*, 56 Tex. 256, where the language of the statute was simply that "the charge shall be in writing," the provision was held directory, and a violation thereof not assignable as error.

But in *Head v. Langworthy*, 15 Iowa 235; *Hardin v. Helton*, 50 Ind. 320; *Miller v. Hampton*, 37 Ala. 342; *Illinois Cent. R. Co. v. Hammer*, 85 Ill. 526; *Dixon v. State*, 13 Fla. 636; *Mason City Bank v. Kent*, 57 Ga. 285; *Householder v. Granby*, 40 Ohio St. 430; *Penberthy v. Lee*, 51 Wis. 261, the statutes were adjudged mandatory.

But it should be observed that some of the statutes which are held mandatory contain negative terms, or are otherwise so expressive of command as to leave no room for doubt as to the legislative intent and are subject to the principles stated above. See *supra*, this title, *Negative and Affirmative Terms*.

Thus, the statute before the court in *Penberthy v. Lee*, 51 Wis. 261, provides substantially that the judge shall reduce his charge to writing before giving it to the jury, and a failure to do so shall, on appeal, work a reversal of the judgment rendered upon the verdict, unless a charge in writing is waived by counsel at the commencement of the trial. The court said: "The object of the statute is to enable a suitor in court to preserve of record the precise language of the instructions given by the court to the jury, and thus to avoid the danger of inaccuracy which the suitor would be exposed to if the charge is not reduced to writing until the bill of exceptions is settled. The statute is mandatory in terms. If its requirements are disregarded, its mandate is, 'the judgment shall be reversed.'"

And in *Dixon v. State*, 13 Fla. 636.



to prevent a sacrifice of his property, are mandatory; while, on the other hand, those intended simply for the guidance of the officers and to promote the efficiency of their work are directory.<sup>1</sup>

*d. CONFERRING POWERS, PRIVILEGES, OR IMMUNITIES.*—A very marked distinction exists between statutes imposing a public duty, such as are discussed in the preceding section, and those conferring powers, privileges, or immunities. Generally speaking, the former are, as has been seen, deemed directory merely, and very justly so, as, apart from the fact that their prescriptions as to the time, manner, etc., of performance are ordinarily not of the essence of the thing required to be done, it would be inequitable to permit parties to suffer by the dereliction of public officers over whose conduct they have no control. But in the latter class these considerations do not obtain, and it is held that where a statute confers a power, privilege, or immu-

the act provided that "charges made by judges to juries in all criminal cases, shall be reduced to writing and filed in the case, and shall be exclusively on points of law; and that any violation of this section shall be deemed and construed to be error from which a writ of error may be prayed as of right." See *INSTRUCTIONS*, vol. 11, p. 236.

1. *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Welker v. Potter*, 18 Ohio St. 85; *Marsh v. Chesnut*, 14 Ill. 223; *Wheeler v. Chicago*, 24 Ill. 105; 76 Am. Dec. 736; *Sibley v. Smith*, 2 Mich. 487; *Magee v. Com.*, 46 Pa. St. 358; *Pittsburg v. Coursin*, 74 Pa. St. 400; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *State v. Metz*, 31 N. J. L. 378; *State v. Camden*, 39 N. J. L. 620; *Gale v. Mead*, 2 Den. (N. Y.) 160; *State v. Harris*, 17 Ohio St. 608; *Pond v. Negus*, 3 Mass. 230; 3 Am. Dec. 131; *Chesnut v. Elliott*, 61 Miss. 569. See generally *TAXATION*.

The rule which has been very generally followed in determining what provisions of statutes of this class are mandatory, and therefore conditions precedent to the legality and validity of the proceeding, and those which are directory merely, and do not constitute conditions, was laid down by Chief Justice Shaw in *Torrey v. Millbury*, 21 Pick. (Mass.) 64. He said: "One rule is very plain and well settled, that all those measures which are intended for the security of the citizen, for insuring an equality of taxation, and to enable every one to know with reasonable certainty for what polls and for what real estate he is taxed, and for what all those who are liable with him are taxed,

are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by statute and designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of tax-paying citizens. These may be considered directory. Officers may be liable to legal animadversion, perhaps to punishment for not observing them, but their observance is not a condition precedent to the validity of the tax." In this case the assessor's list of valuation and assessment of polls and estates did not exhibit in distinct columns the "true value of real estate" and the "reduced value" as required by statute, but contained a column of the "value" (and the like as to personal estate), and it was held that the irregularity did not render the valuation and assessment void, as the provision was designed to promote system in the modes of proceeding by the officer, and was not intended for the security of the taxpayer.

But where a statute provided that taxes on real estate shall be assessed to the owners, and separate tracts or parcels shall be separately described and valued as far as practicable, and a party owning three separate parcels of land in the same town was taxed for one by distinct assessment and description, and for the other two without any description and without separate assessments, and for non-payment of the tax a part

of the first property was sold for the tax on the three parcels; it was held that this provision was for the benefit of the taxpayer and was mandatory, and that the assessment, and consequently the levy and sale, were illegal. *Young v. Joslin*, 13 R. I. 675.

The provision of the *Illinois* statute of 1861, that the notice and the application for judgment against delinquent lands shall be to the June term of the court is mandatory and not directory merely, and an application, at a different term, and judgment will not be sustained; and judgment and sale under such circumstances are void and may be attacked collaterally. The ground of the decision was that the design of the statute was that all persons owning lands in the county, looking to the law for their rights, might know certainly when the application would be made, and make such defense as the law entitled them to make, and show cause, if they could, why judgment should not be rendered against their land.

So, of § 43, ch. 242, *New York* Laws 1823, requiring the comptroller to publish notices stating when the time for the redemption of land sold for taxes will expire, is mandatory and unless complied with, the comptroller's deed passes no title. And it was said in the opinion of the court that it was plain that this provision was for the protection of the landowner whose premises were sold for taxes. It was clearly designed to notify him, if he were ignorant of the sale before, or if he had forgotten, of his peril of losing his property, if he failed to pay, losing it absolutely; in such cases, it is the settled rule that the provision must be complied with or no title passes. See also *Cruger v. Dougherty*, 43 N. Y. 107.

In *Case v. Dean*, 16 Mich. 12, the one-mile tax required to be assessed for township, library, and school purposes by the *Michigan* Comp. Laws, § 2350, was not placed on the tax roll in the column of school taxes as required by law and did not appear by the roll to have been assessed at all. But the amount of taxes stated in the column of state, county, and township taxes was too much, according to the valuation and amount to be raised, by just the amount of a one-mill tax on the valuation of the tracts. It was held that the jury were not at liberty, for the purpose of sustaining the tax title, to find that the one-mill school tax had been added

to or included in the state, county, and township taxes, but that the excess in the column of the latter taxes could not be thus explained and that the sale of the land for the taxes was thereby rendered void. The statute requiring this one-mill tax to be stated in the column of school taxes is not merely directory but mandatory; being intended, among other purposes, for the benefit of the tax-payer to enable him to distinguish to this extent the different kind of taxes he should be called upon to pay, and their respective amounts.

In *Clark v. Crane*, 5 Mich. 151; 71 Am. Dec. 776, where the statute under consideration required the assessors to attach to the assessment roll a certificate stating that they had assessed the real estate "at what we believe to be the true cash value thereof," a certificate stating that they had assessed the real estate "at a sum which, for the purpose of assessing, we believe to be the true value thereof," was held fatally defective. Manning, J., in delivering the opinion of the court, said: "Some parts of the tax law are directory, while others are mandatory and must be substantially complied with to give validity to a tax. The law requires all property to be assessed 'at its true cash value.' The object of this, doubtless, is to insure equality of taxation. There cannot be equality of taxation without equality of assessment; and there can be no equality of assessment where all property is not assessed by the same standard, and that standard, the law has wisely fixed, in the present case, and not left to the discretion of the assessors. The object of the certificate appears to be twofold: to authenticate the assessment and to secure this equality in taxation; and with a view to this last object, the assessors are required to state in their certificate that they have assessed the property mentioned in the assessment roll at what they believe to be the true cash value thereof. If this be the object, and we can see no other, the tax-payer alone is interested in this part of the law. It is for his protection. He, and not the public; the other party interested in the tax, is the loser, if his property is assessed at more than it should be. The public neither gain nor lose by this inequality, however great, in the assessment. It is different with the tax-payer. He pays more or less than he should pay when his property is assessed at a sum above or below its

nity, the formalities or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal to the benefit sought.<sup>1</sup> Thus, the requirements of our copyright laws, as to depositing a copy of the title-page in the proper office, publishing notice of entry, and delivering a copy of the work to the proper officer within the time named, are mandatory; and in *England*, similar requirements are considered indispensable pre-requisites to a perfect title.<sup>2</sup> Where an act authorizing the confinement of lunatics prohibited their reception in asylums without medical certificates in a given form, setting forth certain particulars, and among them, the street and number of the house where the supposed lunatic was examined, a certificate which omitted the street and number of the house where the examination took place, was held insufficient to justify the detention of the lunatic.<sup>3</sup> The innkeeper whose common-law liability for the goods of his guests is limited, if he posts up a notice as required by the statute, does not obtain the exoneration, if his notice is inaccurate in any material particular.<sup>4</sup> The same

cash value. He has a right to know, not only that his property has not been assessed at more than its cash value, but that the property of no other taxpayer has been assessed at less than its cash value; for, in either case, his tax would be increased and he be made to pay more than he should. The certificate furnishes him with this knowledge, and it is for his protection the certificate is required to state that the property mentioned in the assessment roll has been estimated at its true cash value, and what the law requires to be done for the protection of the tax-payer is mandatory, and cannot be regarded as directory merely."

1. *Per Lord Denman*, *Caldow v. Pixell*, 2 C. P. Div. 562. See also cases cited under the section next preceding.

2. *Wheaton v. Peters*, 8 Pet. (U. S.) 591; *Ewer v. Cox*, 4 Wash. (U. S.) 487; *Jollie v. Jaques*, 1 Blatchf. (U. S.) 15; *Baker v. Taylor*, 2 Blatchf. (U. S.) 82. But in an early case, similar provisions were regarded as simply directory, and not essential requisites for securing the copyright. *Nichols v. Ruggles*, 3 Day (Conn.) 158; 3 Am. Dec. 262.

Under the statute that no proprietor of the copyright should be entitled to sue for the infringement thereof, unless he had made an entry at Stationer's Hall of the title and time of the first publication of the book and the name and residence of the publisher, it was held that a suit was not maintainable

where the date of publication was not stated truly, or only the month was stated; or the publishers were not described correctly, that is, neither by the style of the firm nor by the names of the individual partners. *Low v. Routledge*, 33 L. J. Ch. 725; *Mathieson v. Harrod*, L. R., 7 Eq. 270; *Henderson v. Maxwell*, 5 Ch. Div. 892.

So where an act gave to the designers of prints the sole right of printing them for fourteen years after the date of publication, adding "which (day) shall be truly engraved with the name of the proprietor on each plate," it was held that the neglect to conform to this provision was fatal to the copyright. *Newton v. Cowie*, 4 Bing. 234; 13 E. C. L. 412.

3. *Reg. v. Pinder*, 24 L. J. Q. B. 148.

4. Section 1 of 26 & 27 Vict., ch. 41, provides that no innkeeper shall be liable to make good to any guest any loss of, or injury to, property brought to his inn to a greater amount, etc., except in the following cases: "Where such property shall have been stolen, lost, or injured, through the willful act, default, or neglect of such innkeeper, or any servant in his employ. Section 3 requires the innkeeper to exhibit a copy of section 1 in a conspicuous part of the hall or entrance to his inn, otherwise he may not claim the protection of section 1. The defendant, an innkeeper, caused a paper, purporting to be a copy of section 1, to be exhibited in the hall or entrance to his inn, but the

principles are applicable to corporations in regard to the formalities prescribed for the exercise of the powers conferred upon them.<sup>1</sup>

*c. REGULATING JUDICIAL PROCEDURE.*—Where authority to proceed in courts is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory and must be strictly conformed to, otherwise the proceeding will be void.<sup>2</sup> For example, if a statute authorizing an appeal requires the fulfillment of certain conditions, such as entering into recognizances, and giving notice of appeal, non-compliance on the part of the party will be fatal to the appeal.<sup>3</sup>

There are instances where a like imperative effect has been given to statutes, even where the observance of the formalities was not a condition exacted of the party seeking the benefit of

paper was unintentionally misprinted, and the sentence stood: "Where such property shall have been stolen, lost, or injured through the willful default or neglect of such innkeeper, or any servant in his employ"—omitting the word "act" after "willful." In an action against the innkeeper by a guest for property stolen from his bedroom, it was held that the requirement as to notice was mandatory, and that the notice was not such as was contemplated by the law and, therefore, the claim for protection under the statute must fail and the case be dealt with as though the statute had never been passed. *Spice v. Bacon*, 2 Exch. Div. 463.

1. *Hurford v. Omaha*, 4 Neb. 336. The Public Health act of 1848 authorizing the local board to enter into all contracts necessary to carry the act into execution, provides certain formalities, among which is that every contract shall be under the seal of the board. And it was held that a contract unsealed was inoperative against the board. And it was said that the power to contract so as to make it binding could not have been exercised if it had not been given by the act; and being entirely a creature of the statute, it could not be exercised in any other manner than that prescribed by the statute. *Frend v. Dennett*, 4 C. B. N. S. 576. And to the same effect is *Cope v. Thames Haven Dock, etc., Co.*, 6 Ry. Cas. 83; 18 L. J. Exch. 345.

An act which authorized commissioners to curb and pave streets, etc., in a certain district, and gave a lien on the property adjacent for the expenses incurred, contained a proviso that the

curbing, etc., should not exceed "three squares at one time." It was held that the proviso could not be regarded as merely directory, but was a limitation of authority, and that the commissioners had no claim for expenditures when the improvement exceeded the limit allowed by the statute. *District of Kensington v. Keith*, 2 Pa. St. 218.

And under a law authorizing a municipality to grade on the application of a majority of lot-holders on the street, to assess the cost, and enter a lien against the lots abutting on it, it was held that an application by such majority was a condition precedent to the exercise of the power by the council. *Pittsburgh v. Walter*, 69 Pa. St. 265.

*Iowa Code*, § 457, provides that cities "shall have power to make regulations against danger from accident by fire, to establish fire districts, and on petition of the owners of two-thirds of the grounds included in any square or block to prohibit the erection thereon of any building, or addition to any building, unless the outer walls thereof be made of brick," etc. It was held that a city, under this provision, could not prohibit the erection of wooden buildings within the limits designated, except on petition of the owners of two-thirds of the grounds; the statutory requirement being mandatory. *Des Moines v. Gilchrist*, 67 Iowa 210; 56 Am. Rep. 341.

2. *Norwegian Street*, 81 Pa. St. 349.

3. *Reg. v. Oxfordshire*, 1 M. & S. 446; *Reg. v. Carnarvon*, 4 B. & Ald. 86; 6 E. C. L. 401; *Rex v. Bond*, 6 Ad. & El. 905; 33 E. C. L. 242; *Seymour v. Judd*, 2 N. Y. 465; *Mays v. King*, 28 Ala. 690; *Coffman v. Davanay*, 2 How.

the statute, but a duty imposed upon the court or public officer in the exercise of authority conferred upon him. Thus, a statute providing that every warrant issued by a court should be under its seal was held imperative—an omission in this particular invalidating the commitment, and subjecting the person, who had procured it without seeing to it that the court performed its duty of sealing it, to an action for damages to the party aggrieved.<sup>1</sup>

*f. PARTICULAR WORDS*—"SHALL," "MAY," "MUST."—The general principles determining whether a provision in a statute shall be taken as mandatory or directory have been discussed in

(Miss.) 854. Compare *McCarver v. Jenkins*, 2 Helsk. (Tenn.) 629.

Under the *Pennsylvania* act of April 1, 1874, a writ of *certiorari* to a court of quarter session in the matter of the proceedings to vacate and relocate a township road, must be taken within two years from the date of the confirmation of the report of the viewers appointed by the court. And a writ taken more than two years from such date will be quashed. *In re Road in Salem Tp.*, 103 Pa. St. 250.

Construing sections 348 and 337 of the *California* Practice act together, they provide that an appeal is not effectual for any purpose unless an undertaking be filed, or a deposit made with the clerk within five days after filing the notice. A failure to so file the undertaking or make the deposit will be fatal to the appeal, and it must be dismissed. *Elliott v. Chapman*, 15 Cal. 383.

When an appeal is claimed from a verdict or judgment rendered in the district court of *Maine*, and time is given under the statute of that state of 1831, ch. 505, to enter into a recognizance to prosecute the appeal before a justice appointed for that purpose, the recognizance must not only be taken, but must be filed in the clerk's office within ten days after the adjournment of the court, or the appeal cannot be sustained. *Knight v. Bean*, 18 Me. 219.

General Stat. *Minnesota*, § 131, p. 467, provides that, "before issuing the writ (of attachment), the judge or court commissioner shall require a bond on the part of the plaintiff with sufficient sureties, conditioned that if the defendant recovers judgment the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment not exceeding the penalty of the bond." It was held that this section was not to be regarded as directory, but there must be a bond with a penalty

and a condition, and with two or more sureties. *Blake v. Sherman*, 12 Minn. 420.

Where the notice to a non-resident defendant to appear was published in the state paper and in another paper different from the one directed by the court, although published at the same place, it was held that an order *pro confesso* entered against the non-resident defendant who had not appeared, was irregular. And it was said by the court: "The right to an order *pro confesso* against the defendant who has been proceeded against as a non-resident and who has not appeared, is derived from the statute alone, and to entitle the plaintiff to it he must pursue strictly the steps which the same prescribes. The statute requires the notice to appear, to be published in the state paper and such other paper as the court shall direct." *Brisbane v. Peabody*, 3 How. Pr. (N. Y.) 109. See *APPEAL*, vol. 1, p. 616.

1. *Ex parte Van Sandan*, 1 De G. 303. See generally *WARRANTS*.

The statute of 5 Eliz., ch. 5, provided that the writ *de contumace capiendo* shall be brought into the queen's bench and be there opened in the presence of the justices. An omission of this apparently idle ceremony was deemed fatal to the validity of an arrest made in pursuance of the writ though it had been enrolled in the crown office. *In re Dale*, 7 App. 240.

A statute requiring the person serving a summons to indorse the date of service upon it was held mandatory in *Wendel v. Durbin*, 26 Wis. 390. But see *Hester v. Keith*, 1 Ala. 316.

If commissioners authorized to fix the boundaries of a parish, were required by the act to advertise the boundaries which they fixed, and to insert them in their award, and the act declared that the boundaries "so fixed" should be conclusive, a variation between the boundaries set forth in the

the foregoing sections. In the notes will be found a list of cases in which the word "shall," as controlled by the subject or context of the statute, has been held to be mandatory, and another in which it has been held to be directory.<sup>1</sup> Elsewhere in this work

award, and those advertised would vitiate the award, as the requisites of the act would not have been complied with. *Rex v. Washbrook*, 4 B. & C. 732; 10 E. C. L. 451. See *supra*, this title, *Statutes Prescribing Time and Mode of Proceeding by Public Officers*.

1. In the following cases "shall," as used in statutes and constitutions, has been construed to be imperative or mandatory: *United States*, Cairo, etc., R. Co. v. Hecht, 95 U. S. 170; *Ex parte Jordan*, 94 U. S. 248; *The China*, 7 Wall. (U. S.) 53; *French v. Edwards*, 13 Wall. (U. S.) 506; *Alabama*, Tuska-loosa Bridge Co. v. Olmstead, 41 Ala. 9; *Weaver v. Lapsley*, 43 Ala. 224; *Arkansas*, State v. Johnson, 26 Ark. 281; *School Dist. v. Bennett*, 52 Ark. 515; *California*, Weill v. Kenfield, 54 Cal. 111; *Kenfield v. Irwin*, 52 Cal. 164; *Georgia*, Prothro v. Orr, 12 Ga. 36; 1 Am. Law. Reg. 612; *Illinois*, Webster v. French, 12 Ill. 301; *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 121; *People v. National Sav. Bank*, 129 Ill. 618; *Indiana*, Indiana Cent. R. Co. v. Potts, 7 Ind. 681; *Smith v. Noe*, 30 Ind. 125; *Phelps v. Osgood*, 34 Ind. 152; *Bush v. Bush*, 46 Ind. 83; *Nietert v. Trentman*, 104 Ind. 398; *Iowa*, Koehler v. Hill, 60 Iowa 543; *Kansas*, Shawnee Co. v. Carter, 2 Kan. 115; *Darling v. Rodgers*, 7 Kan. 592; *Robinson v. Perry*, 17 Kan. 248; *Kentucky*, Varney v. Justice, 86 Ky. 596; *Maryland*, McPherson v. Leonard, 29 Md. 377; *Massachusetts*, Phillips v. Fadden, 125 Mass. 198; *Eames v. Johnson*, 4 Allen (Mass.) 384; *Michigan*, Clark v. Crane, 5 Mich. 151; 71 Am. Dec. 776; *Minnesota*, Ramsey Co. v. Heeman, 2 Minn. 330; *State v. Smith*, 22 Minn. 222; *Mississippi*, Butler v. Craig, 27 Miss. 628; 61 Am. Dec. 527; *Shulherr v. Bordeaux*, 64 Miss. 59; *Missouri*, McGee v. Porter, 14 Mo. 612; 55 Am. Dec. 129; *State v. Miller*, 45 Mo. 495; *West v. Ross*, 53 Mo. 350; *Nebraska*, State v. Lancaster, 6 Neb. 474; *Nevada*, Corbett v. Bradley, 7 Nev. 106; *State v. Rogers*, 10 Nev. 254; 21 Am. Rep. 738; *State v. Fuffy*, 19 Nev. 391; *New Hampshire*, Jones v. Lane, 63 N. H. 331; *New Jersey*, Buck v. Danzenbacher, 37 N. J. L. 361; *State v. Newark*, 28 N. J. L. 498; *Morris*

*Aqueduct v. Jones*, 36 N. J. L. 206; *State v. Mayor, etc., of Hoboken*, 38 N. J. L. 110; *New York*, *People v. Hills*, 35 N. Y. 449; *People v. Board of Assessors*, 39 N. Y. 81; *Petition of Douglass*, 46 N. Y. 42; *In re Smith*, 52 N. Y. 256; *In re Anderson*, 60 N. Y. 457; *People v. Lawrence*, 36 Barb. (N. Y.) 177; *Morris v. People*, 3 Den. (N. Y.) 381; *Wood v. Brown*, 6 Daly (N. Y.) 428; *Ohio*, Bloom v. Xenia, 32 Ohio St. 461; *McGill v. State*, 34 Ohio St. 264; *Ex parte Falk*, 42 Ohio St. 640; *State v. Kiesewetter*, 45 Ohio St. 254; *Rhode Island*, Young v. Joslin, 13 R. I. 675; *Texas*, Giddings v. San Antonio, 47 Tex. 548; 26 Am. Rep. 321; *Peck v. San Antonio*, 51 Tex. 490; *Fontaine v. State*, 69 Tex. 510; *West Virginia*, Lemons v. State, 4 W. Va. 755; 6 Am. Rep. 293; *Wisconsin*, State v. Merriman, 6 Wis. 14; *State v. Hilmentel*, 21 Wis. 566; *State v. Dousiman*, 28 Wis. 541; *State v. Pierce*, 35 Wis. 93; *England*, Cooke v. New River Co., 38 Ch. Div. 61.

In the following cases "shall" has been construed to be discretionary or directory: *United States*, Wallamet, etc., Co. v. Kittredge, 5 Sawy. (U. S.) 44; *West Wisconsin R. Co. v. Foley*, 94 U. S. 103; *Cairo, etc., R. Co. v. Hecht*, 95 U. S. 168; *Alabama*, State v. Click, 2 Ala. 26; *Limestone Co. v. Rather*, 48 Ala. 433; *Arkansas*, Little Rock v. Willis, 27 Ark. 572; *Edwards v. Hall*, 30 Ark. 31; *Neal v. Burrows*, 34 Ark. 491; *California*, Washington v. Page, 4 Cal. 388; *Pierpont v. Crouch*, 10 Cal. 315; *People v. San Luis Obispo Co.* (Cal. 1875), 3 Cent. L. J. 192; *Connecticut*, Colt v. Eves, 12 Conn. 243; *Donovan's Appeal*, 40 Conn. 154; *Illinois*, Cook v. Hunt, 24 Ill. 550; *Whalin v. Maccomb*, 76 Ill. 49; *Tobin v. People*, 101 Ill. 123; *Indiana*, State v. McGinley, 4 Ind. 11; *Kentucky*, Railroad Co. v. Warren Co., 10 Bush (Ky.) 711; *Anderson v. Winfree*, 85 Ky. 597; *Louisiana*, New Orleans v. St. Romes, 9 La. Ann. 573; *Maryland*, State v. County Com'rs, 29 Md. 516; *County Com'rs v. Meekins*, 50 Md. 42; *Massachusetts*, Pond v. Negus, 3 Mass. 230; 3 Am. Dec. 131; *Fanning v. Com.*, 120 Mass. 388; *Torrey v. Milbury*, 21 Pick. (Mass.) 64; *Williams v. School District No. 1*, 21

Pick. (Mass.) 75; *Lowell v. Hadley*, 8 Met. (Mass.) 180; *Jones v. Varney*, 8 Cush. (Mass.) 137; *Michigan*, Parks v. Goodwin, 1 Dougl. (Mich.) 56; *Mississippi*, Cason v. Cason, 31 Miss. 578; *Hill v. Boyland*, 40 Miss. 618; *Missouri*, State v. Murtens, 14 Mo. 94; *Cape Girardeau v. Riley*, 52 Mo. 424; 14 Am. Rep. 427; *Montana*, Grant v. Spencer, 1 Mont. 136; *New Jersey*, Ludlow v. Ludlow, 4 N. J. L. 304; *Morrill v. Buckley*, 20 N. J. L. 667; *Morris Canal v. Van Vorst*, 21 N. J. L. 114; *Sooy v. State*, 38 N. J. L. 324; *New York*, Striker v. Kelly, 7 Hill (N. Y.) 9; *In re Mohawk, etc.*, R. Co., 19 Wend. (N. Y.) 135; *Gale v. Mead*, 2 Den. (N. Y.) 160; *Ex parte Heath*, 3 Hill (N. Y.) 42; *People v. Peck*, 11 Wend. (N. Y.) 604; 27 Am. Rep. 104; *People v. Batchelor*, 53 N. Y. 128; 13 Am. Rep. 480; *Beal v. Finch*, 11 N. Y. 128; *Jackson v. Young*, 5 Cow. (N. Y.) 269; 15 Am. Dec. 473; *Ex parte Elmendorf*, 25 Wend. (N. Y.) 693; *People v. Ulster Co.*, 34 N. Y. 268; *In re Kings Co. El. R. Co.*, 20 Hun (N. Y.) 234; *Juland v. Rathbone*, 39 Barb. (N. Y.) 101; *People v. Cook*, 8 N. Y. 89; 59 Am. Dec. 451; *Rawson v. Van Ripper*, 1 Thomp. & C. (N. Y.) 370; *Ohio*, State v. West, 3 Ohio St. 509; *Miller v. State*, 3 Ohio St. 476; *Pim v. Nicholson*, 6 Ohio St. 176; *Lehman v. McBride*, 15 Ohio St. 573; *Fry v. Booth*, 19 Ohio St. 25; *State v. Covington*, 29 Ohio St. 116; *Oshe v. State*, 37 Ohio St. 500; *Weil v. State*, 46 Ohio St. 450; *Pennsylvania*, Erie Academy v. Erie, 31 Pa. St. 515; *Texas*, Edwards v. James, 13 Tex. 52; *Wisconsin*, State v. Lean, 9 Wis. 291; *Cameron v. Cameron*, 15 Wis. 1; 82 Am. Dec. 652; *State v. Stumpf*, 21 Wis. 579; *Lackawanna Iron, etc., Co. v. Little Wolf*, 38 Wis. 152; *State v. Davidson*, 32 Wis. 120; *State v. Pierce*, 35 Wis. 93.

**English Cases.**—A careful English authority formulates the following rules upon an exhaustive study of the English cases: "Whenever a statute declares that a thing 'shall' be done, a natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to the time or formality of completing any public act, not being a step in litigation, or accusation; or, the time or formality of creating an executed contract whereof the benefit has been, or but for their own act, might be, received by individuals or private companies or private corporations, the enactment will gen-

erally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements." Stroud's Jud. Dict. And in support of these propositions, the learned author cites the following cases:

**Directory.**—*Rex v. Staffordshire*, 10 L. J. M. C. 166; *Rex v. Norwich*, 1 B. & Ad. 310; 20 E. C. L. 393; *Rex v. Denbighshire*, 4 East 142; *Rex v. Leicester*, 7 B. & C. 6; 14 E. C. L. 1; *Charter v. Greame*, 13 Q. B. 216; 66 E. C. L. 216; *Rex v. Rochester*, 7 E. & B. 910; 90 E. C. L. 909; *Hunt v. Hibbs*, 5 H. & N. 123; *Morgan v. Parry*, 17 C. B. 334; 84 E. C. L. 334; *Brumfitt v. Bremner*, 9 C. B. N. S. 1; 99 E. C. L. 1; *Wells v. Stanforth*, 16 Q. B. Div. 244; *Ackers v. Howard*, 16 Q. B. Div. 739; *Rex v. Ingall*, L. R., 2 Q. B. Div. 199; *Bisanquet v. Woodford*, 5 Q. B. 310; *Steward v. Dunn*, 12 M. & W. 655; *Caldow v. Pixell*, 2 C. P. Div. 562; *Yale v. Rex*, Bro. P. C. 27; *Rex v. Birmingham*, 8 B. & C. 29; 15 E. C. L. 151; *Reg. v. Fordham*, 11 A. & E. 73; 39 E. C. L. 29; *Thompson v. Harvey*, 4 H. & N. 254; *Wolton v. Gavin*, 16 Q. B. 48; 71 E. C. L. 48; *In re Shuttleworth*, 9 Q. B. 651; 58 E. C. L. 651; *Rex v. Patteson*, 4 B. & Ad. 9; 24 E. C. L. 1; *Doe v. Evans*, 1 Cr. & M. 450; 3 Tyr. 339; *Nowell v. Mayor, etc., of Worcester*, 9 Exch. 450; *Cole v. Green*, 6 M. & G. 872; 46 E. C. L. 870; *Ex parte Valpy*, L. R., 7 Ch. 289; *Wright v. Horton*, 12 App. Cas. 371; *Thames Haven Dock, etc., Co. v. Rose*, 4 M. & G. 552; 43 E. C. L. 287; *Southampton Dock Co. v. Richards*, 1 M. & G. 448; 39 E. C. L. 521; *London, etc., R. Co. v. Freeman*, L. R., 2 P. D. 503; 40 E. C. L. 536; *Allen v. C. Assur. Co.*, 9 C. B. 574; 67 E. C. L. 574; *Aggs v. Nicholson*, 1 H. & N. 165.

**Mandatory.**—*Peacock v. Reg.*, 4 C. B. N. S. 264; 93 E. C. L. 262; *Woodhouse v. Woods*, 29 L. J. M. C. 149; *Morgan v. Edwards*, 29 L. J. M. C. 108; *Pennell v. Uxbridge*, 31 L. J. M. C. 92; *South Staffordshire Waterworks Co. v. Stone*, 19 Q. B. Div. 168; *Lockhart v. Mayor, etc., of St. Albans*, 21 Q. B. Div. 188; *Stone v. Dean*, E. B. & E. 504; 96 E. C. L. 502; *Barker v. Palmer*, 51 L. J. Q. B. 110; *Howard v. Bodington*, L. R., 2 P. D. 503; *Williams v. Swansea Canal, etc., Co.*, L. R., 3 Exch. 158; *Bowman v. Blyth*, 7 E. & B. 26; 90 E. C. L. 26; *Rex v. Loxdale*, 1 Burr. 445; *Wanklyn v. Woollett*, 4 C. B. 86; 56 E. C. L. 86; *McKeown v.*

will be found a collection of cases in which the words "may"<sup>1</sup> and "must"<sup>2</sup> have been construed.

**13. Evasions.**—To carry out effectually the purpose of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined; courts must labor to suppress all subtle inventions and circumlocution by which the object and purpose of the law will be defeated.<sup>3</sup>

It is, however, essential not to confound what is actually or virtually prohibited or enjoined by the language, with what is really beyond the contemplation, though it be within the policy,

Bradford, 7 Ir. Jur. N. S. 169; Henry v. Armitage, 52 L. J. Q. B. 165; Liverpool Borough Bank v. Turner, 29 L. J. Ch. 872; Friend v. Dennett, 4 C. B. N. S. 576; 93 E. C. L. 575; Young v. Leamington, L. R., 8 App. Cas. 517; Hunt v. Wimbledon Local Board, L. R., 4 C. P. Div. 48; Mellis v. Shirley, 16 Q. B. Div. 446; *In re Gifford*, 20 Q. B. Div. 368; Crump v. Adney, 1 Cr. & M. 355; 3 Tyr. 270; Cope v. Thames Haven Dock, etc., Co., 3 Exch. 841; Diggle v. London, etc., R. Co., 5 Exch. 442; Finlay v. Bristol R. Co., 7 Exch. 409; Schofield v. Hincks, 37 W. R. 157; Cooke v. New River Co., 38 Ch. Div. 56.

**Shall and May; Shall and May be Lawful; It Shall be Lawful.** etc.—Such expressions as these are generally mandatory and imperative. Doe v. Smith, 1 B. & B. 97; 5 E. C. L. 45; Steward v. Greaves, 10 M. & W. 711; *In re London, etc., Banking Corp.*, 2 De G. & J. 484; Hill v. London, etc., Assur. Co., 1 H. & N. 398; St. Nicholas v. Sketchley, 8 Q. B. 394; 55 E. C. L. 394. And see also the list of cases under the title, MAY, vol. 14, p. 985.

"The words 'shall and lawfully may' are, in their ordinary import, obligatory, and ought, according to established rules, to have that construction, unless it would lead to some absurd or inconvenient consequence, or be at variance with the intent of the legislature, to be collected from other parts of the act." Chapman v. Milvain, 5 Exch. 61.

But in *Malcom v. Rogers*, 5 Cow. (N. Y.) 193, where a statute provided that upon the death of a person leaving several heirs, "all such heirs shall or may recover in one writ or action, as heirs of the deceased person," it was held that the words "shall or may" left it "discretionary with the heirs to bring joint or several actions."

So in *Ex parte Whittington*, 34 Ark.

394, it was held that, where a statute provided that under certain conditions "it shall be lawful" for the county court to grant liquor licenses, it was discretionary with the court to grant or refuse such licenses. And again, though it is provided by an English statute that for the offense of allowing an unauthorized person to act in his name, a solicitor "shall and may be struck off the roll and forever afterwards disabled from practicing," yet the infliction of so heavy a penalty is not imperative, and a lesser punishment may be imposed. *In re Grayton*, 4 T. R. 479; *In re Lamb*, 23 Q. B. Div. 477; *In re Sykes*, London Times, 19 Feb., 1890.

"The meaning to be attributed to the phrase 'it shall be lawful' in a statute, must depend on the subject-matter in every instance. . . . *Prima facie* those words import a discretion, and they must be construed as discretionary, unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are meant to be imperative." Reg. v. Bishop of Oxford, 4 Q. B. Div. 257.

1. MAY, vol. 14, p. 979.

2. MUST, vol. 16, p. 1.

3. Branches Principia 71; *Magdalen College Case*, 11 Rep. 70b; *Moore v. Hussey*, Hob. 75; 3 Rep. 7; *Warner v. Armstrong*, 3 M. & K. 45; *Doe v. Carter*, 8 T. R. 300; *Collins v. Blantern*, 2 Wils. 349; *Com. v. Harris*, 8 B. Mon. (Ky.) 373; *Big Black Creek Imp. Co. v. Com.*, 94 Pa. St. 450; *Douglass v. Com.*, 2 Rawle (Pa.) 262; *Cooler v. Barcroft*, 43 N. J. L. 363; *Woodruff v. State*, 3 Ark. 285.

Lord Coke states the rule, "*Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.*" Co. Litt. 223b.

An act forbade preferences in assignments for creditors. *Lowrie, C. J.*, in reference to this act in *Fallon's Ap-*



of the act, for it is only to the former case that the principle under consideration applies, and not to cases where, however manifest the object of the act may be, the language is not co-extensive with it.<sup>1</sup>

**XI. REPEAL—1. General Rules.**—It is presumed to be the legislative intent that a statute once enacted is enacted for all time, in the absence of an expression of a contrary intent.<sup>2</sup> Its operation

peal, 42 Pa. St. 255, said: "Of course, the courts cannot allow the law to be evaded by any sham departure from the general form of such assignments, and when the transaction is substantially an assignment for the benefit of creditors, the substance rather than the form must be regarded." See also Johnson's Appeal, 103 Pa. St. 377.

It has been held that selling tickets at a picnic for which beer is furnished on presentation was a mere attempt to evade the law, and a person doing so could be convicted of selling liquor without a license. *Com. v. Heffner*, 8 Leg. Gaz. (Pa.) 166.

What is in substance usury will be so treated, and evasions of these laws by mere sham and artifice will not be suffered. Lord Coke said: "To them that lend money my caveat is that neither directly nor indirectly by art or cunning invention they take above six in the hundred; for them that seek by slight to creep out of these statutes will deceive themselves and repent in the end." See *Martin v. Nashville Bldg. Assoc.*, 2 Coldw. (Tenn.) 418; *Floyer v. Edwards*, Cowp. 114. In *Mills v. Salisbury Bldg., etc., Assoc.*, 75 N. Car. 292, Read, J., said: "Calling the borrower a 'partner,' or substituting 'redeeming' for 'lending,' 'premium' for 'bonus,' for an amount they profess to have advanced and yet withhold; or 'dues' for interest, or any like subterfuge, will not avail. We look at the substance." See *USURY*.

If a contract be a wager in substance, no matter how the end is brought about, it will be void, though the object be ever so cunningly concealed in the form given the transaction, under the statutes prohibiting wager contracts. *Tate v. Wellings*, 3 T. R. 531; *Boldero v. Jackson*, 11 East 612; *White v. Wright*, 3 B. & C. 273; 10 E. C. L. 75. Such as a written promise to pay a sum of money on the happening of the contingency which is the subject of a wager. *Nudd v. Burnett*, 14 Ind. 25; *Guyman v. Burlingame*, 36 Ill. 201.

1. *Etherington v. Wilson*, 1 Ch. Div.

161; *Pender v. Lushington*, 6 Ch. Div. 70; *Cross v. Watts*, 32 L. J. M. C. 73; *Brigden v. Heighes*, 1 Q. B. Div. 330; *Neilson v. Lagow*, 12 How. (U. S.) 98; *Johnson's Appeal*, 103 Pa. St. 377.

A hiring, for a few days less than a year, though avowedly for the purpose of preventing the servant from acquiring a settlement, was held not to be an evasion of the act which gave a settlement on a year's service. *R. v. Little Coggleshall*, 6 M. & S. 264; *Rex v. Mursley*, 1 T. R. 694.

So an act which made it penal to personate "any person entitled to vote" would not be violated by personating a dead voter. *Whitely v. Chappel*, L. R., 4 Q. B. 147.

In *Blakey's Appeal*, 7 Pa. St. 449, it was held that judgments confessed to secure creditors are not such preferences as were forbidden by the act prohibiting assignments giving preferences to certain creditors, although an assignment for creditors was intended and shortly afterwards executed.

2. *Potter's Dwarries* 153; *U. S. v. Gear*, 3 How. (U. S.) 120.

A temporary statute continues in force until the time limited on its face expires. *Brown v. Barry*, 3 Dall. (U. S.) 365; and an offense against it cannot be punished after the expiration of the act, unless particular provision is made by law for that purpose. *The Irresistible*, 7 Wheat. (U. S.) 551.

A proceeding in court which is imperfect when the temporary act under which it was begun expires must remain imperfect. *Stoevers v. Immell*, 1 Watts (Pa.) 258; *Com. v. Beatty*, 1 Watts (Pa.) 382; but penalties fixed by a later statute upon offenses enumerated in a temporary one may be enforced, although the temporary statute has expired. *Ex parte Higginbotham*, 9 Dowl. Pr. Cas. 200.

If the temporary act is before its expiration made perpetual, it is considered to have been perpetual from the beginning. *Rex v. Swiney*, 1 A. & N. 139; *Dingley v. Moore*, Cro. Eliz. 750; *Rex v. Morgan*, Str. 1066.

may be suspended however for a specified period;<sup>1</sup> or by a subsequent statute<sup>2</sup> or by an amendment<sup>3</sup> it may be repealed altogether, either expressly or by implication.<sup>4</sup> The question whether a statute has been repealed is not a legislative question, but a

1. *Edmonson v. Ferguson*, 11 Mo. 344; *Lindsey v. Burbridge*, 11 Mo. 545. In these cases it was held that an act suspending statutes and processes against volunteers who, during the war, were absent from the state, until their regiments returned, was constitutional.

An act may be suspended by implication, but such a construction will not be given unless there is a clear and strong inconsistency between the acts. *Egypt Street, 2 Grant's Cas. (Pa.)* 455.

The suspension of an act for a limited time is not a repeal of it. A repealing act and an act suspending it passed at the same session, when construed together, amount only to a provision that the repeal of the act shall take place at a future day. *Brown v. Barry*, 3 Dall. (U. S.) 365.

Where an act has been suspended, it cannot be enforced during the period of suspension for penalties incurred prior to the suspension. *State v. Bank of South Carolina*, 12 Rich. (S. Car.) 609.

Where a previous act forbade the general assembly to "repeal, alter, or modify" it, an act suspending operation of the statute was held not an infringement of the inhibition. *Oliver v. Perry*, Phill. (N. Car.) 581.

The provision that the repeal of the repealing act shall not revive the original act unless it be passed at the same session, does not apply to the repeal of a statute which simply suspends the exercise of a right belonging to the state. *Cassell v. Lexington, etc., Road Co.*, 10 Ky. L. Rep. 486.

The re-enactment at the same session of certain sections of one act is not under the circumstances a repeal by implication, nor does a provision in the second act, suspending the operation of similar sections in that act, suspend the operation of those in the first act. *Powers v. Shepard*, 48 N. Y. 540.

2. A statute cannot be modified nor superseded by one of earlier date. *Thomas v. Collins*, 58 Mich. 64; *Smith v. McDermott*, 93 Cal. 421.

3. *Breitung v. Lindaner*, 37 Mich. 217; *Longlois v. Longlois*, 48 Ind. 60; *State v. Miller*, 58 Ind. 399; *Pana v. Bowler*, 107 U. S. 529; *Lucas County*

*v. Chicago, etc., R. Co.*, 67 Iowa 541. See *infra*, this title, *Implied Repeal*.

4. *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677; *State v. Judge*, 14 La. Ann. 491; *State v. Hoefinger*, 31 Wis. 257; *People v. Livingston*, 6 Wend. (N. Y.) 530. See *Harrington v. Rochester*, 10 Wend. (N. Y.) 547.

The legislature has plenary power to enact laws or repeal them, unless prohibited by the constitution. A power to repeal a law is as complete and full as the power to enact it. *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

Neither mode of repeal is effective until the repealing act takes effect. *Spalding v. Alford*, 1 Pick. (Mass.) 33.

It is within the power of the legislature to repeal a definite portion of a section or article in an act without the re-enactment of the section or article, omitting the part repealed. *Chambers v. State*, 25 Tex. 307.

Power to revoke or annul a statute or ordinance is equivalent to power to repeal it. *Shepherd v. Wheeling*, 30 W. Va. 479.

One legislature cannot bind a future legislature to a particular mode of repeal. *Kellogg v. Oshkosh*, 14 Wis. 623. Nor can an act be made irrepealable. *Thomas v. Daniel*, 2 McCord (S. Car.) 359; unless it assumes the form and substance of a contract. *Bloomer v. Stolley*, 5 McLean (U. S.) 158; *Stone v. Mississippi*, 101 U. S. 814; *Hamrick v. Rouse*, 17 Ga. 56; *Shaw v. Macon*, 21 Ga. 280; *State v. Pillsbury*, 31 La. Ann. 1; *State v. Craig*, 23 Ind. 185; *Wall v. State*, 23 Ind. 150; *Armstrong v. Dearborn County*, 4 Blackf. (Ind.) 208; *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677; *Thomas v. Daniel*, 2 McCord (S. Car.) 354; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383; *Kellogg v. Oshkosh*, 14 Wis. 623; *Atty. Gen'l v. Brown*, 1 Wis. 513; *Brightman v. Kirner*, 22 Wis. 54.

Where a law permitted towns and municipalities to issue bonds by virtue of its provisions, and provided that they should not thereafter issue bonds "by virtue of the authority of any other law of this state," it was held that these words were inapplicable to future enactments. *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383.

judicial one.<sup>1</sup> It seems that long disuse may in effect operate as a repeal,<sup>2</sup> but strong evidence as to the disuse is required.<sup>3</sup>

Under the rule of the English Parliament a statute was not repealed at the same session at which it was passed, in the absence of a clause reserving the power of repeal;<sup>4</sup> but even at common law repeals by implication were apparently not within this rule,<sup>5</sup> and, in the absence of constitutional provision,

1. *U. S. v. Claffin*, 97 U. S. 546; *Shepherd v. Wheeling*, 30 W. Va. 479.

Therefore a recital in a statute, that a former statute was repealed or superseded by subsequent acts, is not conclusive as to such repeal or superse-dure. *U. S. v. Claffin*, 97 U. S. 546.

2. *Hill v. Smith*, 1 Morr. (Iowa) 70; *Wright v. Crane*, 13 S. & R. (Pa.) 452; *Porter's Appeals*, 30 Pa. St. 499; *O'Han-lon v. Myers*, 10 Rich. (S. Car.) 128; *Watson v. Blaylock*, 2 Mills (S. Car.) 351; *Canady v. George*, 6 Rich. Eq. (S. Car.) 103; *Reg. v. Bewdley*, 1 P. Wms. 223; *Money v. Leech*, 3 Burr. 1755. See *Laigh v. Kent*, 3 T. R. 364; *James v. Com.*, 12 S. & R. (Pa.) 220. *Contra Snowden v. Snowden*, 1 Bland (Md.) 552; *Homer v. Com.*, 106 Pa. St. 221; 51 Am. Rep. 521; *Kitchen v. Smith*, 101 Pa. St. 457; not noticing other cases in *Pennsylvania*. There can be no repeal by non-user unless accompanied by the enactment of ir-reconcilable statutes. *Pearson v. In-ternational Distillery*, 72 Iowa 348. And see *Tise v. Shaw*, 68 Md. 1; *The India, Br. & L.* 221.

"It is contrary to the spirit of our institutions to revive without notice a penal statute grown obsolete by long disuse, especially when the general current of legislation shows the con-stitution to have been regarded by the legislature as no longer in force. Custom can repeal a statute." *Hill v. Smith*, 1 Morr. (Iowa) 79.

"The notion that statutes are not re-pealable by non-user is founded on two cases of not very high authority (*Res-publica v. Philadelphia County*, and *Glancey v. Jones*), reported in 4 Yeates (Pa.) 181, 215, both of which depend upon an *obiter dictum* in *White v. Boot*, 2 T. R. 279, a case that was overruled in *Leigh v. Kent*, 3 T. R. 364. A proposition no better supported can-not prevail against the clear reasoning of Chief Justice Tilghman in the case of *Wright v. Crane* already cited in 13 S. & R. (Pa.) 452." *Woodward, J.*, in *Porter's Appeals*, 30 Pa. St. 498.

A law may become obsolete where the object to which it was intended to apply, or the question on which it was enacted no longer exists. *Com. v. Hoover*, 1 Bro. (Pa.) 28.

Non-usage of a statute will, in any event, help the implication of its re-peal by a later inconsistent statute. *Rex v. Dodd*, 9 East 516.

3. *Wright v. Crane*, 13 S. & R. (Pa.) 452; *Porter's Appeals*, 30 Pa. St. 499; *Com. v. Hoover*, 1 Bro. (Pa.) 28.

"It must be a very strong case to justify the court in deciding that an act standing on a statute book unre-pealed is obsolete and invalid." *Tilgh-man, C. J.*, in *Wright v. Crane*, 13 S. & R. (Pa.) 452.

4. *Cooley Const. Lim.* (6th ed.) 183, citing 1 *Dwarris on Stat.*, p. 269; *Sedg-wick, Stat. & Const. Law* 122. The rule is stated in 8 *Bacon, Abr.* 225. See *Cain v. State*, 20 Tex. 355.

As to which of two statutes passed on the same day is the final expression of the legislative will, see *supra*, this title, *In Respect to Time of Taking Effect*.

5. *Spencer v. State*, 5 Ind. 41; *Ham v. State*, 7 Blackf. (Ind.) 314; *Atty. Gen'l v. Brown*, 1 Wis. 513; *People v. Lytle*, 1 Idaho 143; *In re Oregon Bulletin, etc.*, Co., 2 Sawy. (U. S.) 614; *Mobile, etc., Co. v. State*, 29 Ala. 573; *Strauss v. Heiss*, 48 Md. 292; *Watson v. Kent*, 78 Ala. 602; *Rex v. Middlesex*, 2 B. & Ad. 818; 22 E. C. L. 190. In which case it was said that the date of the royal assent being now by statute required to be indorsed on an act passed by Parliament, thus fixing the time of its taking effect, the latter of two repugnant acts passed at the same session of Parliament repeals the former. *Johnson v. Byrd, Hempst.* (U. S.) 434.

Where there was an irreconcilable conflict between a general revision of laws and a later particular law passed at the same session, the latter law was held to impliedly repeal the former as far as their provisions conflicted. *State*

the rule seems never to have been applicable in the states of the Union.<sup>1</sup>

Where one statute purports to repeal another specified statute, by an express clause to that effect, the repealing clause, it seems, may be valid and effective, although every other clause of the statute is unconstitutional.<sup>2</sup> But where there is, by a general clause, a repeal of all acts and parts of acts inconsistent with the statute, and it is apparent that the repealing statute is to be substituted for the one repealed, the unconstitutional character of the repealing statute will also render void the repealing clause.<sup>3</sup> A prior statute will not be impliedly repealed by inconsistency with a subsequent unconstitutional one.<sup>4</sup>

2. **Express.**—In order to repeal expressly a specified statute or part of a statute, the reference to it must be certain.<sup>5</sup> In some

*v. Heidorn*, 74 Mo. 412; *Smith v. McDermott*, 93 Cal. 421; *Cerf v. Reichert*, 73 Cal. 360.

So an act repugnant to a previous one passed on the same day will repeal the previous act. *Strauss v. Heiss*, 48 Md. 292; *Mead v. Bagnall*, 15 Wis. 56; *Metropolitan Board of Health v. Schmades*, 3 Daly (N. Y.) 282.

1. See *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 54; *Mobile, etc., R. Co. v. State*, 29 Ala. 582; *Peyton v. Moseley*, 3 T. B. Mon. (Ky.) 80; *Atty. Gen'l v. Brown*, 1 Wis. 513.

"It would certainly be a novel, if not a very dangerous, doctrine to hold that whenever the legislature had enacted a law on a common subject, they thereupon ceased to possess any legislative control over that subject during the same session." *Atty. Gen'l v. Brown*, 1 Wis. 513.

So a bill in its progress through the legislative channels may be expressly repealed by a subsequent act; for the power to repeal a law involves the power to abrogate a bill in its progress before it becomes a law. *Southwark Bank v. Com.*, 26 Pa. St. 446.

2. *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *Meshmiller v. State*, 11 Ind. 482. See *State v. Hallock*, 14 Nev. 202; 33 Am. Rep. 559. Compare *In re Rafferty*, 1 Wash. 382.

Where, however, it is not clear that the legislature intended to repeal the prior law, without regard to new provisions to be substituted for it, a repealing clause in an unconstitutional statute will be ineffective. *State v. Blend*, 121 Ind. 514.

3. *People v. Tiphaine*, 3 Park. Cr. (N. Y.) 241.

The repeal of all laws inconsistent

with the statute does not affect such laws as are inconsistent only with such parts of the repealing statute as are unconstitutional and void. *Devoy v. New York*, 35 Barb. (N. Y.) 264; *Harbeck v. New York*, 10 Bosw. (N. Y.) 366; *Sullivan v. Adams*, 3 Gray (Mass.) 476; *Tims v. State*, 26 Ala. 165; *Childs v. Shower*, 18 Iowa 261; *State v. Burton*, 11 Wis. 51; *Shepardson v. Milwaukee, etc., R. Co.*, 6 Wis. 605; *State v. Burton*, 11 Wis. 50; *In re Petty*, 22 Kan. 489; *People v. Fleming*, 7 Colo. 230. But see *Harvey v. Virginia*, 20 Fed. Rep. 411.

Where an amendatory law was passed which repealed all acts or parts of acts inconsistent therewith, and the amendatory part of the act failed for uncertainty, it was held that the repealing clause did not repeal the provisions of the original act sought to be amended, on the ground that they could not, as claimed, be inconsistent with the amendatory sections which were a nullity. *Campau v. Detroit*, 14 Mich. 285.

4. *Ex parte Davis*, 21 Fed. Rep. 396; *Stephens v. Ballou*, 27 Kan. 594; *Miller v. Edwards*, 8 Colo. 528; *Raleigh v. Peace*, 110 N. Car. 32; *State v. Burton*, 11 Wis. 50; *Dewy v. New York*, 36 N. Y. 449.

5. *Chegaray v. Jenkins*, 3 Sandf. (N. Y.) 409; *Madison, etc., Plankroad Co. v. Reynolds*, 3 Wis. 287.

It is customary to insert the title of the repealed act in the repealing statute; and a repeal is not to be inferred from a general and uncertain allusion to it in a repealing act. *Chegaray v. Jenkins*, 3 Sandf. (N. Y.) 409.

Where the title was set out, a mistake in the reference to the year or chapter, not preventing identification

states, where a repeal by mere reference to the title of the act to be repealed is unconstitutional, the act, or part of the act to be repealed, must be set out or described in the repealing act.<sup>1</sup> In other states, the latter rule is inapplicable,<sup>2</sup> and an identification in the repealing act of the law intended to be repealed is sufficient.<sup>3</sup>

Where an act is passed covering the whole of a particular subject or field of legislation, it is customary to insert a general clause repealing "all acts or parts of acts inconsistent therewith."<sup>4</sup> Such

of the act to be repealed, was disregarded. *Blake v. Brackett*, 47 Me. 28; *In re Boothroyd*, 15 M. & W. 1.

The title of a bill has been held to be no part of the bill itself, and not, of itself, to effect the repeal of an existing law. *Brooks v. Hydorn*, 76 Mich. 280. See also *Atty. Gen'l v. Rice*, 64 Mich. 385; *Larrison v. Peoria*, etc., R. Co., 77 Ill. 17.

1. See various state constitutions. See *Morrell v. Fickle*, 3 Lea (Tenn.) 79.

A repealing act which in its title declares that it is an act to repeal a certain act, describing it, giving the full title of the statute repealed in its body and repealing the same, is not in violation of the constitution requiring that the repealed act be described. *Adam v. Wright*, 84 Ga. 720.

2. In several states the clause in the constitution does not mention repeals at all, and is held inapplicable to them, whether they are express or implied. *Van Riper v. Parsons*, 40 N. J. L. 126; *Wallace v. Bradshaw*, 54 N. J. L. 175; *Bird v. Wasco County*, 3 Oregon 282; *Shields v. Bennett*, 8 W. Va. 87; *Falconer v. Robinson*, 46 Ala. 340; *Greely v. Jacksonville*, 17 Fla. 174; *Commercial Bank v. Markham*, 3 La. Ann. 698. In other states, though all laws "amended, revived, or repealed" are in terms included in the constitutional provision, repeals by implication are in application excluded. *State v. Miller*, 100 Mo. 439; *State v. Macklin* (Mo. 1890), 13 S. W. Rep. 680; *Home Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *State v. Gaines*, 4 Lea (Tenn.) 353; *Maney v. State*, 6 Lea (Tenn.) 218; *Knoxville v. Lewis*, 12 Lea (Tenn.) 181; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 638; *Poe v. State*, 85 Tenn. 495; *Geisen v. Heiderich*, 104 Ill. 537; *Branham v. Lange*, 16 Ind. 497; *Anderson v. Com.*, 18 Gratt. (Va.) 295; *Scales v. State*, 47 Ark. 476; 58 Am. Dec. 768; *Stephens v. Ballou*, 27 Kan. 601. See also *State v. Elko County* (Nev. 1890), 23 Pac.

Rep. 935. See also *supra*, this title, *Amendment—Form*.

The clause in the *Maryland* constitution, though extended to repealing acts, is held not to effect a general repeal of all laws inconsistent with the purposes of the legislature as expressed in the new statute. *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331.

The *Tennessee* constitutional provision that "all acts which repeal, revive, or amend former laws shall recite, in their caption or otherwise, the title or substance of the law repealed, revived, or amended," is held inapplicable to repeals by implication. *Home Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 633.

**Acts Embracing More Than One Subject Expressed in Title.**—The constitutional provision that no act shall embrace more than one subject is inapplicable to repeals by implication. *Geisen v. Heiderich*, 104 Ill. 537; *Spencer v. State*, 5 Ind. 51. See *Strauss v. Heisa*, 48 Md. 292. Where, however, the title of an act did not indicate its subject-matter on the point in which it was claimed to be inconsistent with a prior act, it was held, therefore, not to repeal the former act, though the fact of repugnancy was conceded. *Miller v. Edwards*, 8 Colo. 528.

3. *Leard v. Leard*, 30 Ind. 171.

So a reference to "provisions to article 411" of the Penal Code by obvious mistake instead of to "proviso to" said article, will not prevent the repeal of the proposed proviso. *Chambers v. State*, 25 Tex. 307.

Where the reference to the published law was a mistaken one, the court looked at the original bill on file to determine what section was actually repealed. *State v. Clare*, 5 Iowa 509.

4. As the rules of construction and effect to be given to inconsistent provisions are the same, whether the question of repeal arises under such a

a clause is effective in repealing inconsistent enactments.<sup>1</sup> Only those acts on the same subject or parts of such acts clearly inconsistent and irreconcilable with the provisions of the repealing act are rendered invalid, and only to the extent of the conflicting provisions.<sup>2</sup>

general clause or by implication alone, see *infra*, this title, *Implied Repeal*, where they are treated.

**Repeal of Acts Within Purview.**—The purview of an act means the enacting part of a statute, in contradistinction to the enabling part. *Payne v. Conner*, 3 Bibb (Ky.) 180.

If an act legislates upon the same subjects as a former, and repeals all other laws within its purview, the former act is repealed, even though it is not inconsistent with the later one. *Ogden v. Witherspoon*, 2 Hayw. (N. Car.) 227. But provisions of the former law as to cases not provided for by the repealing statute are not repealed. *Payne v. Conner*, 3 Bibb (Ky.) 180; *Patterson v. Caldwell*, 1 Metc. (Ky.) 489; *Grigsby v. Barr*, 14 Bush (Ky.) 330; *Com. v. Watts*, 84 Ky. 537.

1. *Prince George's County v. Laurel*, 21 Md. 464; *Newbold v. Pennock* (Pa. 1893), 26 Atl. Rep. 606; *People v. Durick*, 20 Cal. 94; *Tierney v. Dodge*, 9 Minn. 166; *State v. Kelly*, 34 N. J. L. 75; *Rex v. Northteach*, 5 B. & Ad. 978; 27 E. C. L. 250. See *U. S. v. Bedgood*, 49 Fed. Rep. 54.

A general repealing clause repeals every act identical with those expressly repealed thereby. *State v. Barrow*, 30 La. Ann. 657; *New York v. Broadway, etc.*, R. Co., 12 Hun (N. Y.) 571.

Where the last section of a statute declares all acts and parts of acts relating to the subject-matter thereof repealed "from and after the time" when such statute shall take effect, this will not be construed a repeal of such statute itself, but to mean all other acts. *State v. Stinson*, 17 Me. 154.

A law amending the charter of a town permitting it to levy taxes on "trades, businesses, bar-rooms, etc.," and repealing all acts inconsistent therewith, does not repeal a general act prohibiting the sale of intoxicating liquors within two miles of the county courthouse; part of the last-named territory being within the town jurisdiction; the ground of the decision being that a repeal clause amending a city charter does not repeal public laws, but refers only to all laws and clauses

conferring power, authority, and privileges upon or denying the same to the town. *State v. Witter*, 107 N. Car. 792.

An act which repeals by direct reference nearly all the laws on the subject, and then adds a general clause, "together with all acts and parts of acts inconsistent herewith," and which embraces the entire subject-matter of a certain prior act not referred to directly, making changes on the point in question, and adding other provisions, operates a repeal of such prior act. *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424.

2. *Elrod v. Gilliland*, 27 Ga. 467; *People v. Durick*, 20 Cal. 94; *Hickory Tree Road*, 43 Pa. St. 139. See *Payne v. Conner*, 3 Bibb (Ky.) 180.

A repeal of all acts inconsistent with the repealing statute, does not affect a statute not especially mentioned, and which relates to the same subject-matter which is not inconsistent with the repealing act. *People v. Durick*, 20 Cal. 94. Nor are provisions of a former act on the same subject, not inconsistent with the later one, repealed. *Lewis v. Stout*, 22 Wis. 234; *Simmons v. Bradley*, 27 Wis. 689. See *State v. Campbell*, 44 Wis. 529.

Where a statute provided for the punishment of larceny of all sums over fifty dollars by an imprisonment of five years, and a second statute was passed punishing larcenies of sums over two thousand dollars by imprisonment for twenty years, it was held that only so much of the first statute as provided for the punishment of larcenies over two thousand dollars was repealed by the passage of the second statute, as the latter only purported to repeal acts inconsistent therewith. *State v. Grady*, 34 Conn. 118.

So an act providing that any person under sentence may be committed at the discretion of the court to the house of correction in any county of the commonwealth, and repealing all inconsistent statutes, does not repeal a prior statute requiring the imprisonment to be in the county where the offense was committed. *Carter v. Burt*, 12 Allen (Mass.) 424.

A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent, if fairly expressed, must prevail over a mere literal interpretation clearly at variance with such intent.<sup>1</sup>

**3. Implied**—*a.* BY REPUGNANT ACT—(1) *In General*.—If two statutes on the same subject are mutually repugnant and irreconcilable, the later act without any repealing clause operates, in the absence of expressed intent to the contrary,<sup>2</sup> as a repeal of the earlier.<sup>3</sup> But even in such case, the old law is repealed by implication only

An act was passed which granted a right to establish a ferry within certain limits, provided the right should not extend beyond the land of the grantee. A later amendatory act in two sections was passed, which in the first section said nothing of confining the franchise to the grantee's own land, and in the second section repealed all acts inconsistent with the first section. It was held that the first act was thereby repealed. *McRoberts v. Washburne*, 10 Minn. 23.

The general repealing clause of the act of 1855, relative to crimes and offenses, does not repeal the former statutes denouncing crimes and offenses upon which the act is silent. *State v. Fuller*, 14 La. Ann. 678.

An act providing that upon conviction in certain cases where the offender shall give statute proof that he has not previously been convicted of a similar offense, the court may in its discretion inflict only a fine or a punishment by imprisonment, and repealing all inconsistent statutes, does not repeal an act which fixes the minimum penalty at both fine and imprisonment. *Dolan v. Thomas*, 12 Allen (Mass.) 421.

1. *Smith v. People*, 47 N. Y. 331. If the repeal of a statute is by express and positive terms, and there is no legitimate evidence, in or out of the act, of an intent to qualify and restrict the operation, the only question is as to the effect of the repeal. *Smith v. People*, 47 N. Y. 331.

On the question whether a repeal of a prior statute, absolute in terms, can be limited in its operation and effect for any reason, the rule seems to be that while the language of the repealing clause must be accepted as the expression of the will of the legislature, and effect given to it according to its terms, unless it appears, although the language of the repeal was general and unqualified, that it was intended to be used in a qualified or limited sense,

whenever that intent is discovered, effect must be given to it as in the interpretation of other acts. *Smith v. People*, 47 N. Y. 331; *Rex v. Rogers*, 10 East 573; *Warren v. Windle*, 3 East 205.

2. *People v. Kelly*, 7 Robt. (N. Y.) 592; expressly affirmed on this point, though overruled on another, in *People v. Goodwin*, 50 Barb. (N. Y.) 562.

Where a later act expressly provides that it is to be construed as having been passed prior to a specified earlier act, the earlier act is not repealed by implication, but the latter must yield in case an inconsistency exists. *People v. Jaehne*, 103 N. Y. 182; *People v. Moran*, 123 N. Y. 262; 20 Am. St. Rep. 732.

3. *Alabama*.—*Kinney v. Mallory*, 3 Ala. 626; *George v. Skeates*, 19 Ala. 738; *Parker v. Hubbard*, 64 Ala. 203; *Iverson v. State*, 52 Ala. 170; *Smith v. Speed*, 50 Ala. 276; *Barker v. Bell*, 46 Ala. 216; *Watson v. Kent*, 78 Ala. 602; *Riggs v. Brewer*, 64 Ala. 282.

*Arizona*.—*History Co. v. Dougherty* (Arizona, 1892), 29 Pac. Rep. 649.

*Arkansas*.—*Ex parte Osborn*, 24 Ark. 479; *State v. Watts*, 23 Ark. 304; *Coats v. Hill*, 41 Ark. 149.

*California*.—*People v. Grippen*, 20 Cal. 677; *Ex parte Smith*, 40 Cal. 419; *People v. Burt*, 43 Cal. 560; *Pierpont v. Crouch*, 10 Cal. 315; *In re Yick Wo*, 68 Cal. 304; 58 Am. Rep. 12; *People v. Sargent*, 44 Cal. 430; *In re Wixom*, 35 Cal. 320; *Pennie v. Reis*, 80 Cal. 266; *Christy v. Sacramento County*, 39 Cal. 1; *People v. San Francisco, etc.*, R. Co., 28 Cal. 254.

*Colorado*.—*Branagan v. Dulaney*, 8 Colo. 408; *Hirschburg v. People*, 6 Colo. 145.

*Connecticut*.—*Parrott v. Stevens*, 37 Conn. 93.

*Georgia*.—*Harrison v. Walker*, 1 Ga. 32; *Elrod v. Gilliland*, 27 Ga. 467.

It is doubted whether under the clause of the new constitution of *Georgia* providing that, "no law or

section of the code shall be amended by mere reference to its title or to the number of the section of the code, but that the amendment or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made," there can be such a thing as a repeal or alteration of a law by implication. *Central R. Co. v. Hamilton*, 71 Ga. 465. *Butsee Lehman v. McBride*, 15 Ohio St. 573, on same questions.

*District of Columbia*.—*Eckloff v. Dist. of Columbia*, 4 Mackey (D.C.) 572.

*Florida*.—*Greely v. Jacksonville*, 17 Fla. 174; *State v. Palmes*, 23 Fla. 620.

*Idaho*.—*People v. Lytle*, 1 Idaho 143.

*Illinois*.—*Sullivan v. People*, 15 Ill. 233; *West Chicago Park Com'rs v. Brenock*, 18 Ill. App. 559; *Moore v. Moss*, 14 Ill. 106; *Korah v. Ottawa*, 32 Ill. 121; 83 Am. Dec. 255; *People v. Brayton*, 94 Ill. 342; *Devine v. Cook County*, 84 Ill. 590; *Card v. McCaleb*, 69 Ill. 314; *Farwell v. Benevolent Assoc.*, 4 Ill. App. 36; *Fowler v. Pirkins*, 77 Ill. 271; *Kepley v. People*, 123 Ill. 367.

*Indiana*.—*Ham v. State*, 7 Blackf. (Ind.) 314; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *State v. Miskimmons*, 2 Ind. 440; *State v. Youmans*, 5 Ind. 280; *Peru, etc., R. Co. v. Bradshaw*, 6 Ind. 146; *Vermillion County v. Potts*, 10 Ind. 286; *Dowdell v. State*, 58 Ind. 333; *Swinney v. Ft. Wayne, etc., R. Co.*, 59 Ind. 205; *Wall v. State*, 23 Ind. 150; *State v. Craig*, 23 Ind. 185; *Hamlyn v. Nesbit*, 37 Ind. 284; *State v. Wells*, 112 Ind. 237; *State v. Cooper* (Ind. 1887), 13 N. E. Rep. 861. There is nothing in the *Indiana* constitution of 1857 which prohibits the repeal of statutes by implication. *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497.

*Iowa*.—*Casey v. Harned*, 5 Iowa 1; *State v. Smith*, 7 Iowa 244; *Edgar v. Greer*, 8 Iowa 394; 74 Am. Dec. 316; *Straight v. Crawford*, 73 Iowa 676; *Central Iowa R. Co. v. Board of Supervisors*, 67 Iowa 199.

*Kentucky*.—*Adams v. Ashby*, 2 Bibb (Ky.) 96; *Nazareth Literary, etc., Inst. v. Com.*, 14 B. Mon. (Ky.) 214; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70.

*Louisiana*.—*Gayle v. Williams*, 7 La. 162; *Saul v. His Creditors*, 5 Martin N. S. (La.) 569; 16 Am. Dec. 212; *Peet v. Nalle*, 30 La. Ann. 949.

*Maine*.—*Starbird v. Brown*, 84 Me. 238; *Collins v. Chase*, 71 Me. 434.

*Maryland*.—*Cumberland v. Ma-*

*gruder*, 34 Md. 381; *Willing v. Bozman*, 52 Md. 44; *State v. Yewell*, 63 Md. 120; *Appeal Tax Ct. v. Western Md. R. Co.*, 50 Md. 275; *Dugan v. Gittings*, 3 Gill (Md.) 138; 43 Am. Dec. 306.

*Massachusetts*.—*Pease v. Whitney*, 5 Mass. 380; *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386; *Com. v. Kimball*, 21 Pick. (Mass.) 376; *Britton v. Com.*, 1 Cush. (Mass.) 302.

*Michigan*.—*Atty. Gen'l v. Amos*, 60 Mich. 372; *Chapoton v. Detroit*, 38 Mich. 636; *Connors v. Carp River Iron Co.*, 54 Mich. 168; *Brown v. McCormick*, 28 Mich. 220.

*Minnesota*.—*Tierney v. Dodge*, 9 Minn. 166; *Morrison v. Rice*, 35 Minn. 436; *Gates v. Shugrue*, 35 Minn. 392.

*Mississippi*.—*Miller v. State*, 33 Miss. 361; 49 Am. Dec. 351; *Swann v. Buck*, 40 Miss. 268; *Hearn v. Brogan*, 64 Miss. 334; *House v. State*, 41 Miss. 737; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 1; *Planters' Bank v. State*, 6 Smed. & M. (Miss.) 628; *McAfee v. Southern R. Co.*, 36 Miss. 669.

*Missouri*.—*State v. Dolan*, 93 Mo. 467; *State v. Macon County Ct.*, 41 Mo. 453; *Young v. Kansas City, etc., R. Co.*, 33 Mo. App. 509.

*Nebraska*.—*State v. Howe*, 26 Neb. 618; *State v. Maccuaig*, 8 Neb. 215; *State v. Wish*, 15 Neb. 448.

*Nevada*.—*Thorpe v. Schooling*, 7 Nev. 15.

*New Hampshire*.—*Leighton v. Walker*, 9 N. H. 59; *State v. Wilson*, 43 N. H. 415; 82 Am. Dec. 163.

*New Jersey*.—*Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *State v. Blake*, 35 N. J. L. 208; *Mesereau v. Mesereau County* (N. J. 1893), 26 Atl. Rep. 682; *State v. Cavanagh*, 46 N. J. L. 45; *Buckallew v. Ackerman*, 8 N. J. L. 48; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563; *State v. Chambersburg*, 37 N. J. L. 258; *Public School Trustees v. Trenton*, 30 N. J. Eq. 667.

*New York*.—*Bowen v. Lease*, 5 Hill (N. Y.) 221; *Rochester v. Barnes*, 26 Barb. (N. Y.) 657; *People v. New York*, 32 Barb. (N. Y.) 102; *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261; *Kingsland v. Palmer*, 52 N. Y. 83; *Lyddy v. Long Island City*, 104 N. Y. 218; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 18; *People v. Van Nort*, 64 Barb. (N. Y.) 205; *Victory Webb Printing Co. v. Beecher*, 26 Hun (N. Y.) 51; *Church v. Rhodes*, 6 How Pr. (N. Y.) 281; *People v. Palmer*, 52 N. Y. 83; *Piers*



*v. Delamater*, 1 N. Y. 17; *Farley v. DeWaters*, 2 Daly (N. Y.) 192; *Mon-geon v. People*, 55 N. Y. 613.

*North Carolina*.—*Ogden v. Wither-spoon*, 2 Hayw. (N. Car.) 227; *State v. Custer*, 65 N. Car. 339; *State v. Mas-ser*, 103 N. Car. 356; *State v. Monger*, 111 N. Car. 675.

*Ohio*.—*Moore v. Vance*, 1 Ohio 10; *Ruffner v. Hamilton County*, 1 Dis-ney (Ohio) 39; *Lehman v. McBride*, 15 Ohio St. 573.

*Oregon*.—*Grant County v. Sels*, 5 Oregon 243; *Hurst v. Hawn*, 5 Ore-gon 275; *Fleischner v. Chadwick*, 5 Oregon 152; *Stingle v. Nevel*, 9 Ore-gon 63; *Bird v. Wasco County*, 3 Ore-gon 284.

*Pennsylvania*.—*Southwark Bank v. Com.*, 26 Pa. St. 446; *Johnston's Estate*, 33 Pa. St. 511; *Com. v. Cross Cut R. Co.*, 53 Pa. St. 62; *Hendrix's Account*, 146 Pa. St. 289; *Sifred v. Com.*, 104 Pa. St. 179; *Homer v. Com.*, 106 Pa. St. 221; 51 Am. Rep. 521; *Com. v. Cromley*, 1 Ashm. (Pa.) 179; *Egypt Street*, 2 Grant's Cas. (Pa.) 455.

*Rhode Island*.—*State v. Wilbor*, 1 R. I. 199; 36 Am. Dec. 245.

*South Carolina*.—*Byrne v. Stewart*, 3 Desaus. (S. Car.) 135; *Morrison v. Barksdale*, Harp. (S. Car.) 101; *State v. Stoll*, 2 S. Car. 538.

*Tennessee*.—*Home Ins. Co. v. Tax-ing Dist.*, 4 Lea (Tenn.) 644; *Wells v. State*, 3 Lea (Tenn.) 70; *Wilcox v. State*, 3 Heisk. (Tenn.) 110; *Furman v. Nichol*, 3 Coldw. (Tenn.) 432; *Smith v. Hickman*, Cooke (Tenn.) 330; *Hocka-day v. Wilson*, 1 Head (Tenn.) 113; *Browning v. Jones*, 4 Humph. (Tenn.) 69; *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 518; *Poe v. State*, 85 Tenn. 495.

*Texas*.—*Davis v. State*, 2 Tex. App. 425; *Rogers v. Watrous*, 8 Tex. 62; 58 Am. Dec. 100; *Cain v. State*, 20 Tex. 355; *Fayette County v. Faires*, 44 Tex. 514; *Brown v. Chancellor*, 61 Tex. 437.

*United States*.—*Dist. of Columbia v. Hutton*, 143 U. S. 18; *U. S. v. One Hundred Barrels of Spirits*, 2 Abb. (U. S.) 305; *McCool v. Smith*, 1 Black (U. S.) 459; *U. S. v. Walker*, 22 How. (U. S.) 299; *U. S. v. Sixty-seven Pack-ages*, 17 How. (U. S.) 85; *Beals v. Hale*, 4 How. (U. S.) 37; *Johnson v. Byrd*, Hempst. (U. S.) 434; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Furman v. Nichol*, 8 Wall. (U. S.) 44; *Distilled Spirits*, 11 Wall. (U. S.) 356; *Wood County v. Lackawanna Iron, etc., R. Co.*, 93 U. S. 619; *Movins v. Arthur*, 95 U. S. 144;

*Arthur v. Homer*, 96 U. S. 137; *Clay County v. Society for Sav.*, 104 U. S. 579; *Red Rock v. Henry*, 106 U. S. 596; *Ex parte Crow Dog*, 109 U. S. 556; *Woods v. Jackson Iron Mfg. Co.*, 1 Holmes (U. S.) 379; *Wood v. U. S.*, 16 Pet. (U. S.) 342; *Morlot v. Law-rence*, 1 Blatchf. (U. S.) 608; *Powers v. Barney*, 5 Blatchf. (U. S.) 202; *Un-ion Iron Co. v. Pierce*, 4 Biss. (U. S.) 327; *U. S. v. Irwin*, 5 McLean (U. S.) 178; *U. S. v. Barr*, 4 Sawy. (U. S.) 254; *U. S. v. Tynen*, 11 Wall. (U. S.) 92; *Henderson's Tobacco*, 11 Wall. (U. S.) 657; *Den v. Pine*, 4 Wash. (U. S.) 691; *Davies v. Fairbairn*, 3 How. (U. S.) 636; *Milne v. Huber*, 3 McLean (U. S.) 212.

*West Virginia*.—*Shields v. Bennett*, 7 W. Va. 88; *State v. Cain*, 8 W. Va. 730; *Forqueran v. Donnally*, 7 W. Va. 114; *Fox v. Com.*, 16 Gratt. (Va.) 10; *Hogan v. Guigon*, 29 Gratt. (Va.) 705.

*Washington*.—*Kings County v. Da-vies* (Wash. 1890), 24 Pac. Rep. 540.

*English*.—*Rex v. Middlesex*, 1 Dow. P. C. 117; *Dobbs v. Grand Junction Water Works Co.*, 9 Q. B. Div. 158; *Hayden v. Carroll*, 3 Ridgw. P. C. 545; *Harris v. Robinson*, 2 C. B. 908; 52 E. C. L. 907; *Reg. v. St. Edmunds*, 2 Q. B. 84; 42 E. C. L. 583; *O'Flaherty v. McDowell*, 6 H. L. Cas. 142; *Sharp v. Warren*, 6 Price 131.

Repeals by necessary implication take place whenever, by subsequent legislation, it becomes apparent that the legislature did not intend the former act to remain in force. *Pennie v. Reis*, 80 Cal. 266.

When a state changes its constitu-tion, all laws not inconsistent there-with continue in force; those repug-nant to it are repealed by implication. *Cass v. Dillon*, 2 Ohio St. 607.

Where a statute is passed to take ef-fect from its passage, and on the next day another statute upon the same subject is passed to take effect at a fu-ture day, the later one operates as a re-peal of the former. *Weatherford v. Weatherford*, 8 Port. (Ala.) 171.

If an amendment to a law changes it in its substantial provisions, it must by necessary implication repeal the old laws as far as they are in conflict. *Longlois v. Longlois*, 48 Ind. 60.

*United States Rev. Sts.* must be re-garded as passed on December 1st, 1877, and all other acts of the same session of Congress passed subsequent to that date are to be treated as subse-quent acts repealing the revised stat-

*pro tanto* to the extent of the repugnancy; <sup>1</sup> and generally speaking, such parts of the prior act as may be incorporated into the subsequent statute consistently therewith, must be considered in force.<sup>2</sup>

<sup>1</sup> In the absence of any repealing clause, it is, however, necessary to the implication of a repeal that the object of the statutes as well as the subject be the same; if they are not, both statutes will stand though they refer to the same subject.<sup>3</sup>

utes as far as they are inconsistent therewith. *In re Oregon Bulletin*, etc., Co., 3 Sawy. (U. S.) 614. See *In re Oregon Bulletin*, etc., Co., 13 Nat. Bankr. Reg. 200.

The passage of an act by Congress within its constitutional power, inconsistent with a state law, may abrogate the state law. *Henderson v. Spofford*, 59 N. Y. 131; *Sturgis v. Spofford*, 45 N. Y. 452; *The South Carolina*, 27 Fed. Rep. 526; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Ex parte McNeil*, 13 Wall. (U. S.) 236; *People v. Brooks*, 4 Den. (N. Y.) 469; *Smith v. Turner*, 7 How. (U. S.) 395.

Of two inconsistent statutes re-enacted in a subsequent act, the one originally passed at the later date will prevail and operate as a repeal of the other, since even though the re-enactment purports to repeal all prior acts, such original statutes will be treated not as new enactments, but as a continuation. *Northern Pac. R. Co. v. Ellison*, 3 Wash. 226.

In *Louisiana* it is prescribed by the Code of Practice that whenever its provisions conflict with those of the civil code the latter shall be considered repealed. *Beck v. Brady*, 7 La. Ann. 124.

1. *Turner v. State*, 40 Ala. 21; *Watson v. Kent*, 78 Ala. 602; *Coats v. Hill*, 41 Ark. 149; *Elrod v. Gilliland*, 27 Ga. 467; *Hunt v. Chicago*, etc., R. Co., 121 Ill. 638; *Butz v. Kerr*, 123 Ill. 659; *Manker v. Faulhaber*, 94 Mo. 430; *Sullivan v. People*, 15 Ill. 233; *Pennsylvania Co. v. McCarty*, 112 Ind. 322; *Pennsylvania Co. v. Dunlap* (Ind. 1887), 13 N. E. Rep. 403; *State v. Cooper*, 114 Ind. 12; *Jeffersonville*, etc., R. Co. v. *Dunlap*, 112 Ind. 93; *Connors v. Carp River Iron Co.*, 54 Mich. 168; *Brown v. McCormick*, 28 Mich. 220; *Breitung v. Lindauer*, 37 Mich. 233; *Hearn v. Brogan*, 64 Miss. 334; *Public School Trustee v. Trenton*, 30 N. J. Eq. 667; *State v. Camden*, 50 N.

J. L. 87; *Plum v. Lugar*, 49 N. J. L. 557; *Mongeon v. People*, 55 N. Y. 613; *State v. Custer*, 65 N. Car. 339; *In re Contested Election*, 86 Pa. St. 392; *State v. Massey*, 103 N. Car. 356; *Byrne v. Stewart*, 3 Desaus. (S. Car.) 135; *Justice v. Com.*, 81 Va. 209; *St. Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731; *Weil v. Polack*, 30 Fed. Rep. 813; *Wood v. U. S.*, 16 Pet. (U. S.) 363; *Chicago*, etc., R. Co. v. *U. S.*, 127 U. S. 406; *Dist of Columbia v. Hutton*, 143 U. S. 18; *McCool v. Smith*, 1 Black (U. S.) 459. And see cases in preceding note.

If one act imposes a toll payable to turnpike trustees for passing along the road, and another transfers the duty of repairing the road to another body, prohibiting also the trustee from repairing it, the provision imposing the toll is not impliedly repealed. *Phipson v. Harvett*, 1 C. M. & R. 473. See *Brown v. Great Western R. Co.*, 51 L. J. Q. B. 529.

2. *Daviess v. Fawbain*, 3 How. (U. S.) 636; *Potter's Dwaris*, p. 219; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437; 18 Am. Dec. 516; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Ottawa v. La Salle*, 12 Ill. 339; *Fowler v. Pirkins*, 77 Ill. 271; *East St. Louis v. Maxwell*, 99 Ill. 439; *Dunaway v. Goodall*, 3 Ill. App. 201; *Holton v. Daly*, 106 Ill. 131; *Warder v. Arell*, 2 Wash. (Va.) 296; 1 Am. Dec. 488. See *infra*, this title, *By Act Covering Same Subject*.

3. *U. S. v. Claflin*, 97 U. S. 546; *People v. Platt*, 67 Cal. 22; *Rosborough v. Boardman*, 67 Cal. 116; *Rawson v. Rawson*, 52 Ill. 62; *U. S. v. Gear*, 3 How. (U. S.) 120; *Miller v. Edwards*, 8 Colo. 528; *Bowen v. Lease*, 5 Hill (N. Y.) 225.

A statute which made a willful omission by an insolvent debtor of part of his assets in a sworn inventory, a misdemeanor, has not the same object as an earlier law making the false verification of such an inventory, perjury,

Whether or not an implied repeal takes place in any case, the later act stands unaffected.<sup>1</sup>

(2) *Negative and Affirmative Terms*—(a) *In General*.—If a subsequent statute which is contrary to an earlier one has negative words, it repeals the former.<sup>2</sup> Two such statutes expressed in negative terms may however be affirmative *inter se* and not contradictory, though negative as regards a third at which they are avowedly aimed, and so may be made to stand side by side.<sup>3</sup> Even where the later statute is expressed in the affirmative, it is often found to involve that negative which makes it fatal to the earlier enactment.<sup>4</sup> But when the later enactment is worded in affirmative terms only, without any negative, expressed or implied, it does not repeal the earlier law.<sup>5</sup>

(b) *Prescribing Different Powers, Privileges, or Duties*.—A subsequent statute conferring in affirmative words larger or more restricted powers,<sup>6</sup> granting wider or less extensive privileges,<sup>7</sup> imposing a

and does not therefore repeal it. *People v. Platt*, 67 Cal. 22.

1. *State v. Blake*, 35 N. J. L. 208; *Kingsland v. Palmer*, 52 N. Y. 83.

2. *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Read v. Story*, 30 L. J. M. C. 110.

3. *Canastota, etc., Plank Road Co. v. Parkill*, 50 Barb. (N. Y.) 601; *Clark v. Sainsbury*, 11 C. B. 695; 73 E. C. L. 695; *Nixon v. Phillips*, 7 Exch. 188; *Ex parte Warrington*, 3 De G. M. & G. 159.

4. *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386; *Com. v. McCandless* (Pa. 1888), 12 Atl. Rep. 440; *Goddard v. Boston*, 20 Pick. (Mass.) 410; *Whitney v. Blanchard*, 2 Grav. (Mass.) 208; *Sullivan v. People*, 15 Ill. 233; *Com. v. Erie R. Co.*, 98 Pa. St. 127; *Foster's Case*, 5 Rep. 59; *Garnett v. Bradley*, 3 App. Cas. 966; *O'Flaherty v. McDowell*, 6 H. L. Cas. 142; *Ex parte Warrington*, 3 De G. M. G. 159.

In *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386, Gray, J., said: "But a later statute containing provisions, though merely affirmative in form, plainly repugnant to those in a former statute, repeals it as absolutely as by a negative clause."

5. *Com. v. Richmond, etc., R. Co.*, 81 Va. 355; *State v. Buckner*, 42 La. Ann. 74; *Atty. Gen'l v. Brown*, 1 Wis. 513; *Atty. Gen'l v. Chicago, etc., R. Co.*, 35 Wis. 435. See *supra*, this title, *Statutes in Pari Materia*.

6. *Reg. v. Harden*, 2 El. & Bl. 188; 75 E. C. L. 187; *R. v. Llangian*, 4 B. & S. 249; 116 E. C. L. 247; *Schneider v.*

*Staples*, 66 Wis. 167; *Vermillion County v. Potts*, 10 Ind. 286; *Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *Knox County v. McComb*, 19 Ohio St. 320; *McRoberts v. Washburne*, 10 Minn. 23; *Com. v. Allegheny County*, 40 Pa. St. 348.

A statute granting general jurisdiction to a court was held to repeal one granting limited jurisdiction. *Farley v. De Waters*, 2 Daly (N. Y.) 192.

An act providing that costs in the high courts should be in the discretion of the court, was held to repeal a prior law depriving a successful plaintiff of costs in an action of slander when he did not recover as much as forty shillings' damages. *Garnett v. Bradley*, 3 App. Cas. 944; *Mersey Docks v. Lucas*, 51 L. J. Q. B. 116; *Gardner v. Whitford*, 4 C. B. N. S. 665; 93 E. C. L. 664.

The provision of the statute which gave an appeal without any limit as to time against overseers' accounts, was impliedly repealed by a subsequent act which gave power to appeal to the next quarter sessions. *Rex v. Worcestershire*, 5 M. & S. 457.

7. *Hogane v. Hogane* (Ark. 1893), 22 S. W. Rep. 167.

A statute granting to a public officer a salary different from that given him by an act under which he was serving, repealed the previous statute in that particular. *Pierpont v. Crouch*, 10 Cal. 315.

Where a statute permitted an appeal from a judgment of a justice of the peace, and an act was passed allowing an appeal whenever the judgment exceeded five dollars, it was held that

heavier<sup>1</sup> or less grievous burden,<sup>2</sup> or imposing different duties than were imposed in the same particular by a previous act, the old or new provisions being conflicting in their nature, operates to repeal the corresponding provisions of the earlier act.<sup>3</sup>

(e) **Prescribing Exclusive Rule—Conflicting Rights.**—A later statute, the evident intent of which is to furnish the exclusive rule governing a certain case, repeals by implication an earlier law on the same

the former act was repealed by implication. *Curtis v. Gill*, 34 Conn. 49.

Where an act exempted from impressment all seamen employed in the Greenland fisheries, and a later one exempted seamen who had embarked for those fisheries, whose names were registered and who gave security, it was held that the earlier was repealed *pro tanto* by the latter act. *Ex parte Carruthers*, 9 East 44.

A law which directed that turnpike trustees should keep books of account, and that "all persons" should have access to such entries, was held to be impliedly repealed by a subsequent act which provided that the said books should be open to inspection of the "trustees" or of "any creditor on the tolls." *Rex v. North Leach*, 5 B. & Ad. 978; 27 E. C. L. 250.

An ancient franchise to hold a market was held to be impliedly repealed by a statute giving power to hold markets on such days as were thought fit at any appropriate places and to charge specific tolls and to make certain charges for weighing which could not have been made under the old franchise; the ground of the decision being that changes were made in time and place and new charges and extension of powers given. *Manchester v. Lyons*, 22 Ch. Div. 287.

1. *State v. Whitworth*, 8 Port. (Ala.) 434; *Smith v. State*, 1 Stew. (Ala.) 506; *Carter v. Hawley*, *Wright* (Ohio) 74; *Leighton v. Walker*, 9 N. H. 59.

The penalty for failing to return a marriage certificate was, under the old law, five dollars for each month of default. By a later law, the penalty was fixed at from five to one hundred dollars for such failure, and was held to impliedly repeal the earlier law. *State v. Horsey*, 14 Ind. 185; *State v. Pierce*, 14 Ind. 302.

Where an act made it actionable to sell a pirated copy of a work with knowledge that it was pirated, and the subsequent act contained a similar provision, but without any mention of guilty knowledge, it was held that the earlier

act was so far abrogated that an action was maintainable for a sale made in ignorance of the piracy. *Reg. v. Harden*, 2 El. & Bl. 188; 75 E. C. L. 187.

Where a statute imposing a penalty is amended by increasing the penalty and the second act contains a proviso that it shall not apply to prosecutions under the first except to enlarge the penalty, the later act repeals the former. *Wilson v. Ohio*, etc., R. Co., 64 Ill. 542; 16 Am. Rep. 565.

2. *State v. Cain*, 8 W. Va. 735; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Gormond v. Hammond*, 28 Ga. 85; *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70; *State v. Smith*, 44 Tex. 443; *Watson v. Kent*, 78 Ala. 602; *St. Louis*, etc., R. Co. v. *Kay* (Tex. 1893), 22 S.W. Rep. 665.

So where a statute provided that every dog must be licensed, and prescribed a penalty on the owner for its violation, the statute was followed by one containing similar provisions, but omitted the penalty, the first statute was held to be repealed by the second. *Com. v. Kelliher*, 12 Allen (Mass.) 480.

A statute punishing a described act as a felony, is repealed by implication by a subsequent statute making the same act a misdemeanor. *Hayes v. State*, 55 Ind. 99. See *People v. Tisdale*, 57 Cal. 104. See *infra*, this title, *Penal Laws*.

Where an act required that a cognizance should be given in writing attested by two witnesses, and a subsequent act made the cognizance valid if in writing but made no mention of witnesses, this silence was held to repeal by implication the provision which required them. *Cumberland v. Copeland*, 1 H. & C. 104; *Jeffreys v. Boosey*, 4 H. L. 943; *Kyle v. Jeffreys*, 3 Macq. 611.

3. In *Com. v. Godshaw*, 13 Ky. L. Rep. 572, an act requiring that what remained of the jury fund after the trustee had paid the jurors, should be paid into the state treasury, was held to repeal a prior act requiring the trustee to pay the balance to the auditor.

subject.<sup>1</sup> And if the co-existence of two sets of affirmative provisions would be destructive of the object for which the later set was passed, or if the same right would be made dependent on conflicting conditions,<sup>2</sup> the earlier set would be impliedly repealed by the later.<sup>3</sup>

b. BY ACT COVERING SAME SUBJECT—(1) *In General*.—Where two acts are not in express terms repugnant, but the later act covers the whole subject-matter of the earlier, not purporting to amend it, and plainly shows that it was intended as a substitute for the earlier, it will operate as a repeal thereof,<sup>4</sup> though all the

1. *People v. Lytle*, 1 Idaho 143; *Druggist Cases*, 85 Tenn. 449.

If a subsequent statute requires the same, and more than a former statute prescribed, this is a repeal of the former, so far as the subsequent statute renders more necessary than the first prescribed. *Gorham v. Luckett*, 6 B. Mon. (Ky.) 154.

Where an act confers no new and conflicting right or duty, but merely prescribes limitations and qualifications on those already existing, it does not repeal the acts conferring the previous rights and duties. *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. (N. Y.) 287; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

2. *Gwinner v. Lehigh, etc., R. Co.*, 55 Pa. St. 126.

3. *Herron v. Carson*, 26 W. Va. 62; *Van Steen v. Beatrice* (Neb. 1893), 54 N. W. Rep. 677; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 1; *Korah v. Ottawa*, 32 Ill. 121; 83 Am. Dec. 255; *Gibbons v. Brittenum*, 56 Miss. 232; *Green v. Rex*, 1 App. (H. L.) 513; *Roles v. Rosewell*, 5 T. R. 538; *Lord Cowley v. Byas*, 5 Ch. Div. 944; *People v. Van Nort*, 64 Barb. (N. Y.) 205.

Although repeal by implication is not favored, and is not allowable save where the inconsistency is plain and unavoidable, yet a subsequent statute making a different provision on the same subject is not to be construed as an explanatory act, but an implied repeal of the former so far as the provisions are incompatible with each other. *People v. Van Nort*, 64 Barb. (N. Y.) 205, *citing* *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291; *People v. Deming*, 13 How. Pr. (N. Y.) 441.

Where one act of the legislature directed the appointment of trustees to sue for and collect the debts, and sell

the property of charter-forfeited banks, and a subsequent act directed a sale of the same debts and property in a prescribed mode, it was held that there was a direct repugnance between the two acts; the first created a trustee, the latter a limited agency; the first allowed a discretion, the latter was peremptory; the two laws being thus inconsistent, the latter was held to prevail. *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 1.

So a law providing that certain officials should fix the price of all county advertising, is repealed by one providing that the county advertising must be contracted for with the lowest bidder. *Journal Pub. Co. v. Whitney* (Cal. 1893), 32 Pac. Rep. 237.

Where a statute provided that suits against banking companies might be instituted against the public officer, it was held to take away by implication the common-law right of suing the individual members. *Steward v. Greaves*, 10 M. & W. 711; *Chapman v. Milvain*, 5 Exch. 61; *Davison v. Farmer*, 6 Exch. 252; *O'Flaherty v. McDowell*, 6 H. L. Cas. 142.

The monopoly conferred upon the city of New Orleans of keeping powder magazines in the state, was repealed to the extent that like privileges were conferred upon other corporations by subsequent enactments. *New Orleans v. Hoyle*, 23 La. Ann. 740.

4. *Hogane v. Hogane* (Ark. 1893), 22 S. W. Rep. 167; *State v. Conkling*, 19 Cal. 501; *Sacramento v. Bird*, 15 Cal. 294; *Pierpont v. Crouch*, 10 Cal. 316; *Campbell v. Case*, 1 Dakota Ter. 17; *State v. Palmes*, 23 Fla. 620; *Andrews v. People*, 75 Ill. 605; *Hunt v. Chicago, etc., R. Co.*, 20 Ill. App. 282 (*rev'd* on another point in 121 Ill. 638); *Eaton v. Graham*, 11 Ill. 622; *Devine v. Cook County*, 84 Ill. 590; *Crowell v. Jaqua*, 114 Ind. 246; *Western Union Tel. Co. v. Brown* (Ind.), 5

provisions of the two may not be repugnant.<sup>1</sup> But there must be an unmistakable intent manifested on the part of the legislature to make the new act a substitute for the old and to contain all the law on the subject;<sup>2</sup> for mere similarity in the provisions of the two statutes is not enough to effect a repeal,<sup>3</sup> even

West. Rep. 661; *State v. Mason*, 108 Ind. 538; *Dowdell v. State*, 58 Ind. 333; *State v. Studt*, 31 Kan. 245; *Gorham v. Luckett*, 6 B. Mon. (Ky.) 146; *State v. King*, 12 La. Ann. 593; *Bartlet v. King*, 12 Mass. 536; 7 Am. Dec. 99; *Weeks v. Walcott*, 15 Gray (Mass.) 54; *Com. v. Cooley*, 10 Pick. (Mass.) 39; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Shannon v. People*, 5 Mich. 88; *Breitung v. Lindauer*, 37 Mich. 217; *Ex parte McDaniel* (Miss. 1891), 8 So. Rep. 645; *Clay County v. Chickasaw County*, 64 Miss. 534; *Swann v. Buck*, 40 Miss. 268; *State v. Rogers*, 10 Nev. 319; 21 Am. Rep. 738; *Young v. Kansas City, etc.*, R. Co., 33 Mo. App. 519; *Berkshire v. Missouri Pac. R. Co.*, 28 Mo. App. 225; *Thorpe v. Schooling*, 7 Nev. 15; *Wakefield v. Phelps*, 37 N. H. 295; *Brome v. Cuming County*, 31 Neb. 362; *State v. Benton*, 33 Neb. 834; *State v. Jersey City*, 40 N. J. L. 257; *Bracken v. Smith*, 39 N. J. Eq. 169; *McCartin v. Traphagen*, 43 N. J. Eq. 323; *Industrial School Dist. v. Whitehead*, 13 N. J. Eq. 290; *Reinhardt v. Fritzsche*, 69 Hun (N. Y.) 565; *People v. Jaehne*, 103 N. Y. 182; *People v. Carr*, 36 Hun (N. Y.) 488; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 15; *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261; *Cromwell v. MacLean*, 123 N. Y. 485; *Heckman v. Pinkney*, 81 N. Y. 215; *Horton v. Cantwell*, 108 N. Y. 255; *Anderson v. Anderson*, 112 N. Y. 104; *In re New York Institution, etc.*, 121 N. Y. 234; *People v. Gold, etc., Tel. Co.*, 98 N. Y. 78; *Little v. Cogswell*, 20 Oregon 345; *Philadelphia v. Congers* (Pa. 1892), 24 Atl. Rep. 675; *Com. v. Cromley*, 1 Ashm. (Pa.) 179; *Johnston's Estate*, 33 Pa. St. 515; *Philadelphia v. Kates*, 150 Pa. St. 30; *Harold v. State*, 16 Tex. App. 157; *Stebbins v. State*, 22 Tex. App. 32; *Rogers v. Watrous*, 8 Tex. 62; *State v. Horan*, 11 Tex. 144; *Stirman v. State*, 21 Tex. 734; *Bartch v. Meloy* (Utah 1890), 32 Pac. Rep. 694; *Farr v. Brackett*, 30 Vt. 344; *Lewis v. Stout*, 22 Wis. 234; *Burlander v. Milwaukee, etc., R. Co.*, 26 Wis. 76; *Simmons v. Bradley*, 27 Wis. 689; *Moore v. Superior, etc.,*

R. Co., 34 Wis. 173; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383; *State v. Campbell*, 44 Wis. 538; *Smith v. Eau Claire*, 78 Wis. 457; *State v. Carbon Hill Coal Co.*, 4 Wash. 422; *Mansfield v. First Nat. Bank* (Wash. 1893), 32 Pac. Rep. 789; *King v. Cornell*, 106 U. S. 395; *Red Rock v. Henry*, 106 U. S. 596; *Fisk v. Henarie*, 142 U. S. 459; *Dist. of Columbia v. Hutton*, 143 U. S. 27; *Tracy v. Tuffly*, 134 U. S. 207; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *Murdock v. Memphis*, 20 Wall. (U. S.) 590; *U. S. v. Barr*, 4 Sawy. (U. S.) 254; *Norris v. Crocker*, 13 How. (U. S.) 429; *Davies v. Fairbairn*, 3 How. (U. S.) 636; *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 306.

Provisions of the former law not contained in the latter, will be presumed to have been intentionally omitted. *In re Wheelock* (Supreme Ct.), 3 N. Y. Supp. 890; *In re Alexander* (Supreme Ct.), 3 N. Y. Supp. 892.

1. *Excelsior Petroleum Co. v. Embury*, 67 Barb. (N. Y.) 261; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 15; *State v. Studt*, 31 Kan. 245; *Dist. of Columbia v. Hutton*, 143 U. S. 18; *Bartch v. Meloy* (Utah 1893), 32 Pac. Rep. 694; *Rogers v. Watrous*, 8 Tex. 62; 58 Am. Dec. 100; *Sullivan v. People*, 15 Ill. 233; *Leighton v. Walker*, 9 N. H. 59; *Com. v. Kimball*, 21 Pick. (Mass.) 376; *Harrison v. Walker*, 1 Ga. 32. See cases in preceding note.

2. *State v. Kirk*, 53 Ark. 337. Where, for the purpose of preventing frauds against the revenue laws, the powers given custom officers are embodied in complicated and numerous provisions, a later law giving new powers and providing for new modes of procedure is not presumed to repeal the earlier ones, but "the most natural if not necessary implication in all such cases is that the legislature intended the new laws to be auxiliary to and in aid of the purposes of the old laws, even when some of the cases provided for may equally be within the reach of each." *Story, J., in Wood v. U. S.*, 16 Pet. (U. S.) 363.

3. *Robinson v. Rippey*, 111 Ind. 112. See *Powers v. Shepard*, 48 N. Y. 540.

though the similarity may be such as to cause confusion or inconvenience.<sup>1</sup>

Even where the later statute covers the whole ground of the earlier, if there is an expressed declaration of intention against a repeal by implication, the courts will let both acts stand and construe them as instituting two separate systems of accomplishing the same object,<sup>2</sup> unless such a construction is impossible.<sup>3</sup> And where the revisory statute declares what effect it is intended to have upon the former, only such effect can be given to it.<sup>4</sup>

(2) *Revisions*.—The general rule that where a statute, not merely cumulative of the common law or of previous statutes, and not made to cure the deficiencies thereof, is designed to create a new and independent system, and to dispose of the whole subject of legislation, it is the only law upon that subject and without an express repealing clause displaces the old rules and statutes,<sup>5</sup> has been almost universally applied to codes and revisions.<sup>6</sup> In some instances however their repealing effect has been lim-

1. *Robinson v. Rippey*, 111 Ind. 112; *Waldo v. Bell*, 13 La. Ann. 329; *Mitchell v. Duncan*, 7 Fla. 13; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *State v. Berry*, 12 Iowa 58; *Wilson v. Shorick*, 21 Iowa 332.

So in the case of remedial laws where a new remedy or mode of proceeding is authorized without an express repeal of a former one relating to the same matter, it is to be regarded as merely cumulative, creating a concurrent remedy and not as abrogating the former mode of procedure. *Raudebaugh v. Shelley*, 6 Ohio St. 306. See *infra*, this title, *Remedies*.

2. *Robinson v. Rippey*, 111 Ind. 116; *Ex parte Yerger*, 8 Wall. (U. S.) 105; *Hurst v. Samuels*, 29 S. Car. 476.

3. *Deisner v. Simpson*, 72 Ind. 435.

4. *Patterson v. Tatum*, 3 Sawy. (U. S.) 164. In this case, the act itself provided that such provisions of the earlier act as were inconsistent with it were to be repealed, and it was held that only the inconsistent provisions were repealed.

5. *Barker v. Bell*, 46 Ala. 221.

6. *Barker v. Bell*, 46 Ala. 221; *Pulaski County v. Downer*, 10 Ark. 588; *Sacramento v. Bird*, 15 Cal. 294; *Pierpont v. Crouch*, 10 Cal. 316; *State v. Conkling*, 19 Cal. 501; *Campbell v. Case*, 1 Dakota Ter. 17; *State v. Palmes*, 23 Fla. 620; *Andrews v. People*, 75 Ill. 605; *Eaton v. Graham*, 11 Ill. 622; *Illinois, etc., Canal v. Chicago*, 14 Ill. 334; *Hunt v. Chicago, etc., R. Co.*, 20 Ill. App. 282; *reversed on another point in 121 Ill. 638*; *Bartlet v. King*,

12 Mass. 536; 7 Am. Dec. 99; *Goednow v. Buttrick*, 7 Mass. 140; *Ashley, Appellant*, 4 Pick. (Mass.) 23; *Com. v. Cooley*, 10 Pick. (Mass.) 39; *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Berkshire v. Missouri Pac. R. Co.*, 28 Mo. App. 225; *Young v. Kansas City, etc., R. Co.*, 33 Mo. App. 509; *Clay County v. Chickasaw County*, 64 Miss. 534; *Ex parte McDaniel* (Miss. 1891), 8 So. Rep. 645; *Brome v. Cuming County*, 31 Neb. 362; *Wakefield v. Phelps*, 37 N. H. 295; *Dexter, etc., Plank Road Co. v. Allen*, 16 Barb. (N. Y.) 15; *State v. Rogers*, 10 Nev. 319; 21 Am. Rep. 738; *Little v. Cogswell*, 20 Oregon, 345; *Giddings v. Cox*, 31 Vt. 607; *Farr v. Brackett*, 30 Vt. 344; *State v. Carbon Hill Coal Co.*, 4 Wash. 422; *Lewis v. Stout*, 22 Wis. 234; *Burlander v. Milwaukee, etc., R. Co.*, 26 Wis. 76; *Simmons v. Bradley*, 27 Wis. 689; *Moore v. Superior, etc., R. Co.*, 34 Wis. 173; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383; *State v. Campbell*, 44 Wis. 538; *Smith v. Eau Claire*, 78 Wis. 457; *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach C. C. 306.

Wherever the legislature of *Maine* appear to have revised the subject-matter of any statutes of *Massachusetts* and enacted such provisions as they deemed suitable to the wants of the people of this state, the former statutes are to be considered as no longer in force, though not expressly repealed. *Towle v. Marrett*, 3 Me. 22; 14 Am. Dec. 206.

The implication of repeal is equally

ited to those matters embraced in the old law which are omitted in the new,<sup>1</sup> or to cases where there is a manifest repugnancy between the old and new laws.<sup>2</sup>

(3) *By Amendments "So as to Read."*—A statute re-enacting a former statute and providing that certain sections thereof shall be amended "so as to read as follows," repeals all contained in the sections of the original act not re-enacted.<sup>3</sup> The same rule has

as strong in the case of the revision of the common law by statute. *Com. v. Dennis*, 105 Mass. 162, citing *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Com. v. Marshall*, 11 Pick. (Mass.) 350; *Lakin v. Lakin*, 2 Allen (Mass.) 45.

But a mere change of phraseology in the revision of statutes will not impliedly repeal the old law, unless it appears that such was the intention of the legislature. *In re Brown*, 21 Wend. (N. Y.) 316; *Theriat v. Hart*, 2 Hill (N. Y.) 380.

This general rule of construction will not govern in a case where the statute that revises the old law clearly indicates that the parts of the former act which are not inconsistent with it, are not to be repealed. *Lewis v. Stout*, 22 Wis. 236.

It was not intended by the legislature of *Kentucky* that the acts adopting the civil and criminal codes should repeal the general statutes or any part thereof, except where, as expressly provided for in the repealing sections of both, the general statutes come within the purview of those acts. *Com. v. Watts*, 84 Ky. 544.

The act adopting the *Alabama Code* of 1886, expressly provided that "no act passed at the present session, 1886, 1887, of the general assembly, shall be repealed or affected in any manner by the adoption of this code." And though the commissioners were required to incorporate all the acts of that session "amending sections of the code of 1876," it was held that a failure on their part to so incorporate a part of the jury law of 1887 would not have the effect of repealing that act, as the requirement was merely directory. *South v. State*, 86 Ala. 617.

1. *Georgia*, etc., *R. Co. v. Kirkpatrick*, 35 Ga. 144; *State v. Judge*, 37 La. Ann. 581; *Bracken v. Smith*, 39 N. J. Eq. 172; *Combined Saw, etc., Co. v. Flournoy* (Va. 1892), 14 S. E. Rep. 976; citing *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Buck v. Spofford*, 31 Me. 36; *Bedell v. Janney*, 9 Ill. 207. See also *Rutland v. Mendon*, 1 Pick. (Mass.) 154;

*Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Stafford v. Creditors*, 11 La. Ann. 470; *Pingree v. Snell*, 42 Me. 53. And the rule is the same though the omission is caused by accident; it belongs to the legislature to supply it. *Combined Saw, etc., Co. v. Flournoy* (Va. 1892), 14 S. E. Rep. 976; *Buck v. Spofford*, 31 Me. 36.

2. *Lyon v. Flisk*, 1 La. Ann. 456.  
3. *People v. McNulty*, 93 Cal. 427; *State v. Ingersoll*, 17 Wis. 634; *Goodno v. Oshkosh*, 31 Wis. 127; *Chapin v. Crusen*, 31 Wis. 209; *State v. Andrews*, 20 Tex. 230; *Barton v. Moscow School Dist.* (Idaho 1892), 29 Pac. Rep. 43; *Denver, etc., R. Co., v. Crawford*, 11 Colo. 598; *State v. Duval County*, 23 Fla. 483; *Druggist Cases*, 85 Tenn. 449; *Blakemore v. Dolan*, 50 Ind. 194; *Longlois v. Longlois*, 48 Ind. 60; *Moore v. Mausert*, 49 N. Y. 332; *People v. Montgomery County*, 67 N. Y. 109; *Mosby v. St. Louis, etc., Ins. Co.*, 31 Gratt. (Va.) 629; *McRoberts v. Washburne*, 10 Minn. 23; *Gossler v. Goodrich*, 3 Cliff. (U. S.) 71; *Breitung v. Lindauer*, 37 Mich. 217; *State v. Wish*, 15 Neb. 448.

A statute enacted "in lieu" of another has a similar effect. *Steamboat Co. v. Collector*, 18 Wall. (U. S.) 478; *Gossler v. Goodrich*, 3 Cliff. (U. S.) 71; *Griggs v. Guinn*, 29 Abb. N. Cas. (N. Y.) 144; *In re Prime's Estate*, 136 N. Y. 347; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335.

See *infra*, this title, *Repeal and Re-enactment*, for the effect on portions of the prior statute which are re-enacted without change in the later one.

Where, in an amendatory act, the amendments to be made were mere substitutions of words which were specified and stated to be inserted "so as to make the section read as follows," and in the recital of the sections as amended a clerical error was made, the error was disregarded and held not to operate as a repeal of the original statute. *State v. Stillman*, 81 Wis. 128.

When an amendment does not change the original law, but simply adds some-



been applied to revisions of previous laws, but this has been touched upon in a previous section of this article.<sup>1</sup>

c. BY REMOVING REASON OF LAW.—Where the object and reason for which a statute was passed is removed by a later enactment, there is an implied repeal of the former statute.<sup>2</sup> But the mere removal of some of the evils provided against in the original statute, does not operate to repeal it.<sup>3</sup>

d. IMPLIED REPEALS NOT FAVORED—RECONCILIATION.—Repeals by implication are not favored<sup>4</sup> and will not be decreed,

thing to it, the amendatory law will not operate as a repeal of the former one. *Alexander v. State*, 9 Ind. 337; *State v. Miller*, 58 Ind. 399.

1. See *supra*, this title, *Revisions*.

2. *Hayward v. Gunn*, 82 Ill. 385; *Castner v. Walrod*, 83 Ill. 171; *affirming Emerson v. Clayton*, 32 Ill. 493; and *overruling Morrison v. Norman*, 47 Ill. 477; and *Noble v. McFarland*, 51 Ill. 226; *Enos v. Buckley*, 94 Ill. 458; *Geisen v. Heiderich*, 104 Ill. 537; *Kibbe v. Ditto*, 93 U. S. 674; *Cameron v. Smith*, 50 Cal. 303; *Ong v. Summer*, 1 Cin. Super. Ct (Ohio) 424; *Brown v. Cousens*, 51 Me. 302; *Thicknesse, H. & W.* 219; *Weldon v. Neil*, 51 L. T. N. S. 289; *Lowe v. Fox*, 15 Q. B. Div. 667. In these cases, it was held that exemptions granted to married women on account of their coverture were impliedly repealed and removed by the married women's acts enabling women to sue and be sued, and hold property as men. But this effect has been denied in other jurisdictions. *McLaughlin v. Spengler*, 57 Miss. 818; *State v. Smith*, 83 N. Car. 306; *State v. Troutman*, 72 N. Car. 551; *Hershy v. Latham*, 42 Ark. 305.

In *New York* the provision that coverture is an exemption has been specifically repealed. *Acker v. Acker*, 81 N. Y. 143. See *Clarke v. Gibbons*, 83 N. Y. 107. But prior thereto it had been held that the exemption was impliedly repealed. *Ball v. Bullard*, 52 Barb. (N. Y.) 141, though the doctrine was questioned. *Clark v. McCann*, 18 Hun (N. Y.) 13; *Dunham v. Sage*, 52 N. Y. 229.

A statute which prohibited bottomry loans by Englishmen to foreigners on foreign ships engaged in the Indian trade, was held to have been silently repealed by the subsequent enactments which put an end to the monopoly of the East Indian Company and threw its trade open to foreign as well as to British ships. *The India, Br. & L.* 221.

3. *Alexandria v. Dearmon*, 2 Sneed (Tenn.) 104.

4. *Wyman v. Campbell*, 6 Port. (Ala.) 219; 31 Am. Dec. 677; *Horton v. Mobile School Com'rs*, 43 Ala. 598; *Riggs v. Brewer*, 64 Ala. 282; *Parker v. Hubbard*, 64 Ala. 203; *Kinney v. Mallory*, 3 Ala. 626; *Abernathy v. State*, 78 Ala. 411; *Herr v. Seymour*, 76 Ala. 270; *Cook v. Meyer*, 73 Ala. 580; *Jackson v. State*, 76 Ala. 26; *U. S. v. Crawford*, 47 Fed. Rep. 561; *State v. Watts*, 23 Ark. 304; *People v. San Francisco, etc.*, R. Co., 28 Cal. 258; *Merrill v. Gorham*, 6 Cal. 41; *In re Yick Wo*, 68 Cal. 294; 58 Am. Rep. 12; *Scofield v. White*, 7 Cal. 400; *Crosby v. Patch*, 18 Cal. 439; *Home for Inebriates v. Reis*, 95 Cal. 142; *Saguache County v. Decker*, 10 Colo. 149; *Schwenke v. Union Depot, etc.*, R. Co., 7 Colo. 512; *Erwin v. Moore*, 15 Ga. 361; *Conner v. Southern Express Co.*, 37 Ga. 397; *Central R. Co. v. Hamilton*, 71 Ga. 461; *Montgomery v. Board of Education*, 74 Ga. 41; *Harding v. Rockford, etc.*, R. Co., 65 Ill. 98; *East St. Louis v. Maxwell*, 99 Ill. 443; *Hunt v. Chicago, etc.*, R. Co., 121 Ill. 644; *Barr v. People*, 103 Ill. 112; *Chicago v. Quimby*, 38 Ill. 278; *Card v. McCaleb*, 69 Ill. 317; *Holton v. Daly*, 106 Ill. 139; *McDonough County v. Campbell*, 42 Ill. 490; *Hyde Park v. Oakwoods Cem. Assoc.*, 119 Ill. 141; *Hume v. Gossett*, 43 Ill. 297; *People v. Barr*, 44 Ill. 198; *Tyson v. Postlethwaite*, 13 Ill. 728; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Covington v. East St. Louis*, 78 Ill. 548; *Fowler v. Pirkins*, 77 Ill. 271; *Butz v. Kerr*, 123 Ill. 659; *Lichtenstein v. State*, 5 Ind. 162; *Blain v. Bailey*, 25 Ind. 165; *Coghill v. State*, 37 Ind. 111; *Pennsylvania Co. v. Dunlap* (Ind. 1887), 13 N. E. Rep. 403; *Indianapolis Water Works v. Burkhardt*, 41 Ind. 364; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Hamlyn v. Nesbit*, 37 Ind. 284; *State v. Cooper*, 114 Ind. 12; *Robinson v.*

Ripsey, 111 Ind. 112; Evansville v. Summers, 108 Ind. 189; Casey v. Harned, 5 Iowa 1; State v. Berry, 12 Iowa 58; Burke v. Jeffries, 20 Iowa 145; Cole v. Jackson County, 11 Iowa 552; Baker v. Steamboat Milwaukee, 14 Iowa 214; Snell v. Dubuque, etc., R. Co., 78 Iowa 588; Central Iowa R. Co. v. Board of Supervisors, 67 Iowa 199; Ament v. Humphrey, 3 Greene (Iowa) 255; Stephens v. Ballou, 27 Kan. 594; *In re* Hall, 38 Kan. 670; Com. v. Mason, 82 Ky. 256; Elizabethtown, etc., R. Co. v. Elizabethtown, 12 Bush (Ky.) 233; Brown v. Miller, 4 J. J. Marsh. (Ky.) 474; Peyton v. Moseley, 3 T. B. Mon. (Ky.) 77; Hebert's Succession, 5 La. Ann. 121; Nixon v. Piffet, 16 La. Ann. 379; Desban v. Pickett, 16 La. Ann. 350; Saul v. His Creditors, 5 Martin N. S. (La.) 569; 16 Am. Dec. 212; Gee v. Thompson, 11 La. Ann. 657; Collins v. Chase, 71 Me. 434; People v. Grand Rapids, etc., Road Co., 64 Mich. 618; People v. Gustin, 57 Mich. 407; Breitung v. Lindauer, 37 Mich. 217; Brown v. McCormick, 28 Mich. 215; Ryan's Case, 45 Mich. 173; State v. Archibald, 43 Minn. 328; Kerlinger v. Barnes, 14 Minn. 526; McAfee v. Southern R. Co., 36 Miss. 669; Planters' Bank v. State, 6 Smed. & M. (Miss.) 628; White v. Johnson, 23 Miss. 68; Commercial Bank v. Chambers, 8 Smed. & M. (Miss.) 9; Swann v. Buck, 40 Miss. 268; State v. Morrow, 26 Mo. 131; State v. Bishop, 41 Mo. 16; State v. Draper, 47 Mo. 29; St. Louis v. Independent Ins. Co., 47 Mo. 146; State v. Jaeger, 63 Mo. 403; Pacific R. Co. v. Cass County, 53 Mo. 17; State v. Bishop, 41 Mo. 16; State v. Macon County Ct., 41 Mo. 453; State v. Severance, 55 Mo. 378; Higgins v. State, 64 Md. 419; Dugan v. Gittings, 3 Gill (Md.) 138; 43 Am. Dec. 306; Naylor v. Field, 29 N. J. L. 287; Plum v. Lugar, 49 N. J. L. 557; State v. Chambersburg, 37 N. J. L. 258; *In re* Evergreens, 47 N. Y. 216; People v. St. Lawrence County, 103 N. Y. 541; New York v. Walker, 4 E. D. Smith (N. Y.) 258; Wallace v. Bassett, 41 Barb. (N. Y.) 92; Smith v. People, 47 N. Y. 330; Heckmann v. Pinkney, 6 Abb. N. Cas. (N. Y.) 371; Powers v. Shepard, 48 N. Y. 540; McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437; 18 Am. Dec. 516; New York, etc., R. Co. v. Delaware County, 67 How. Pr. (N. Y.) 5; Cattaraugus County v. Willey, 2 Lans. (N. Y.) 427; Bowen v. Lease, 5 Hill (N. Y.) 221; Chamberlain v. Chamberlain, 43 N. Y. 424; People v. St. Lawrence

County, 103 N. Y. 541; Harrington v. Rochester, 10 Wend. (N. Y.) 550; People v. Van Nort, 64 Barb. (N. Y.) 205; People v. Deming, 1 Hilt. (N. Y.) 271; Williams v. Potter, 2 Barb. (N. Y.) 316; Van Rensselaer v. Snyder, 9 Barb. (N. Y.) 302; State v. Woodside, 9 Ired. (N. Car.) 496; State v. Sutton, 100 N. Car. 474; Robbins v. State, 8 Ohio St. 131; Buckingham v. Steubenville, etc., R. Co., 10 Ohio St. 25; Ludlow v. Johnston, 3 Ohio 553; Cass v. Dillon, 2 Ohio St. 607; *Ex parte* Van Hagan, 25 Ohio St. 426; Gillette v. Sharp, 7 Nev. 245; Street v. Com., 6 W. & S. (Pa.) 209; Morris v. Delaware, etc., Canal, 4 W. & S. (Pa.) 461; Walter's Appeal, 70 Pa. St. 392; Erie v. Bootz, 72 Pa. St. 196; Rhein Bldg. Assoc. v. Lea, 100 Pa. St. 214; Osborne v. Everitt, 103 Pa. St. 421; Harrisburg v. Sheck, 104 Pa. St. 53; Brown v. Philadelphia County, 21 Pa. St. 43; State v. Alexander, 14 Rich. (S. Car.) 247; Greely v. Jacksonville, 17 Fla. 174; Stingle v. Nevel, 9 Oregon 62; Hockaday v. Wilson, 1 Head (Tenn.) 113; Furman v. Nichol, 3 Coldw. (Tenn.) 432; Smith v. Hickman, Cooke (Tenn.) 330; Cate v. State, 3 Sneed (Tenn.) 120; Buchanan v. Robinson, 3 Baxt. (Tenn.) 147; Walker v. State, 7 Tex. App. 245; 32 Am. Rep. 595; Thouvenin v. Rodrigues, 24 Tex. 468; Napier v. Hodges, 31 Tex. 287; Cain v. State, 20 Tex. 370; Selman v. Wolfe, 27 Tex. 72; Neil v. Keese, 5 Tex. 33; 51 Am. Dec. 746; Rogers v. Watrous, 8 Tex. 62; 58 Am. Dec. 100; Stirman v. State, 21 Tex. 734; Gill v. State, 30 Tex. 514; Davies v. Creighton, 33 Gratt. (Va.) 696; Justice v. Com., 81 Va. 209; Chesapeake, etc., R. Co. v. Hoard, 16 W. Va. 270; Conley v. Calhoun County, 2 W. Va. 416; State v. Cain, 8 W. Va. 732; Forqueran v. Donally, 7 W. Va. 114; Atty. Gen'l v. Brown, 1 Wis. 513; Goodrich v. Milwaukee, 24 Wis. 422; U. S. v. Twenty-five Cases of Cloths, Crabbe (U. S.) 356; Aspden's Estate, 2 Wall. Jr. (U. S.) 368; Arthur v. Homer, 96 U. S. 137; Red Rock v. Henry, 106 U. S. 596; Wood v. U. S., 16 Pet. (U. S.) 342; Harford v. U. S., 8 Cranch (U. S.) 109; Beals v. Hale, 4 How. (U. S.) 37; McCool v. Smith, 1 Black (U. S.) 459; U. S. v. 67 Packages, 17 How. (U. S.) 85; U. S. v. Walker, 22 How. (U. S.) 299; U. S. v. 100 Barrels of Spirits, 2 Abb. (U. S.) 305; Furman v. Nichol, 8 Wall. (U. S.) 44; *Ex parte* Yerger, 8 Wall. (U. S.) 85; Henderson's Tobacco, 11 Wall. (U. S.) 652; Clay County v. Society for Sav-

unless it is manifest that the legislature so intended.<sup>1</sup> As laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, un-

ings, 104 U. S. 579; *Louisiana v. Taylor*, 105 U. S. 454; *Ex parte Crow Dog*, 109 U. S. 556; *Chew Heong v. U. S.*, 112 U. S. 536; *Distilled Spirits*, 11 Wall. (U. S.) 365; *King v. Cornell*, 106 U. S. 395; *Tracy v. Tuffly*, 134 U. S. 207; *Dist. of Columbia v. Hutton*, 143 U. S. 18; *U. S. v. 10,000 Cigars*, 1 Woolw. (U. S.) 123; *Loker v. Brookline*, 13 Pick. (Mass.) 343; *Goddard v. Boston*, 20 Pick. (Mass.) 407; *Snell v. Bridgewater, etc., Mfg. Co.*, 24 Pick. (Mass.) 206; *Haynes v. Jenks*, 2 Pick. (Mass.) 172; *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 389; *Reg. v. St. Edmunds*, 2 Q. B. 84; 42 E. C. L. 583; *Foster's Case*, 11 Rep. 63a; *Dobbs v. Grand Junction Water Works Co.*, 9 Q. B. Div. 158.

1. *McGruder v. State*, 40 Ala. 347; *Tyson v. Postlethwaite*, 13 Ill. 727; *Blain v. Bailey*, 25 Ind. 165; *Indianapolis Water Works Co. v. Burkhart*, 41 Ind. 364; *Robinson v. Rippey*, 111 Ind. 112; *Lane v. Missoula County*, 6 Mont. 473; *Thorpe v. Schooling*, 7 Nev. 15. See *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Severance*, 55 Mo. 378.

There is a strong presumption, where express words of repeal are absent, that the legislature had no intent to give a later act a repealing effect. *Plum v. Lugar*, 49 N. J. L. 557.

A repeal will not be implied if an unconstitutional result would be produced thereby. *Reid v. Smoulter*, 128 Pa. St. 334. No repeal of existing laws in reference to the suppression and sale of intoxicating liquors was intended by the adoption of the fifth amendment to the *Maine* constitution prohibiting the manufacture, sale, etc., of liquors. *State v. Dorr*, 82 Me. 212.

It will not be presumed that the legislature intended an unjust result of the repeal of a law, but if the language be clear, it must govern, whatever the result, and pending interests be defeated. *Calkins v. State*, 14 Ohio St. 232.

Where an act repeals expressly a particular portion or section of another act, this shows the intention of the legislature to allow the remaining parts of the act to stand unaffected. *Pursell v. New York, etc., Ins. Co.*, 42 N. Y. Super. Ct.

383; *Scales v. States*, 47 Ark. 476; 58 Am. Dec. 768; *State v. Morrow*, 26 Mo. 131; *Everham v. Hulit*, 45 N. J. L. 53; *The Louis Olsen*, 52 Fed. Rep. 652; provided there is no necessary repugnance between such remaining sections and the subsequent statute. *Crosby v. Patch*, 18 Cal. 439. A mere enumeration in a statute of certain previous provisions, which are not to be affected by it, does not warrant the inference that all existing provisions on similar subjects not so enumerated are repealed. *Burnham v. Onderdonk*, 41 N. Y. 425.

So where all the laws of a specified class, except one, were specifically repealed, and it was evident from the course of the legislature that it intended to repeal all such laws, but had overlooked the omitted one, it was held that this law was also repealed by implication. *New York v. Broadway, etc., R. Co.*, 12 Hun (N. Y.) 571.

**Acts Passed at the Same Session.**—The question of implied repeal is one of intention, and where two acts are passed at the same session of the legislature on the same subject it shows an intent that one is not repealed by the other but that they are to be construed together. *Curtwright v. Crow*, 44 Mo. App. 563; *State v. Clark*, 54 Mo. 216; *Barton v. Moscow School Dist.* (Idaho 1892), 29 Pac. Rep. 43; *Com. v. Huntley* (Mass. 1892), 30 N. E. Rep. 1127.

Where several sections of a statute were repeated in a later one passed at the same session of the legislature, it was held that the sections repeated were not repealed, but both sets stood, and a suspension of the later did not suspend the earlier, the court saying: "It is hardly to be presumed that the legislature would repeal an act passed but fourteen days before, and if they had intended to do so they would probably have said so in some appropriate language and would not have left it to mere inference." *Powers v. Shepard*, 48 N. Y. 540. See *Cheezem v. State*, 2 Ind. 149; *Martindale v. Martindale*, 10 Ind. 566; *Alexander v. State*, 9 Ind. 337; *Cordell v. State*, 22 Ind. 1; *Gorley v. Sewell*, 77 Ind. 319; *La Grange County v. Cutler*, 6 Ind. 354.

less the repugnancy between the two is not only irreconcilable,<sup>1</sup> but also clear and convincing,<sup>2</sup> and following necessarily from the language used,<sup>3</sup> unless the later act fully embraces the subject-matter of the earlier,<sup>4</sup> or unless the reason for the earlier act is beyond peradventure removed.<sup>5</sup> Hence, every effort must be used to make all acts stand, and if, by any reasonable construction, they can be reconciled, the later act will not operate as a repeal of the earlier.<sup>6</sup>

It is frequently found that the conflict between two statutes is apparent only, as their objects are different, and when the lan-

1. *Bowen v. Lease*, 5 Hill (N. Y.) 225; *Adams Express Co. v. Lexington*, 83 Ky. 657; *Com. v. Boone County Ct.*, 82 Ky. 632; *State v. Babcock*, 21 Neb. 599; *State v. Bishop*, 41 Mo. 16; *State v. Macon County Ct.*, 41 Mo. 453; *Ludlow v. Johnston*, 3 Ohio 553; *Dodge v. Gridley*, 10 Ohio St. 178; *Cass v. Dillon*, 2 Ohio St. 607; *Coghill v. State*, 37 Ind. 111; *Hamlyn v. Nesbit*, 37 Ind. 284; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Gurney v. St. Paul*, 36 Minn. 163; *Forqueran v. Donnelly*, 7 W. Va. 114; *Covington v. East St. Louis*, 78 Ill. 548.

2. *Lee v. Forman*, 3 Metc. (Ky.) 114; *House v. State*, 41 Miss. 737; *Iverson v. State*, 52 Ala. 170; *State v. Blend*, 121 Ind. 514; *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *Orton v. Noonan*, 29 Wis. 541.

3. *Pratt v. Atlantic, etc.*, R. Co., 42 Me. 579; *Richards v. Patterson*, 30 Miss. 583; *Lucas County v. Chicago, etc.*, R. Co., 67 Iowa 541.

That two acts are repugnant in principle merely, forms no reason why both acts may not stand. *Ex parte Smith*, 40 Cal. 419.

One statute is never repealed by the spirit of another. *Cass v. Dillon*, 2 Ohio St. 612. See *State v. Cincinnati*, 19 Ohio 197.

4. *Dugan v. Gittings*, 3 Gill (Md.) 138; 43 Am. Dec. 306. See *supra*, this title, *Removing Reason of Law*.

In *Chicago, etc.*, R. Co. v. U. S., 127 U. S. 406, Field, J., said: "The second act will not operate as a repeal merely because it may repeal some of the provisions of the first and omit others or add new provisions. In such cases, the later act will operate as a repeal only when it plainly appears that it was intended as a substitute for the first act. . . . It may be merely affirmative or cumulative, or auxiliary." See *State v. Donnelly*, 20 Neb. 214.

5. See *supra*, this title, *Removing Reason of Law*.

6. *Lybbe v. Hart*, 29 Ch. Div. 15; *Parker v. Hubbard*, 64 Ala. 203; *Iverson v. State*, 52 Ala. 170; *Riggs v. Brewer*, 64 Ala. 282; *Merrill v. Gorham*, 6 Cal. 41; *Hollenberger v. People*, 9 Colo. 233; *Conner v. Southern Express Co.*, 37 Ga. 397; *Barr v. People*, 103 Ill. 110; *Wragg v. Penn Tp.*, 94 Ill. 11; 34 Am. Rep. 199; *Fowler v. Perkins*, 77 Ill. 271; *Perteet v. People*, 65 Ill. 230; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Mullen v. People*, 31 Ill. 444; *Cook County v. Gilbert* (Ill. 1893), 33 N. E. Rep. 761; *Roberts v. Fahs*, 36 Ill. 268; *People v. Barr*, 44 Ill. 108; *Harbin v. State* (Ind. 1893), 33 N. E. Rep. 635; *Ledgerwood v. State* (Ind. 1893), 33 N. E. Rep. 631; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364; *Blain v. Bailey*, 25 Ind. 165; *De Pauw v. New Albany*, 22 Ind. 204; *Ament v. Humphrey*, 3 Greene (Iowa) 255; *Cedar Rapids, etc., R. Co. v. Elseffer* (Iowa 1892), 51 N. W. Rep. 27; *Elliott v. Lechname*, 1 Kan. 126; *Brown v. Miller*, 4 J. J. Marsh. (Ky.) 474; *Graves v. Graves*, 10 B. Mon. (Ky.) 31; *Nixon v. Piffet*, 16 La. Ann. 379; *New Orleans v. Mechanics', etc., Bank*, 15 La. Ann. 107; *State v. Callac* (45 La. Ann.), 12 So. Rep. 119; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 6; *State v. Mister*, 5 Md. 11; *Billingslea v. Baldwin*, 23 Md. 85; *Com. v. Herrick*, 6 Cush. (Mass.) 465; *Pratt v. Atlantic, etc., R. Co.*, 42 Me. 579; *People v. Gustin*, 57 Mich. 407; *State v. Archibald*, 43 Minn. 328; *Richards v. Patterson*, 30 Miss. 583; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 9; *White v. Johnson*, 23 Miss. 68; *Planters' Bank v. State*, 6 Smed. & M. (Miss.) 628; *Shelton v. Baldwin*, 26 Miss. 443; *State v.*

guage of each is restricted to its own object they run in parallel lines without meeting;<sup>1</sup> or the later act can be construed as a

Macon County Ct., 41 Mo. 453; *State v. Bishop*, 41 Mo. 16; *Jackson v. Washington County*, 34 Neb. 680; *Lawson v. Gibson*, 18 Neb. 137; *State v. Babcock*, 21 Neb. 599; *State v. Blake*, 35 N. J. L. 208; *Reinhardt v. Fritzsche*, 69 Hun (N. Y.) 565; *Williams v. Potter*, 2 Barb. (N. Y.) 316; *Kilbourne v. Sullivan County*, 62 Hun (N. Y.) 210; *New York, etc., R. Co. v. Delaware County*, 67 How. Pr. (N. Y.) 5; *People v. St. Lawrence County*, 103 N. Y. 541; *Kingsland v. Palmer*, 52 N. Y. 83; *In re Evergreens*, 47 N. Y. 216; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *State v. Massey*, 103 N. Car. 356; *State v. Custer*, 65 N. Car. 339; *Ludlow v. Johnston*, 3 Ohio 553; *Winter v. Norton*, 1 Oregon 42; *McLaughlin v. Hoover*, 1 Oregon 31; *Street v. Com.*, 6 W. & S. (Pa.) 209; *Morris v. Delaware, etc., Canal*, 4 W. & S. (Pa.) 461; *Shinn v. Com.*, 3 Grant's Cas. (Pa.) 205; *Wayne County's Appeal*, 4 W. N. C. (Pa.) 411; *Com. v. Erie R. Co.*, 98 Pa. St. 127; *In re Contested Election*, 86 Pa. St. 392; *Williamsport v. Brown*, 84 Pa. St. 438; *Erie v. Bootz*, 72 Pa. St. 196; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Fisher v. Baldrige* (Tenn. 1892), 19 S. W. Rep. 227; *Walker v. State*, 7 Tex. App. 245; 32 Am. Rep. 595; *Forqueman v. Donnelly*, 7 W. Va. 114; *Atty. Gen'l v. Brown*, 1 Wis. 513; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *Dist. of Columbia v. Hut-ton*, 143 U. S. 18.

1. *Street v. Com.*, 6 W. & S. (Pa.) 209; *McFate's Appeal*, 105 Pa. St. 323; *Hamden v. Gould*, 126 Mass. 411; *Gilson v. Emery*, 11 Gray (Mass.) 430; *McQuade v. O'Neil*, 15 Gray (Mass.) 52; 77 Am. Dec. 350; *Ely v. Cash*, 15 M. & W. 617; *Dean of Ely v. Bliss*, 2 De G. M. & G. 459; *Reg. v. Everett*, 1 El. & Bl. 273; 72 E. C. L. 273; *Adey v. Trinity House*, 22 L. J. Q. B. 3; *Grant v. Ellis*, 9 M. & W. 113; *Manning v. Phelps*, 10 Exch. 59; *Wright v. Lee* (S. Dak. 1893), 55 N. W. Rep. 931.

A new law simply giving application and direction to the prior general law does not repeal it. *State v. County Ct.*, 53 Mo. 128; and a statute which does not take away any right or impose any substantially new duty, but regulates, with additional requirements, a duty imposed by a previous act, is not to be deemed inconsistent with the

previous act. *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. (N. Y.) 287.

Where the legislature passed two acts at the same session, the first relating to the subject-matter of a former statute, and the second expressly repealing all of the former statute, except one section, the first of these two acts should not be regarded as a repeal by implication of the whole of the former statute inclusive of the section excepted in the second act. *Curtwright v. Crow*, 44 Mo. App. 566.

Where the original act fixed a tax upon the privilege of standing jacks, and also a penalty for the exercise thereof without a license, and a later statute changed the tax and provided a remedy for its collection, but was silent as to the penalty, it was held that the two acts were not inconsistent. *Cate v. State*, 3 Sneed (Tenn.) 120.

A statute concerning "idle and disorderly persons" is not repealed by one having similar but inconsistent provisions concerning "vagrants." *Com. v. Norton*, 13 Allen (Mass.) 550.

An act prohibiting any public officer from appropriating funds collected in one year to demands which arose in a previous year, is not an implied repeal of a previous act directing that proceeds of a certain tax shall be applied to pay past-due claims. The two are not inconsistent. The later act only denies to the executive officers power to employ, in their own discretion, all public funds to pay past due claims. *State v. Smith*, 8 S. Car. 127.

Where certain counties were given the right to issue bonds to aid in the construction of any railroad running through them, upon a vote of a majority of the legal voters, and by a subsequent act certain other counties, including one of the former, were given a similar authority upon a vote by the majority of the legal voters, "and a majority of the supervisors," it was held that it being the manifest intention of the legislature to provide for two different roads, the latter statute did not repeal the former. *Red Rock v. Henry*, 106 U. S. 596.

A statute giving the right of action for compensatory damages to the surviving husband, wife, child or parent, or any person whose life is lost by negligence or carelessness of the proprie-

tors, etc., of any railroad, steamboat, etc., is not necessarily abrogated by a subsequent constitutional provision making every person, corporation, etc., that may commit a homicide through willful act or omission, responsible in exemplary damages to the surviving husband, widow, or heirs of the deceased. There is no positive repugnancy between the enactments. *Gohen v. Texas Pac. R. Co.*, 2 Woods (U. S.) 346.

Where a statute prescribed for the doing of a particular act, a penalty to be recovered in a civil action by the person injured thereby, and a subsequent statute made the performance of the same act a criminal offense, it was held that the two statutes were not repugnant, and that the first was not repealed by the later one. *Mobile, etc., R. Co. v. Steiner*, 61 Ala. 559.

The right which a non-resident plaintiff had by one act to bring suit by a "long" summons without first giving security for costs, is not taken away by a subsequent act permitting him to bring suit by a "short" summons on giving security for costs. *Osborne v. Everitt*, 103 Pa. St. 421.

An act which declares that the expense of publication of the notice of tax sale shall not "exceed" the sum of \$2 for "each newspaper" so publishing, is not inconsistent with and does not repeal the provision of a prior act prescribing the total amount of expense for that purpose. *Crouch v. Hayes*, 98 N. Y. 183.

An act which provides one course of proceeding for the habitual neglect to send a child to school, does not conflict with another which provides a different mode of proceeding for a neglect which was not habitual but occasional only, and both therefore can stand. *In re Murphy*, 2 Q. B. Div. 397; *Ex parte Attwater*, 5 Ch. Div. 27.

The following cases will serve as examples in which it has been held that there is not such inconsistency or repugnancy as to repeal the earlier statute by implication: *Turner v. State*, 40 Ala. 21; *Campbell v. State*, 46 Ala. 116; *Lillenstein v. State*, 46 Ala. 498; *Iverson v. State*, 52 Ala. 170; *Roberts v. Pippen*, 75 Ala. 103; *Fulghum v. Roberts*, 75 Ala. 341; *Coats v. Hill*, 41 Ark. 149; *State v. Kirk*, 53 Ark. 337; *Shear v. Columbia County*, 14 Fla. 146; *Hall v. San Francisco*, 20 Cal. 591; *Taylor v. Palmer*, 31 Cal. 240; *Central Bank v. Kendrick*, *Dudley (Ga.)*

66; *Jackson v. State*, 12 Ga. 1; *Shaw v. Macon*, 21 Ga. 280; *Wooley v. Watkins* (Idaho, 1889), 22 Pac. Rep. 102; *Louisville, etc., R. Co. v. East St. Louis* (Ill. 1890), 25 N. E. Rep. 962; *Tyson v. Postlethwaite*, 13 Ill. 727. In this case a later, law was passed in ignorance of an earlier, the former conferring a less benefit. *State v. Barbee*, 3 Ind. 258; *Cordell v. State*, 22 Ind. 1; *Blain v. Bailey*, 25 Ind. 165; *State v. Donehy*, 8 Iowa 396; *Baker v. Steamboat Milwaukee*, 14 Iowa 214; *Com. v. Duff*, 87 Ky. 586; *Moore v. Miller*, 1 Litt. (Ky.) 356; *Graves v. Graves*, 10 B. Mon. (Ky.) 31; *Christian County Ct. v. Smith* (Ky. 1890), 13 S. W. Rep. 276; *Commercial Bank v. Markham*, 3 La. Ann. 698; *State v. Judge*, 5 La. Ann. 518; *Albert v. Brewer*, 9 La. Ann. 64; *New Orleans v. Mechanics, etc., Bank*, 15 La. Ann. 107; *St. Martin v. New Orleans*, 14 La. Ann. 113; *State v. Le Bourgeois* (La. 1893), 12 So. Rep. 360; *Dolan v. Thomas*, 12 Allen (Mass.) 421; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Com. v. Norton*, 13 Allen (Mass.) 550; *Shear v. Columbia*, 14 Fla. 146; *People v. Mahaney*, 13 Mich. 481; *Green v. Com.*, 12 Allen (Mass.) 155; *State v. Bishop*, 41 Mo. 16; *State v. Vernon County Ct.*, 53 Mo. 128; *Gaston v. Merriam*, 33 Minn. 271; *Maple Lake v. Wright, County*, 12 Minn. 403; *Shelton v. Baldwin*, 26 Miss. 439; *House v. State*, 41 Miss. 737; *Crouch v. Hayes*, 98 N. Y. 183; *People v. Harris* (Supreme Ct.), 7 N. Y. Supp. 773; *Powers v. Shepard*, 48 N. Y. 540; *Harlem Bridge, etc., R. Co. v. Southern Boulevard R. Co.*, 41 Hun (N. Y.) 553; *Kilbourne v. Sullivan County* (Supreme Ct.), 16 N. Y. Supp. 507; *State v. Storey County*, 17 Nev. 96; *State v. Cunningham*, 72 N. Car. 469; *Hodge v. Hodge*, 72 N. Car. 616; *Cramer v. Milwaukee*, 18 Wis. 257; *Jones v. St. Onge*, 67 Wis. 520; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *State v. Board of Public Works*, 36 Ohio St. 409; *Cass v. Dillon*, 2 Ohio St. 607; *Winter v. Norton*, 1 Oregon 42; *Moyer v. Gross*, 2 Pa. St. 171; *Com. v. Collis*, 10 Phila. (Pa.) 430; *Dick's Appeal*, 106 Pa. St. 589; *Drew v. Com.*, 1 Whart. (Pa.) 279; *Malloy v. Com.*, 115 Pa. St. 25; *State v. Young*, 30 S. Car. 399; *State v. Smith*, 8 S. Car. 127; *State v. Durant, Harp.* (S. Car.) 319; *State v. Beaufort* (S. Car. 1893), 17 S. E. Rep. 355; *Green v. State*, 28 Tex. App. 493; *Cain v. State*, 20 Tex. 355. In this case subsequent

modification of or exception to the earlier one,<sup>1</sup> thus avoiding all conflict between the two.

*c. PENAL ACTS—(1) In General.*—The general rules relating to implied repeals are applicable to penal statutes; so where two such statutes are repugnant in any of their provisions, the later will be held to repeal the earlier to the extent of the repugnancy;<sup>2</sup> and where a new statute covers the whole subject-matter of an earlier one, and adds offenses and prescribes penalties different from those enumerated in the old law, so as to indicate an intention to substitute the new law for the old, it is by necessary implication a repeal of the former statute, even though all its provisions be not repugnant.<sup>3</sup>

recognition was held to rebut intention to repeal. *Gohen v. Texas Pac. R. Co.*, 2 Woods (U. S.) 346; *Red Rock v. Henry*, 106 U. S. 596.

1. *State v. Bishop*, 41 Mo. 16; *Riggs v. Pfister*, 21 Ala. 469.

Where an act fixed the yearly salary of a public official at one sum, and a later general appropriation act appropriated to satisfy it for a specified year a less sum, on an appeal from an order refusing a *mandamus* to compel the payment of the larger sum the order was affirmed, two judges sitting; the reason of one judge being that the acts were inconsistent, that of the other, that while not inconsistent the later act modified the earlier for the year in question, but that the excess over the appropriation was due awaiting a later appropriation. *State v. Brewer*, 64 Ala. 287.

2. *Com. v. Gardner*, 11 Gray (Mass.) 438; *Com. v. Wyman*, 12 Cush. (Mass.) 237; *Mongeon v. People*, 55 N. Y. 613; *State v. Miller*, 58 Ind. 399; *State v. Hamblin*, 4 S. Car. 1; *State v. Grady*, 34 Conn. 118; *Fraser v. Alexander*, 75 Cal. 147.

In *Gormond v. Hammond*, 28 Ga. 85, it was said: "It is a rule, that where there are two statutes imposing a penalty for the same offense, and the penalty imposed by the one is not the same as that imposed by the other, the later statute repeals the earlier, the intention to inflict two punishments for the same offense being a thing not to be imputed to the legislature."

In *Rex v. Cator*, 4 Burr. 2026, it was held that a former statute inflicting a penalty of one hundred pounds and three months' imprisonment on persons enticing away artificers, was repealed by a subsequent statute inflicting a penalty of five hundred pounds and

twelve months' imprisonment for the same offense.

Where an act which was an offense at common law is declared to be an offense by statute, and a punishment is provided for it, the common law is repealed by implication. *State v. Boogher*, 71 Mo. 631; *State v. Duncan*, 16 Lea (Tenn.) 79.

*Same Object as Well as Subject.*—To effect the repeal of an earlier act the subject thereof must be treated and both statutes enacted to accomplish the same object. *U. S. v. Clafin*, 97 U. S. 546; *Stockwell v. U. S.*, 13 Wall. (U. S.) 531; *Coghill v. State*, 37 Ind. 111; *Com. v. Gardner*, 11 Gray (Mass.) 447; *State v. Grady*, 34 Conn. 118; *Cate v. State*, 3 Sneed (Tenn.) 120. See also *Shoemaker v. State*, 20 N. J. L. 163; *Walker v. State*, 7 Tex. App. 257; 33 Am. Rep. 595.

In *Gray v. Cookson*, 16 East 13, an act which empowered justices to commit for a month an apprentice guilty of any misconduct in his service, was held not to be repealed by a later one, which empowered them to compel an apprentice, who absented himself, to make compensation for his absence, and committed him, in default, for three months. The object of the first act was to punish the apprentice, while that of the later was to compensate the master.

3. *Rex v. Cator*, 4 Burr. 2026; *Rex v. Davis*, 1 Leach's C. C. 306; *Michell v. Brown*, 1 E. & E. 267; 102 E. C. L. 267; *In re Baker*, 2 H. & N. 219; *Robinson v. Emerson*, 4 H. & C. 355; *Henderson v. Sherborne*, 2 M. & W. 236; *Parry v. Croyden Commercial Gas, etc., Co.*, 15 C. B. N. S. 568; 109 E. C. L. 566; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *State v. Whitworth*, 8 Port. (Ala.)

But, as in the case of statutes generally, repeals by implication are not favored, and if the statutes can stand together consistently, there is no repeal.<sup>1</sup> As there is no repugnancy in several

434; *State v. Grady*, 34 Conn. 118; *Mitchell v. Duncan*, 7 Fla. 13; *Gormond v. Hammond*, 28 Ga. 85; *Adams v. Ashby*, 2 Bibb (Ky.) 96; *State v. Horsey*, 14 Ind. 185; *State v. Pierce*, 14 Ind. 302; *Johns v. State*, 78 Ind. 332; 41 Am. Rep. 577; *Dowdell v. State*, 58 Ind. 333; *Peru, etc., R. Co. v. Bradshaw*, 6 Ind. 146; *Wagoner v. State*, 90 Ind. 504; *State v. Pike County*, 104 Ind. 123; *Phillips v. Lewis*, 109 Ind. 62; *State v. Wells*, 112 Ind. 245; *Engle v. State*, 97 Ind. 122; *Sullivan v. People*, 15 Ill. 233; *Com. v. Jones*, 10 Pa. Co. Ct. Rep. 611; 1 Pa. Dist. Rep. 29; *Heckman v. Pinkney*, 81 N. Y. 215; *Hartung v. People*, 22 N. Y. 95; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *U. S. v. Irwin*, 5 McLean (U. S.) 178; *Norris v. Crocker*, 13 How. (U. S.) 429.

In *Norris v. Crocker*, 13 How. (U. S.) 429, the court said: "As a general rule, it is not open to controversy that where a new statute covers the whole subject-matter of an old one, adds offenses and prescribes different penalties from those enumerated in the old law, the former is repealed by implication, as the provisions of both cannot stand together."

In *Com. v. Kelliher*, 12 Allen (Mass.) 480, it was held that a statute which required every owner or keeper of a dog to cause it to be annually registered, numbered, described and licensed, in the office of the clerk of the city or town wherein he resided, and imposed a penalty for keeping a dog contrary to its provisions, was repealed by a subsequent statute which required such owner or keeper to have the dog annually registered in the office of the clerk of the city or town where the dog was kept, but imposed no penalty for keeping a dog contrary to its provisions.

In *Com. v. Cooley*, 10 Pick. (Mass.) 37, it was held that where a statute has revised the whole subject, made that a qualified offense which was one absolutely before, and limited the time for prosecution and degree of punishment, and where the same purpose is to be accomplished, that of restraining the offense by punishment, the statute must be deemed a constructive repeal of the common law, because such must be presumed to have been

the intent of the legislature. See also *State v. Norton*, 23 N. J. L. 41; *Jennings v. Com.*, 17 Pick. (Mass.) 82.

1. This question, like others in construction, must be governed by the intention of the legislature; and when it is evident that no repeal was intended, no such effect will be given to the statute. *U. S. v. Case of Hair Pencils*, 1 Paine (U. S.) 400; *Ex parte Osborn*, 24 Ark. 479; *Sifried v. Com.*, 104 Pa. St. 179; *State v. Miller*, 58 Ind. 399; *Walker v. State*, 7 Tex. App. 246; 32 Am. Rep. 595.

Repeal by implication of penal statutes is no more favored than of other statutes. *People v. Gustin*, 57 Mich. 107; *State v. Alexander*, 14 Rich. (S. Car.) 247.

In *Dolan v. Thomas*, 12 Allen (Mass.) 421, it was held that a statute imposing a penalty of a certain fine and minimum term of imprisonment for a first offense, was not repealed by a subsequent statute providing that on conviction of such an offense, the court might, in its discretion, impose the penalty either of a fine or imprisonment, where the offender proved, to the satisfaction of the court, that he had not before been convicted of a similar offense. The statutes were not inconsistent. The court, speaking of the later statute, said: "It is obvious that this provision is applicable only to a certain class of cases."

In *People v. Gustin*, 57 Mich. 407, it was held that a statute which punished the keeping of houses of ill fame by a fine of three hundred dollars or a year's imprisonment, was not repealed by an act which classed that offense as disorderly conduct and punished it by a fine of fifty dollars or three months' imprisonment; and it was said that such a result was not within the legislative intention. *Cooley, C. J.*, said: "A change in a statute specially aimed at disorderly persons, as such, affords no ground for an interference of anything to change the statute for the punishment of keepers of houses of ill fame, as such."

In *State v. Alexander*, 14 Rich. (S. Car.) 247, it was held that an act making it an indictable offense, "willfully, unlawfully and maliciously, to cut, shoot," etc., any horse, was not repealed by a law declaring every "willful tres-



remedies of a different nature, with different penalties, they may coexist.<sup>1</sup>

(2) *By Change in Nature of Offense.*—Where a statute alters the quality and incidents of an offense, as by making that which was a felony merely a misdemeanor, or *vice versa*, it will be construed as repealing, by implication, the old law.<sup>2</sup>

(3) *By Change in Degree of Punishment.*—Where the punishment is altered in degree but not in kind, the later statute repeals by implication the earlier one, so far as they are inconsistent; as where milder punishment is provided by the later statute;<sup>3</sup> so

pass" to be a misdemeanor. It was said that an offense both willful and malicious contains an ingredient which is not to be found in one which is willful merely.

1. *Rex v. Jackson*, Cowp. 297; *Henderson v. Sherborne*, 2 M. & W. 236; *Stephens v. Watson*, 1 Salk. 45; *Jennings v. Com.*, 17 Pick. (Mass.) 80; *Hastings v. Aiken*, 1 Gray (Mass.) 163; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; 15 Am. Dec. 463; *State v. Shaw*, 8 Humph. (Tenn.) 32.

So a statute which provides a penalty for a nuisance does not take away the common-law method of abating the nuisance; as in *State v. Moffett*, 1 Greene (Iowa) 247, a statute making it a penal offense to injure a mill-dam was held not to take away the right to abate it as a nuisance. In this case, Kinney, J., said: "Nothing is better settled, as a general rule, than that the addition of a penalty by a statute or a common-law offense is merely cumulative, and that without negative words such statutes detract nothing from remedies formerly allowed by law;" citing *Renwick v. Morris*, 3 Hill (N. Y.) 621; *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250; 28 Am. Dec. 525; *Salem T.*, etc., Co. v. *Hayes*, 5 Cush. (Mass.) 458; *Com. v. Ruggles*, 10 Mass. 391; *Jennings v. Com.*, 17 Pick. (Mass.) 80. See also *Coates v. New York*, 7 Cow. (N. Y.) 585; *Mills v. Hall*, 9 Wend. (N. Y.) 315; 24 Am. Dec. 160; *State v. Wilson*, 43 N. H. 475; 82 Am. Dec. 163; *State v. Wilkinson*, 2 Vt. 480; 21 Am. Dec. 560.

In *Cate v. State*, 3 Sneed (Tenn.) 120, it was held that an act which affixed a privilege tax and prescribed certain measures for its collection, did not repeal an act which imposed a penalty for the exercise of said privilege or license, but was merely cumulative.

2. *Michell v. Brown*, 1 El. & El. 267; 102 E. C. L. 267; *Robinson v. Emer-*

*son*, 4 H. & C. 355; *Rex v. Davis*, 1 Leach C. C. 271; *Reg. v. Button*, 12 Jur. 1017; *Rex v. Robinson*, 2 East P. C. 1110; *People v. Tisdale*, 57 Cal. 104; *Sherman v. State*, 17 Fla. 888; *Hayes v. State*, 55 Ind. 99; *State v. Hope*, 15 Ind. 474; *State v. Upchurch*, 9 Ired. (N. Car.) 454; *Mongeon v. People*, 55 N. Y. 613; *U. S. v. Tynen*, 11 Wall. (U. S.) 88.

In *State v. Upchurch*, 9 Ired. (N. Car.) 454, *Ruffin, C. J.* said: "It is perfectly well settled as a rule of construction that if, by the common or statute law, an offense for example be a felony, and a subsequent statute, by an enactment merely affirmative, lessens its grade or mitigates the punishment, the latter is to that extent an implied repeal of the former."

3. *Potter's Dwaris* 673; *Atty. Gen'l v. Lockwood*, 9 M. & W. 391; *Rex v. Cator*, 4 Burr. 2026; *Rex v. McKenzie, R. & R.*, C. C. 429; *Henderson v. Sherborne*, 2 M. & W. 236; *Rex v. Heath*, 2 East P. C. 609; *Michell v. Brown*, 1 El. & El. 267; 102 E. C. L. 267; *Robinson v. Emerson*, 4 H. & C. 353; *Smith v. State*, 1 Stew. (Ala.) 506; *State v. Whitworth*, 8 Port. (Ala.) 434; *Gormond v. Hammond*, 28 Ga. 87; *State v. Daley*, 29 Conn. 272; *Com. v. Wyman*, 12 Cush. (Mass.) 237; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Kimball*, 21 Pick. (Mass.) 376; *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *People v. Bussell*, 59 Mich. 104; *State v. Upchurch*, 9 Ired. (N. Car.) 454.

In *Nichols v. Squire*, 5 Pick. (Mass.) 168, it was held that a statute which imposed a penalty for unlawfully selling lottery tickets, different from that imposed by a former statute, repealed that statute. And the court said, that where the legislature imposes a second penalty for an offense, whether smaller or larger than the former one, the former is repealed.

In *State v. Whitworth*, 8 Port. (Ala.)

also where the punishment is increased.<sup>1</sup> But where the new statute merely provides a new kind of punishment or a change in procedure, without a change in the degree of punishment, no such effect will be allowed.<sup>2</sup>

*f. GENERAL AND SPECIAL LAWS.*—See *supra*, this title, *Private and Special*.

434. the court said: "The act inhibiting gaming, covers the whole ground of the previous statute, so far as the keeping, exhibiting, carrying on, or being in any manner interested in, any gaming table, or bank whatever, is concerned, and includes every offense connected with the subject-matter; and, as it provides a different, and in some respects a milder, punishment for these offenses than the previous statutes, it repeals them so far as the same offenses are provided to be punished by it."

So in *Com. v. Davis*, 11 Gray (Mass.) 48, a statute declaring houses of ill fame to be common nuisances, to be regarded and treated as such, and that any person convicted of keeping any such nuisance shall be punished by imprisonment not exceeding one year, or a fine of not more than \$1,000, was held to repeal a former statute providing that the same offense should be punished by imprisonment not more than two years or by fine not exceeding \$300.

In *Rex v. Cator*, 4 Burr. 2026, a statute imposing a fine of one hundred pounds and three months' imprisonment for enticing artificers abroad, was held to be repealed by a subsequent statute imposing a fine of five hundred pounds and twelve months' imprisonment for the same offense.

A mere change in the degree of punishment does not necessarily have the effect of repealing the whole law, but only affects the provisions with which it is inconsistent. As in *Com. v. Wyman*, 12 Cush. (Mass.) 237, it was held that a statute substituting for the penalty of death imprisonment in the state prison for life in three cases—treason, rape, and arson—did not repeal the statute concerning arson, but merely the repugnant provisions providing the death penalty for the offense. In this case, the later statute dealt only with the punishment of the offense, not with the offense itself, and to that extent only could the earlier statute be repealed.

In *Turner v. State*, 40 Ala. 46, it was held that a statute which provided a mitigated alternative punishment for

an offense, provided for by a former statute, was merely a change in the punishment, and did not effect a repeal of the earlier law.

Where a statute merely provides punishment for a common-law offense, the common-law is not abrogated, but the offense is still a common-law offense, the punishment only is changed. *State v. Daley*, 29 Conn. 276; *Rex v. Bridges*, 8 East 53; *Williams v. Reg.*, 7 Q. B. 250; 53 E. C. L. 250.

1. *Carter v. Hawley*, Wright (Ohio) 74; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *Buckallew v. Ackerman*, 8 N. J. L. 48; *Leighton v. Walker*, 9 N. H. 59; *People v. Bussell*, 59 Mich. 104.

In *Buckallew v. Ackerman*, 8 N. J. L. 48, a statute which prohibited an act and imposed a penalty of ten dollars, was held to be repealed by a subsequent statute which made the same offense indictable and the offender liable to a fine of twenty dollars.

In *Flaherty v. Thomas*, 12 Allen (Mass.) 428, a statute imposing upon an offense the penalty of a fine, or imprisonment not exceeding one year, was held to be repealed by a subsequent statute containing no saving clause as to offenses already committed, which imposed for the like offense the penalty of a fine and imprisonment for not less than three, nor more than twelve months, unless the offender shall prove, to the satisfaction of the court, that he has not before been convicted of a similar offense; in which case he may, in the discretion of the court, be sentenced to be punished by imprisonment without fine or by fine without imprisonment.

2. *Rex v. Carlile*, 3 B. & A. 161; 53 E. C. L. 249; *Rex v. Wigg*, 2 Salk. 460; *Stephens v. Watson*, 1 Salk. 45; *Rex v. Robinson*, 2 Burr. 800; *Com. v. McKenney*, 14 Gray (Mass.) 1; *Mitchell v. Duncan*, 7 Fla. 13; *Sifried v. Com.*, 104 Pa. St. 179; *Ex parte Osborn*, 24 Ark. 479; *U. S. v. Case of Hair Pencils*, 1 Paine (U. S.) 400. See *Druc v. Com.*, 1 Whart. (Pa.) 279.

When a statute prohibits an act, un-

**4. Effect—*a*. GENERAL RULES.**—The effect of a repeal is the same whether it is accomplished by express terms or results from necessary implication.<sup>1</sup> The time from which a repeal takes effect is determined by the general rules governing the time of the taking effect of statutes generally,<sup>2</sup> unless the terms of the repealing act or the surrounding circumstances show the intent of the legislature to be otherwise.<sup>3</sup>

der a penalty to be enforced by an indictment, and a subsequent statute gives a *qui tam* action for such penalty, the latter is merely cumulative of, and does not repeal the remedy given by the former statute. *Bush v. Texas*, 1 Tex. 455.

In *Carter v. Burt*, 12 Allen (Mass.) 424, it was held that a mere change in the locality of a punishment by a subsequent statute did not repeal the former statute. Bigelow, C. J., said: "In legal contemplation, a commitment to a house of correction in one locality for a specific term cannot be regarded as a higher or lesser punishment than a commitment to a house of correction in another county for the same period of time."

In *State v. Wilbor*, 1 R. I. 200; 35 Am. Dec. 245, it was held that a change in the distribution of a penalty did not work a repeal.

In *Shoemaker v. State*, 20 N. J. L. 159. Hornblower, C. J., said: "That the legislature should add to a penalty the forfeiture of certain property, and even superadd to that, fine and imprisonment, for an offense, is not contrary or repugnant. It may be unwise legislation, but it certainly is not unlawful legislation. It may be indiscreet in a legislature to invest so much power in a court, in regard to the extent of punishment; but we cannot, on that account, adjudge that prior enactments and penalties must be considered as repealed, simply because the legislature has subjected the offender to an additional punishment."

In *People v. Stevens*, 13 Wend. (N. Y.) 341, Sullivan, J., said: "It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle."

1. *Angel v. Hume*, 17 Hun (N. Y.) 379; *People v. Davis*, 61 Barb. (N. Y.) 456; *Townsend Savings Bank v. Epping*, 3 Woods (U. S.) 391.

Whether a specified act has been repealed by a subsequent one is a judicial question to be determined by the courts, and is not for the legislative branch of the government to determine. *Dist. of Columbia v. Hutton*, 143 U. S. 27; *Postmaster Gen'l v. Early*, 12 Wheat. (U. S.) 136; *South Ottawa v. Perkins*, 94 U. S. 270; *U. S. v. Claflin*, 97 U. S. 548.

2. See *supra*, this title, *Time of Taking Effect*.

3. When an act repeals another in whole or in part, and substitutes some provision or provisions in lieu of those repealed, the latter remain in force until the substituted provision or provisions come into operation. *Leyner v. State*, 8 Ind. 490; *Rogers v. Vass*, 6 Iowa 405; *Spaulding v. Alford*, 1 Pick. (Mass.) 33; *McArthur v. Franklin*, 16 Ohio St. 193; *Moore v. Houston*, 3 S. & R. (Pa.) 185; *Butcher v. Henderson*, L. R., 3 Q. B. 338.

Words in the present tense in the repealing statute refer to the time of taking effect, not to the time of passage. *Leyner v. State*, 8 Ind. 490.

A saving clause in the repealing act takes effect at the time the repeal takes effect, and not sooner. *Rogers v. Vass*, 6 Iowa 405. See *In re Ankrum*, 3 McLean (U. S.) 285; *In re Richardson*, 2 Story (U. S.) 571.

A repealing act repealed before it was to take effect by its own terms has no effect on the original act, which continues in force. *Adam v. Wright*, 84 Ga. 720.

Where two inconsistent statutes expressly repealed an earlier statute, and one of them was to take effect June 1st, and the other July 1st, the former was held to continue in force one month and then to be repealed by the other. *Malick v. McDermot*, 25 Neb. 267.

Where a general repealing statute was passed, and on the next day a supplementary act was passed excepting

The repeal of a statute, as a rule, repeals everything contained in it;<sup>1</sup> and an amendment, in such terms as to stand in the stead of an original section of an act, is repealed with the repeal of the act in which it stands.<sup>2</sup> But where the provisions of a statute are incorporated or adopted by reference in another, and the earlier statute so adopted is afterwards repealed, the adopted provisions continue in force, so far as they form part of the second enactment;<sup>3</sup> nor does the subsequent repeal of the adopting statute affect the repeal of the statute from which the provisions were adopted.<sup>4</sup>

*b. ON INTERESTS UNDER REPEALED STATUTE—(1) In General.*—A statute repealed by a later act of the same legislature is, in the absence of provisions to the contrary, considered, as to its operative effect, as if it had never existed, except as to matters and transactions past and closed.<sup>5</sup>

certain counties from the operation of the repeal to a certain extent, and there was no doubt as to the intention of the legislature, the supplementary act was regarded as part of the repealing act, and given the same effect as if passed on the same day. *Manlove v. White*, 8 Cal. 376.

A statute passed to take effect immediately is not immediately repealed by another statute on the same subject passed to take effect from a future day. *Weatherford v. Weatherford*, 8 Port. (Ala.) 171.

1. *Church v. Stadler*, 16 Ind. 463. In this case, a proviso in a repealed statute was held to be repealed also, and not to continue as an independent enactment.

The express repeal of an exception to a statute extends by so much the operation of the statute. *Goodno v. Oshkosh*, 31 Wis. 127; *Smith v. Hoyt*, 14 Wis. 252; *Bank for Savings v. Field*, 3 Wall. (U. S.) 495; *Brodhead v. Milwaukee*, 19 Wis. 660; 88 Am. Dec. 711; *State v. Hoefflinger*, 31 Wis. 262.

2. *Greer v. State*, 22 Tex. 588; *Kamerrick v. Castleman*, 21 Mo. App. 587; *McKibben v. Lester*, 9 Ohio St. 627; *Holbrook v. Nichol*, 36 Ill. 162; *State v. Ranson*, 73 Mo. 88; *Griggs v. Guinn*, 29 Abb. N. Cas. (N. Y.) 144. See *State v. Elko County* (Nev. 1890), 23 Pac. Rep. 935.

3. *Turney v. Wilton*, 36 Ill. 385; *Munes v. Wellisch*, 12 Bush (Ky.) 363; *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Schwenke v. Union Depot, etc., Co.*, 7 Colo. 512; *Kugler's Appeal*, 55 Pa. St. 123; *People*

*v. Whipple*, 47 Cal. 592; *Phoenix Iron Co. v. The Hopatcong*, 62 Hun (N.Y.) 263; *Com. v. Kendall*, 144 Mass. 357; *Reg. v. Merionethshire*, 6 Q. B. 343; 51 E. C. L. 342; *Reg. v. Stock*, 8 Ad. & El. 405; 35 E. C. L. 414; *Reg. v. Smith*, L. R., 8 Q. B. 146; *Reg. v. Stepney Union*, L. R., 9 Q. B. 383.

Where a statute giving a lien provides for its enforcement in the same manner as another lien is enforced, the repeal of the remedy in the latter case will not affect the remedy applicable to the former. *Collins v. Blake*, 79 Me. 218.

4. *Sika v. Chicago, etc., R. Co.*, 21 Wis. 371; *Phoenix Iron Co. v. The Hopatcong*, 62 Hun (N. Y.) 263; *Ex parte Rossmore*, 8 Ir. R. Eq. 366; *Clarke v. Bradlaugh*, 8 Q. B. Div. 69.

Procedure of an earlier act, adopted by reference in a later one, will remain after the repeal of the earlier act. *Reg. v. Stock*, 3 N. & P. 420.

5. *Medical College v. Muldoon*, 46 Ala. 603; *Hirschburg v. People*, 6 Colo. 145; *Thorne v. Hays*, 4 Cal. 165; *Hartung v. People*, 22 N. Y. 95; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *Ex parte McCordle*, 7 Wall. (U. S.) 514; *Bank of Hamilton v. Dudley*, 2 Pet. (U. S.) 492; *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 359; *Thompson v. Sayre*, 1 Den. (N. Y.) 175; *Smith v. People*, 47 N. Y. 338; *Belvidere v. Warren, etc. R. Co.*, 34 N. J. L. 193; *Den v. Dubois*, 16 N. J. L. 285; *Van Inwagen v. Chicago*, 61 Ill. 31; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146; *Dillon v. Linder*, 36 Wis.

(2) *On Interests Past and Closed*—(a) *In General*.—The repeal of a statute has no effect on those rights and interests which have accrued under it, and which are past and closed.<sup>1</sup>

(b) *Transactions Invalid Under Repealed Statute*.—If a statute making certain contracts illegal is afterwards repealed, the repeal will not give validity to such a contract, unless it appears that the repealing act was intended to have a retrospective operation.<sup>2</sup> Other

344; *Curran v. Owens*, 15 W. Va. 208; *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 677; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Kay v. Goodwin*, 4 M. & P. 341, 351; *Rex v. McKenzie*, R. & R. C. C. 429; *Reg. v. Mawgan*, 8 Ad. & El. 496; 35 E. C. L. 447; *Surtees v. Ellison*, 9 B. & C. 720; 17 E. C. L. 491; *Ex parte Grisewood*, 4 De G. & J. 544; *Reg. v. Denton*, 16 Q. B. 832.

In *Kay v. Goodwin*, 4 M. & P. 341, it was said: "The effect of a repealing statute I take to be to obliterate the statute to be repealed as completely from the records of Parliament as if it had never been passed; and that it must be considered as a law that had never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law."

But an act of Congress, while it may supersede an act of the state legislature on the same subject, does not have the effect to obliterate the act, so as to extinguish pending rights, remedies, or suits. *Sturgis v. Spofford*, 45 N. Y. 452, where *Church, C. J.*, in delivering the opinion of the court said: "I do not think the act of Congress had the same effect as a repeal of the statute by the state itself. It indicates an intention from that time to assume the exercise of the power conferred by the constitution, and the state law became from that time inoperative; but it is not repealed nor can it be presumed that any rights or interest secured or obligations incurred under it were intended to be interfered with." See also *Henderson v. Spofford*, 59 N. Y. 131.

1. *Butler v. Palmer*, 1 Hill (N. Y.) 355; *Capital State Bank v. Lewis*, 64 Miss. 727; *Den v. Du Bois*, 16 N. J. L. 285; *Den v. Robinson*, 5 N. J. L. 706; *Baygents v. Beard*, 41 Miss. 531; *Tucker v. Stokes*, 3 Smed. & M. (Miss.) 124; *Couch v. Jeffries*, 4 Burr. 2462.

Puffendorf says: "Suppose it were a law that, as a man disposes of his possessions by will, so the right to them should stand. It would be very

fair in the sovereign to retrench this liberty of testaments and to order that, for the future, all these inheritances shall pass to the heirs at law; yet it would be unreasonable to take away from persons what fell to them by will, while the former law was in use and vigor."

If the legislature *ex mero motu* by a statute gives to an individual property belonging to the state, and he accepts it, a repeal of the statute would not deprive him of his property. *Den v. Du Bois*, 16 N. J. L. 285.

The repeal of a law authorizing a conveyance of real estate directly from a husband to a wife does not invalidate a conveyance executed before the repeal. *Baygents v. Beard*, 41 Miss. 531. Acts done under a contract made legal by statute and accomplished during its existence, are not invalidated by its subsequent repeal. *Bennett v. Woolfolk*, 15 Ga. 213.

2. *Conley v. Palmer*, 2 N. Y. 182; *Bailey v. Mogg*, 4 Den. (N. Y.) 60; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Roby v. West*, 4 N. H. 285; 17 Am. Dec. 423; *Woods v. Armstrong*, 54 Ala. 150; *Anding v. Levy*, 57 Miss. 58; *Mays v. Williams*, 27 Ala. 267; *Milne v. Huber*, 3 McLean (U. S.) 212; *Mitchell v. Doggett*, 1 Fla. 400; *Gilliland v. Phillips*, 1 S. Car. 152; *Bancher v. Mansel*, 47 Me. 58; *People v. Brooks*, 16 Cal. 11; *Hathaway v. Moran*, 44 Me. 67; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675; *Hitchcock v. Way*, 6 Ad. & El. 943; 33 E. C. L. 249; *Jaques v. Withy*, 1 H. Bl. 65.

So contracts, void under the usury laws and laws prohibiting a party from recovering for liquor bills, are not validated by the subsequent repeal of the act making them invalid. *Gorsuth v. Butterfield*, 2 Wis. 237; *Root v. Pinney*, 11 Wis. 84; *Wood v. Lake*, 13 Wis. 84; *Lee v. Peckham*, 17 Wis. 383; *Morton v. Rutherford*, 18 Wis. 298; *Meiswinkel v. Jung*, 30 Wis. 361; 11 Am. Rep. 572; *Hughes v. Boone*, 102 N. Car. 137. The repeal of a statute declaring

acts void when performed under the same circumstances are governed by the same rule.<sup>1</sup>

(3) *On Interests Pending*—(a) *Dependent on Repealed Statute*—(1) IN GENERAL.—The effect of the repeal of a statute on interests dependent upon it, is not uniform, but varies according to the nature and object of the statute and the circumstances of the case.<sup>2</sup> The general rule, however, may be stated to be that the repeal of a statute, in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it,<sup>3</sup> while

void all contracts for unlicensed peddlers, does not validate contracts made before its repeal. *Anding v. Levy*, 57 Miss. 51; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449.

The repeal of a statute prohibiting unlicensed physicians from recovering compensation for their services, does not permit a recovery for services rendered before the repeal. *Bailey v. Mogg*, 4 Den. (N. Y.) 60; *Puckett v. Alexander*, 102 N. Car. 95.

But it has been held in *New York*, that the repeal of an act which makes a contract illegal on the grounds of public policy, repeals also the consequences of the act even as to contracts entered into while it was in force. *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23. Said to have been reversed in 22 How. Pr. (N. Y.) 571. note; followed in *Washburn v. Franklin*, 35 Barb. (N. Y.) 599, which latter reversed same case 11 Abb. Pr. (N. Y.) 93.

Causes of action barred by limitations are not revived by a repeal of the statute. *Right v. Martin*, 11 Ind. 124; *Cassity v. Storms*, 1 Bush (Ky.) 452.

1. In *Boorman v. Juneau County*, 76 Wis. 550, it was held that the repeal of a statutory bar or condition precedent to an action did not restore an action which had been lost by failure to observe the statutory requisite.

2. See *Den. v. DuBois*, 16 N. J. L. 300.

3. *Lamb v. Schottler*, 54 Cal. 319; *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 239; *Gregory v. German Bank*, 3 Colo. 332; 25 Am. Rep. 760; *Eaton v. Graham*, 11 Ill. 619; *Van Inwagen v. Chicago*, 61 Ill. 31; *Wilson v. Ohio*, etc., R. Co., 64 Ill. 542; 19 Am. Rep. 565; *Menard County v. Kincaid*, 71 Ill. 590; *Hunt v. Jennings*, 5 Blackf. (Ind.) 195; 33 Am. Dec. 465; *Moor v. Seaton*, 31 Ind. 11; *Covington*, etc., R. Co. v. *Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *Oriental Bank v.*

*Freese*, 18 Me. 109; 36 Am. Dec. 701; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559; *Gaul v. Brown*, 53 Me. 496; *Williams v. Middlesex County*, 4 Met. (Mass.) 76; *Foster v. Essex Bank*, 16 Mass. 245; 8 Am. Dec. 135; *Tivey v. People*, 8 Mich. 128; *Bay City*, etc., R. Co. v. *Austin*, 21 Mich. 390; *Bailey v. Mason*, 4 Minn. 546; *Musgrove v. Vicksburg*, etc., R. Co., 50 Miss. 677; *Bennet v. Hargus*, 1 Neb. 419; *Lewis v. Foster*, 1 N. H. 61; *Belvidere v. Warren R. Co.*, 34 N. J. L. 193; *Butler v. Palmer*, 1 Hill (N. Y.) 334; *People v. Livingston*, 6 Wend. (N. Y.) 526; *Knox v. Baldwin*, 80 N. Y. 610; *Washburn v. Franklin*, 35 Barb. (N. Y.) 599; *Richardson v. Pulver*, 63 Barb. (N. Y.) 67; *Burch v. Newbury*, 4 How. Pr. (N. Y.) 145; *Church v. Rhodes*, 6 How. Pr. (N. Y.) 284; *Hampton v. Com.*, 19 Pa. St. 329; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 432; *Pratt v. Brown*, 3 Wis. 603; *French v. Owen*, 5 Wis. 112; *State v. Ingersoll*, 17 Wis. 631; *Kertschack v. Ludwig*, 28 Wis. 430; *Goodno v. Oshkosh*, 31 Wis. 137; *Chapin v. Crusen*, 31 Wis. 209; *State v. Hoeflinger*, 31 Wis. 263; *Dillon v. Linder*, 36 Wis. 344; *Rood v. Chicago*, etc., R. Co., 43 Wis. 146; *State v. Stone*, 43 Wis. 481; *Smith v. Chicago*, etc., R. Co., 43 Wis. 688; *Streeter v. Chicago*, etc., R. Co., 44 Wis. 383; *State v. Campbell*, 44 Wis. 529; *State v. Van Stralen*, 45 Wis. 437; *Smith v. Chicago*, etc., R. Co., 49 Wis. 443; *Baltimore*, etc., R. Co. v. *Nesbit*, 10 How. (U. S.) 395; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Ex parte McCordle*, 7 Wall. (U. S.) 506; *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378; *Watson v. Mercer*, 8 Pet. (U. S.) 110; *National Exch. Bank v. Peters*, 144 U. S. 570; *Schooner Rachel v. U. S.*, 6 Cranch (U. S.) 329; *Miller's Case*, 3 Wills. 420.

"The repeal of a statute is held to have the effect of expunging it from the statute book as completely as if it

it leaves unimpaired those which either have become vested,<sup>1</sup> or, though connected with it, have an independent existence.<sup>2</sup> A

had never existed, except as to rights which have vested under it. All actions pending at the time of the repeal, and all proceedings then uncompleted which have for their foundation a repealed statute, fall with it; only such as are fully completed or ripened into judgment are not affected by the repeal. It is said as to pending actions that they must fall with the repeal, because when the court comes to pronounce judgment it finds itself without a law authorizing a judgment to be rendered." George, C. J., in *Anding v. Levy*, 57 Miss. 58. See *Allen v. Farrow*, 2 Bailey (S. Car.) 584.

1. *Den v. DuBois*, 16 N. J. L. 285; *Den v. Robinson*, 5 N. J. L. 689; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364; *Rice v. Minnesota, etc.*, R. Co., 1 Black (U. S.) 358; *Naught v. O'Neal*, 1 Ill. 29; *Taylor v. Rushing*, 2 Stew. (Ala.) 160; *Davis v. Minor*, 1 How. (Miss.) 183; 28 Am. Dec. 325; *M'Mechen v. Baltimore*, 2 Har. & J. (Md.) 41; *Wildermore v. Baltimore*, 8 Md. 551; *State v. Warren*, 28 Md. 339; *Ex parte Graham*, 13 Rich. (S. Car.) 277; *Mitchell v. Doggett*, 1 Fla. 400; *Butler v. Palmer*, 1 Hill (N. Y.) 333; *Church v. Rhodes*, 6 How. Pr. (N. Y.) 284; *Worthen v. Ratcliffe*, 42 Ark. 330; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 503; 5 Am. Dec. 291; *Van Rensselaer v. Secor*, 32 Barb. (N. Y.) 469; *Merrill v. Sherburne*, 1 N. H. 213; *Bennet v. Hargus*, 1 Neb. 419.

"A statute ought never to be construed so as to defeat a suit or conveyance upon a right already vested. . . . if it be susceptible of any other construction." *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 503; 5 Am. Dec. 291. In *Belvidere v. Warren R. Co.*, 34 N. J. L. 196, *Beasley, C. J.*, said: "It is to be remembered that the retroactive effect which is to be given to statutes is largely a question of intention, and that although in criminal or penal matters it may be unobjectionable to require express words in the repeal act to preserve punishments and penalties, yet, nevertheless, when rights are given either to an individual or the public, it is obvious that a somewhat less arbitrary and inflexible test should be resorted to."

Where a statute authorizing the lay-

ing of a tax was repealed after assessment but before collection, it was held that the repeal did not prevent the collection, that being regulated by the general tax law, which remained unrepealed; *Belvidere v. Warren R. Co.*, 34 N. J. L. 196; *Pacific, etc., Tel. Co. v. Com.*, 66 Pa. St. 70; but that a penalty of 12 per cent. on failure to pay the tax could not be collected after the repeal of the statute—the rule being that the assessment of the tax was a thing past and completed, and could not be affected by the repeal; *contra*, with respect to the penal percentage. *Belvidere v. Warren R. Co.*, 34 N. J. L. 196. See also *Com. v. Standard Oil Co.*, 101 Pa. St. 110.

It was held in *Gilmore v. Shouter*, 2 Lev. 227, *temp. Charles II* (§ 2 Mod. 310), that where one had a right of action it could not be taken away by the retroactive effect of the Statute of Frauds prohibiting such actions except upon a written agreement. The Statute of Frauds was in effect a repeal of so much of the former law as allowed such actions on parol agreements.

The repeal of the statute securing to the purchaser at a void tax sale a lien on the land for the amount paid by him, does not affect liens existing complete and vested before the repeal. *Capital State Bank v. Lewis*, 64 Miss. 727.

Where a statute authorizing tax assessors on the failure of tax-payers to furnish a list of their taxable property as required by law, to make out such a list and add a certain percentage of the total value of the articles therein to the assessment for the service, was repealed, it was held that the taxes so assessed before the repeal were not affected; but the percentage added being in the nature of a penalty was lost by the repeal of the act. *Hartford v. Champion*, 58 Conn. 268.

Final judgments are unaffected by the repeal of the statute on which they depended. *Osborn v. Sutton*, 108 Ind. 443. See *infra*, this title, *Judgments—Appeals*.

The court may make an order regarding costs in a proceeding brought under a repeal statute to enforce a right vested before the repeal. *Restall v. London, etc., R. Co.*, 3 L. R. Ex. 141.

2. See *infra*, this title, *Connected with but Independent of Repealed Statute*.

saving clause in the repealing statute, or in a general statute, preserves pending interests.<sup>1</sup>

(2) REMEDIES.—The general rule is that there is no vested right in a particular remedy, unless the remedy is part of the right itself.<sup>2</sup> Aside from this exception, the legislature has complete control over the remedy and mode of procedure.<sup>3</sup> If a repealing statute merely modifies a remedy, or takes away one remedy, leaving another, interests under the statute are not affected,<sup>4</sup> though in the latter case pending suits will be determined.<sup>5</sup> The interests,

1. *New Orleans v. Graihle*, 9 La. Ann. 562; *New Orleans v. St. Romes*, 9 La. Ann. 574; *Backes v. Dart*, 55 Ind. 181; *Brotherton v. Brotherton*, 41 Iowa 112; *Com. v. Desmond*, 123 Mass. 407; *Chittenden v. Judson*, 57 Conn. 333; *In re House Bill*, 12 Colo. 337; *Com. v. Duff*, 87 Ky. 586; *Waddell v. Com.*, 84 Ky. 276; *Com. v. Sullivan*, 150 Mass. 315; *U. S. v. Keokuk, etc.*, *Bridge Co.*, 45 Fed. Rep. 178; *Lincoln County v. Oneida County*, 80 Wis. 267; *National Bank v. Lemke* (N. Dak. 1893), 54 N. W. Rep. 919; *McCann v. Mortgage Bank, etc.*, *Co.* (N. Dak. 1893), 54 N. W. Rep. 1026; *Daggy v. Ball* (Ind. 1893), 34 N. E. Rep. 246; *Hall v. Hall*, 64 N. H. 295; *Kemmish v. Ball*, 30 Fed. Rep. 759; *State v. Proctor*, 90 Mo. 334. See also *supra*, this title, *Provisos, Exceptions, and Saving Clauses*.

Pending an action under the provision of the act concerning the transportation of slaves, the act was repealed, but the action was held to be unaffected under a general statutory saving clause. *Rogers v. Pacific R. Co.*, 35 Mo. 153.

2. *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 681; *Bennet v. Hargus*, 1 Neb. 419; *Gilleland v. Schuyler*, 9 Kan. 169; *McMinn v. Bliss*, 31 Cal. 122.

There can be no vested right in a rule of evidence or a presumption of law. *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358; *Fogg v. Holcomb*, 64 Iowa 621; *Journeay v. Gibson*, 56 Pa. St. 57; *Herbert v. Easton*, 43 Ala. 547. The repeal of a statute authorizing a presumption of regularity of a sale of real estate, compelled grantees under a deed from the comptroller to make proof of every fact necessary to give the comptroller jurisdiction to make the sale in which the deed was given. *Hickox v. Tallman*, 38 Barb. (N. Y.) 608. So rights to continuances and times to plead are not "rights accrued" within the meaning of the *Iowa* code, by which it is

provided that such rights cannot be affected by the repeal of the statute on which they depend. *Brotherton v. Brotherton*, 41 Iowa 112.

A rule as to competency of witnesses is not a vested right. *Laughlin v. Com.*, 13 Bush (Ky.) 261.

3. *Mechanics', etc.*, Bank, 31 Conn. 63; *Farmer v. People*, 77 Ill. 322; *Templeton v. Horne*, 82 Ill. 491; *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 677; *Dismukes v. Stokes*, 41 Miss. 431; *Mastronada v. State*, 60 Miss. 86; *Colby v. Dennis*, 36 Me. 13; *Onondaga v. Briggs*, 3 Den. (N. Y.) 173; *Stocking v. Hunt*, 3 Den. (N. Y.) 274; *In re Palmer*, 40 N. Y. 561; *Newsom v. Greenwood*, 4 Oregon 119; *Knoup v. Piqua Branch Bank*, 1 Ohio St. 603; *Hickory Tree Road*, 43 Pa. St. 139; *Treasurer v. Wygall*, 46 Tex. 447; *Danforth v. Smith*, 23 Vt. 247; *Harris v. Townsend*, 56 Vt. 716; *Dean v. Mel-lard*, 15 C. B. N. S. 19; 109 E. C. L. 19; *Linton v. Blakeney, etc.*, Soc., 3 H. & C. 853.

4. *Newsom v. Greenwood*, 4 Oregon 120; *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 684; *Danforth v. Smith*, 23 Vt. 247; *Whitehead v. Wells*, 29 Ark. 99. See also *supra*, this title, *In Derogation of Common Law*.

The repeal of a statute prescribing a particular mode of trial in a civil case, will not operate to annul proceedings had under the statute in cases pending at the time of the repeal. *Danforth v. Smith*, 23 Vt. 247.

Where a statute permitting the transfer of trials at law, when an equitable issue was developed, to the equity side of the court, was repealed, a pending suit so transferred was held to be unaffected by the repeal. *Newsom v. Greenwood*, 4 Oregon 120.

5. *Jones v. Com.*, 86 Va. 661; *citing Bank of Hamilton v. Dudley*, 2 Pet. (U. S.) 492; *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 677.

The repeal of an act allowing the



however, may be enforced under the modified procedure or the remaining remedy.<sup>1</sup>

(3) CONTRACTS.—The repeal of a statute which has entered into and become part of a contract will not deprive the parties of their rights under the contract, for such a repeal is as much a violation of the constitution as the passage of a new and different statute.<sup>2</sup> But if a contract is against sound morals, natural justice, and

auditor of a state to assess a tax under certain circumstances to pay a subscription, put an end to proceeding against the auditor to compel the levy of a tax, but did not destroy the right to enforce the tax by another remedy provided by law. *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

1. *Mayne v. Huntington County*, 123 Ind. 132; *Kille v. Reading Iron Co.*, 134 Pa. St. 225; *Bate v. Sheets*, 64 Ind. 209; *Moss v. State*, 101 Ind. 321; *Knoup v. Piqua Branch Bank*, 1 Ohio St. 603; *Hickory Tree Road*, 43 Pa. St. 139; *Uwchlan Tp. Road*, 30 Pa. St. 156; *Gorley v. Sewell*, 77 Ind. 316; *Mulcahey v. Givens*, 115 Ind. 286; *New York Express Co.*, 23 Hun (N. Y.) 615; *Farmer v. People*, 77 Ill. 322; *State v. Blend*, 121 Ind. 514.

Where a statutory remedy for a right created by that statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. *Knoup v. Piqua Branch Bank*, 1 Ohio St. 603; *Mitchell v. Eyster*, 7 Ohio 257; *Debolt v. Ohio L. Ins., etc., Co.*, 1 Ohio St. 563; *McMullen v. Guest*, 6 Tex. 275. This has been similarly held in criminal actions as to mere changes in procedure. *Jones v. Com.*, 86 Va. 661.

That part of an act relative to statutes which provides that when the courts of practice or procedure for the enforcement of a right vested or approved under a statute subsequently repealed shall be changed, actions then pending or thereafter commenced for the enforcement of such right shall be conducted as nearly as may be in accordance with such altered practice or procedure, applies only to cases where the legislature has substituted a new course of practice or procedure for the enforcement of such antecedent liability. Where no new remedy has been substituted for the enforcement of a right accrued under a statute afterwards repealed, the old remedy remains, notwithstanding the repeal of

the statute by force of constitutional provision. *Wilson v. Herbert*, 41 N. J. L. 454; 36 Am. Rep. 243. See also *Harris v. Townsend*, 56 Vt. 716.

2. *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *Van Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *State v. Madison*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468; *Bryson v. McCreary*, 102 Ind. 1; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Flewellen v. Proetzel*, 80 Tex. 191; *Lathrop v. Brown*, 1 Woods (U. S.) 474. See also *Woodruff v. Trapnall*, 10 How. (U. S.) 190; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods (U. S.) 222.

The repeal of a law authorizing a municipality to issue bonds "exempt from taxation," does not affect bonds issued before the repeal, for that would change the obligation of the contract between the municipality and the bondholders. But as the authority did not create a contract between the state and the municipality, the authority could be withdrawn, and bonds issued after the repeal were subject to taxation. *Merchants' Ins. Co. v. Newark* (N. J. 1892), 23 Atl. Rep. 305.

The repeal of a statute making stockholders of a railroad liable for all debts incurred by the corporation, does not affect their liability to creditors whose debts against the corporations were incurred prior to the repeal. *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87. This case went upon the theory, that "the right is not created or given by statute, but is a common-law right; and the liability of the stockholders is a part of the contract."

The same point was similarly decided in *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *Provident Sav. Inst. v. Jackson Place Skating, etc., Rink*, 52 Mo. 552; the ground of the decision being that were the rule different, the obligation of contracts would be impaired, because, first, the creditors contracted with the corporation on the faith of the individual responsibility of the stockholders; and, second, the remedy would be so

right, it falls with the repeal.<sup>1</sup> But where the effect of a statute is to declare that certain future voluntary acts of parties shall be a contract by which they shall be bound, the repeal of the statute after such acts have been performed does not affect the rights of the parties so contracting.<sup>2</sup>

(4) JURISDICTION — POWERS AND PRIVILEGES.—If a law conferring jurisdiction is repealed, expressly or by implication,<sup>3</sup> without any reservation or saving clause, the right to exercise the jurisdiction

seriously affected that the obligation would be impaired.

A law repealing a statute under which action has been had, giving a prior lien for a valuable consideration to the city of Louisville on certain property, does not interfere with the lien for such portion of the consideration as had been already advanced. *Sinking Fund Com'rs v. Northern Bank*, 1 Metc. (Ky.) 174.

Where, under a statute, a contractor for the grading of streets was authorized to sue delinquent abutters for unpaid assessments, it was held that this right became a part of the contract and was not taken away by a repeal of the statute creating it. *Creighton v. Pragg*, 21 Cal. 115.

Where a bank was incorporated and in its charter it was provided that the bills and notes of the institution should be received in all payments of debts due to the state, this was held to be a contract, and all bills and notes of the bank in circulation at the time of the repeal were receivable thereafter for the payment of debts due to the state. *Woodruff v. Trapnall*, 10 How. (U. S.) 190. See *Curran v. State*, 15 How. (U. S.) 304.

Where a law providing for a proceeding for the condemnation and sale of lands on which taxes were overdue, and giving costs to the attorney who prosecuted the same, was repealed, it was held that the repeal did not affect the right of attorneys to recover costs in actions pending under the act at the time of its repeal; the right to costs being in the nature of a contract. *Files v. Fuller*, 44 Ark. 273.

The repeal of a license law does not affect a right to recover for a breach of a bond given under the law. *Coggeshall v. Groves*, 16 R. I. 18.

Where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power itself given can-

not be withdrawn by the repeal of the act until the contracts entered into are actually satisfied. *Van Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *People v. Woods*, 7 Cal. 579; *People v. Bond*, 10 Cal. 563. See also TAXATION.

1. *Osborn v. Nicholson*, 1 Dill. (U. S.) 219, and cases cited; *Norris v. Crocker*, 13 How. (U. S.) 429; *Kimbrow v. Colgate*, 5 Blatchf. (U. S.) 229.

So a slave contract based on a statute permitting it, could not be enforced after the repeal of the statute. *Osborn v. Nicholson*, 1 Dill. (U. S.) 219.

2. *Streubel v. Milwaukee, etc., R. Co.*, 12 Wis. 85.

In *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450, it was decided that the repeal of an act declaring that when a vessel is spoken by a pilot and his services are declined, he shall be entitled to one-half pilotage fees, does not affect claims for fees accrued before its repeal. The court said: "Where a right has arisen upon a transaction in the nature of a contract authorized by statute, and it has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement."

On the same principle a right of action for cutting timber on mineral lands given by a regulation of the secretary of the treasury under an act of Congress, is not affected by the repeal of the regulation. *U. S. v. Williams*, 8 Mont. 85.

The repeal of an act which made a railroad liable for the wages of all men employed in the construction of its line on the giving of a prescribed notice, did not divest the right of an employé of a sub-contractor who had fulfilled the conditions and given the notice. *Streubel v. Milwaukee, etc., R. Co.*, 12 Wis. 74.

3. *New London, etc., R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386; *Crisp v. Bunbury*, 8 Bing. 394; 21 E. C. L. 333; *Cates v. Knight*, 3 T. R. 442.

is lost,<sup>1</sup> and proceedings pending under it fall with the law.<sup>2</sup> So the naked repeal of a statute conferring a power or privilege destroys the right to exercise it, and abates suits pending to enforce it.<sup>3</sup>

(5) PENALTIES AND FORFEITURES.—The repeal of a statute pre-

1. *Lamb v. Schottler*, 54 Cal. 319; *Smith v. Arapahoe Dist. Ct.*, 4 Colo. 235; *Hunt v. Jennings*, 5 Blackf. (Ind.) 196; 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 489; *Roush v. Morrison*, 47 Ind. 414; *State v. Passaic*, 36 N. J. L. 382; *Belvidere v. Warren R. Co.*, 34 N. J. L. 195; *State v. Jersey City*, 38 N. J. L. 85; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Angel v. Hume*, 17 Hun (N. Y.) 377; *Saco v. Gurney*, 34 Me. 14; *Macnawhoc Plantation v. Thompson*, 36 Me. 365; *Thayer v. Seavey*, 11 Me. 284; *Cummings v. Chandler*, 26 Me. 453; *Hampton v. Com.*, 19 Pa. St. 329; *Stoever v. Immell*, 1 Watts (Pa.) 258; *North Canal Street Road*, 10 Watts (Pa.) 351; 36 Am. Dec. 185; *Hatfield Tp. Road*, 4 Yeates (Pa.) 392; *Uwchlan Tp. Road*, 30 Pa. St. 156; *Hampton v. Com.*, 19 Pa. St. 329; *Fenelon's Petition*, 7 Pa. St. 173; *Rice v. Wright*, 46 Miss. 679; *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 677; *State v. Brookover*, 22 W. Va. 214; *U. S. v. Boisdore*, 8 How. (U. S.) 121; *McNulty v. Batty*, 10 How. (U. S.) 79; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. (U. S.) 541; *Ex parte McCardle*, 7 Wall. (U. S.) 506; *Gates v. Osborne*, 9 Wall. (U. S.) 569; *Baltimore, etc.*, R. Co. v. *Grant*, 98 U. S. 398; *Sherman v. Grinnell*, 123 U. S. 679; *Gurnee v. Patrick County*, 137 U. S. 141; *Morey v. Lockhart*, 123 U. S. 56; *Wilkinson v. Nebraska*, 123 U. S. 286; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *South Carolina v. Gaillard*, 101 U. S. 433; *Maggs v. Hunt*, 12 J. B. Moore 357; 4 Bing. 212; 13 E. C. L. 404; *Miller's Case*, 1 W. Bl. 451; *Grant v. Grant*, 12 S. Car. 29; 32 Am. Rep. 506; *Todd v. Landry*, 5 Martin (La.) 459; 12 Am. Dec. 479; *Wade v. St. Mary's Industrial School*, 43 Md. 178; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Com. v. Hampden County*, 6 Pick. (Mass.) 501.

The rule is the same where the statute expires by limitation. *Stoever v. Immell*, 1 Watts (Pa.) 258; *Com. v. Batty*, 1 Watts (Pa.) 382; *Gates v. Osborne*, 9 Wall. (U. S.) 567; *Illinois, etc.*, Canal v. *Chicago*, 14 Ill. 334.

All proceedings after the repeal are void. *Bank of Hamilton v. Dudley*, 2 Pet. (U. S.) 492; *Church v. Rhodes*, 6 How. Pr. (N. Y.) 281; *Fenelons' Petition*, 7 Pa. St. 173; *North Canal Street Road*, 10 Watts (Pa.) 351; 36 Am. Dec. 185.

2. *U. S. v. Boisdore*, 8 How. (U. S.) 121; *McNulty v. Batty*, 10 How. (U. S.) 79; *Gates v. Osborne*, 9 Wall. (U. S.) 567; *U. S. v. 6 Fermenting Tubs*, 1 Abb. (U. S.) 269; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 489; *Hunt v. Jennings*, 5 Blackf. (Ind.) 195; 33 Am. Dec. 465.

A statute repealing all divorce laws of a state ousts the court of jurisdiction in pending divorce cases *Grant v. Grant*, 12 S. Car. 29; 32 Am. Rep. 506.

The repeal of an act authorizing the governor to appoint special revenue agents, empowered to bring suits in the name of the state against defaulters, takes away the jurisdiction of the court in a suit pending under the act, so that no judgment can be rendered. *French v. State*, 53 Miss. 651.

Where a statute authorizing a writ of foreign attachment was repealed during the pendency of a suit begun under it, the suit was abated. *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 489.

So where a court was given jurisdiction to determine whether a road should be laid out, and in the midst of the proceedings the act granting the jurisdiction was repealed, the power of the court to proceed was taken away. *North Canal Street Road*, 10 Watts (Pa.) 351; 36 Am. Dec. 185; *In re North Street*, 1 Pears. (Pa.) 199.

3. *Veats v. Danbury*, 37 Conn. 412; *Downs v. Huntington*, 35 Conn. 588; *Smith v. Arapahoe Dist. Ct.*, 4 Colo. 235; *Illinois, etc.*, Canal v. *Chicago*, 14 Ill. 334; *Hunt v. Jennings*, 5 Blackf. (Ind.) 195; 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 489; *Gilleland v. Schuyler*, 9 Kan. 569; *Todd v. Landry*, 5 Martin (La.) 459; 12 Am. Dec. 479; *Macnawhoc Plantation v. Thompson*, 36 Me. 365; *Holmes v. French*, 68 Me. 525; *New London, etc.*, R. Co. v. *Boston, etc.*, R. Co., 102 Mass. 389; *Com. v. Hampden County*, 6 Pick. (Mass.) 501;

*Williams v. Middlesex County*, 4 Met. (Mass.) 76; *Den v. DuBois*, 16 N. J. L. 285; *Church v. Rhodes*, 6 How. Pr. (N. Y.) 281; *South Carolina v. Gailard*, 101 U. S. 433; *Hatfield Tp. Road*, 4 Yeates (Pa.) 392; *Stoeber v. Immell*, 1 Watts (Pa.) 258; *Com. v. Beaty*, 1 Watts (Pa.) 382; *Fenelon's Petition*, 7 Pa. St. 173; *Hampton v. Com.*, 19 Pa. St. 329; *Uwchlan Tp. Road*, 30 Pa. St. 156; *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *McRee v. McLenore*, 8 Heisk. (Tenn.) 440; *State v. Brookover*, 22 W. Va. 214; *Warne v. Beresford*, 2 M. & W. 848; *Butcher v. Henderson*, L. R., 3 Q. B. 335.

The repeal of an act which authorized a course of proceedings by a public officer, invalidates the proceedings, if unfinished, at whatever state they have arrived. *Williams v. Lincoln County*, 35 Me. 345; *Tivey v. People*, 8 Mich. 128; *Lamb v. Schottler*, 54 Cal. 319; *Hampton v. Com.*, 19 Pa. St. 329.

A power to dispose of public lands given by Congress to a territory is a mere trust in its nature, and unless executed is destroyed by a repeal of the law granting it. *Rice v. Minnesota*, etc., R. Co., 1 Black (U. S.) 358.

The right to recover, as well as the obligation to pay assessments, is extinguished by the repeal of the statute authorizing the assessments. *Hampton v. Com.*, 19 Pa. St. 329.

A gratuitous pension granted by a statute is not a vested right in the recipient and is destroyed by the repeal of the granting statute. *Dale v. Governor*, 3 Stew. (Ala.) 387.

The repeal of a statute under which taxes are levied, puts an end to the right to collect them, unless the repealing statute contains a provision preserving the taxes and the right to collect. *Gorley v. Sewell*, 77 Ind. 316; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Mount v. State*, 6 Blackf. (Ind.) 25; *Bleidorn v. Abel*, 6 Iowa 5; *Bryan v. Harvey*, 11 Tex. 311.

But where the re-enactment of the tax sections constitutes the repeal by implication, the re-enactment itself furnishes the inference that the legislature intended to preserve the right to collect the taxes. *Gorley v. Sewell*, 77 Ind. 319.

Should Congress by a resolution appoint the head of a department to settle or adjust any claims against the government, and should the head of such department in making such adjustment exceed his powers, Congress

may repeal such resolution and revoke the authority conferred upon him. *De Groot v. U. S.*, 5 Wall. (U. S.) 419.

A statute locating the seat of justice in any county is subject to repeal like any other statute. *Monet v. Jones*, 10 Smed. & M. (Miss.) 237.

Where the legislature authorizes a private individual or a corporation to raise a sum of money by lottery to effect an object of public concern, as a railroad, a bridge, or a canal, the statute by which the authority is created may be at any time repealed without violating any constitutional provision. *Freleigh v. State*, 8 Mo. 606.

So the assembly has power to repeal an act directing the payment of a judgment out of the public funds, and the claim is thereby indefinitely suspended. *Young v. Territory*, 1 Oregon 212.

The defense of usury cannot be set up or relied on after the repeal of the statute permitting it, even in suits pending at the time of the repeal. *Curtis v. Leavitt*, 15 N. Y. 152; *Ewell v. Daggs*, 108 U. S. 143.

By the repeal of the statute authorizing the making of assessments for the building of a plank road and the collection thereof, not only the remedy for the collection of the assessments, but also the lien or right itself is taken away. *Warren Tp. Gravel Road Co. v. Sleeth*, 53 Ind. 35; *Bradley v. Brandywine*, etc., *Turnpike Co.*, 53 Ind. 70.

A sale by an administrator under an order of court is void where the law empowering the court to make such order is repealed after the making of the order but before the sale. *Campau v. Chene*, 1 Mich. 411; *Bank of Hamilton v. Dudley*, 2 Pet. (U. S.) 523; *Davis v. Livingston*, 6 Ohio 225; *Paine v. Skinner*, 8 Ohio 162; *Perry v. Clarkson*, 16 Ohio 573; *Ludlow v. Wade*, 5 Ohio 503. The ground of these decisions was that the order was not a judgment settling the rights of the parties, and constituted nothing more than record evidence of the existence of the necessary facts to justify the proceeding, and the assent on the part of the court that the administrator should exercise the power previously vested in him.

Where the plaintiff got a verdict for one shilling and the judge did not grant a certificate to deprive him of costs until the time of its repeal, it was held that the power of certifying could not be exercised in such a case after the

scribing a penalty or forfeiture recoverable in a civil action, takes away the right of recovery,<sup>1</sup> whether an action has been

repeal, and that the certificate was void. *Morgan v. Thorne*, 7 M. & W. 400.

Where an action is brought and judgment recovered in a case where title was in question and the plaintiff would have had his costs, either by the presiding judge's certificate under one statute, or by a judge's order to which he would have been entitled *ex debito justitiae* under another statute, but he obtained neither until after both of those acts stood repealed, it was held that the powers under them had ceased to exist and could not be exercised in the plaintiff's favor. *Butcher v. Henderson*, L. R., 3 Q. B. 335. *Contra Restall v. London, etc.*, R. Co., L. R., 3 Exch. 141. See *Doe v. Holt*, 21 L. J. Ex. 335; *Wood v. Riley*, L. R., 3 C. P. 26; *Hobson v. Neale*, 22 L. J. Ex. 25; *Doe v. Roe*, 22 L. J. Ex. 17.

1. *Pope v. Lewis*, 4 Ala. 487; *Carlisle v. State*, 42 Ala. 523; *State v. Tombeckbee Bank*, 1 Stew. (Ala.) 347; *Tombeckbee Bank v. State*, 1 Minor (Ala.) 425; *Crawford v. State*, 1 Minor (Ala.) 143; *Judson v. State*, 1 Minor (Ala.) 150; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Curtis v. Leavitt*, 15 N. Y. 229; *Van Dyck v. McQuade*, 86 N. Y. 38; *Hartung v. People*, 22 N. Y. 95; *Knox v. Baldwin*, 80 N. Y. 610; *Smith v. Banker*, 3 How. Pr. (N. Y.) 142; *Victory Webb Printing Co. v. Beecher*, 26 Hun (N. Y.) 48; *Fischer v. New York Cent., etc.*, R. Co., 46 N. Y. 656; *State v. Youmans*, 5 Ind. 281; *Wood v. Kennedy*, 19 Ind. 68; *Hunt v. Jennings*, 5 Blackf. (Ind.) 195; 33 Am. Dec. 465; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 489; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 239; *Denver, etc.*, R. Co. v. *Crawford*, 11 Colo. 598; *Gregory v. German Bank*, 3 Colo. 332; 25 Am. Rep. 760; *Oriental Bank v. Freese*, 18 Me. 109; 36 Am. Dec. 701; *Gaul v. Brown*, 53 Me. 496; *Herald v. State*, 36 Me. 62; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *Schooner Rachel v. U. S.*, 6 Cranch (U. S.) 329; *U. S. v. Passmore*, 4 Dall. (U. S.) 372; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327; *Norris v. Crocker*, 13 How. (U. S.) 429; *Seymour v. McCormick*, 16 How. (U. S.) 480; *Belvidere v. Warren R. Co.*, 34 N. L. 193; *Menard County v. Kincaid*, 71 Ill. 587; *Parmelee v. Lawrence*, 44

Ill. 415; *Mix v. Illinois Cent. R. Co.*, 116 Ill. 502; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Bay City, etc.*, R. Co. v. *Austin*, 21 Mich. 391; *Musgrove v. Vicksburg, etc.*, R. Co., 50 Miss. 677; *Anding v. Levy*, 57 Miss. 57; *Chalker v. Ives*, 55 Pa. St. 81; *Com. v. Duane*, 1 Binn. (Pa.) 601; 2 Am. Dec. 497; *Abbott v. Com.*, 8 Watts (Pa.) 517; 34 Am. Dec. 492; *Com. v. Shopp*, 2 Woodw. (Pa.) 123; *Governor v. Howard*, 1 Murph. (N. Car.) 465; *Rood v. Chicago, etc.*, R. Co., 43 Wis. 146; *Com. v. Welch*, 2 Dana (Ky.) 330; *Rex v. McKenzie*, R. & R. C. C. 429.

In *Eastman v. Clackamas County*, 32 Fed. Rep. 24, *Deady, J.*, observed: "In the case of what are called penal statutes, there has been a more marked disposition on the part of the courts to hold that a repeal thereof destroys or takes away all existing rights of action thereunder without any express declaration to that effect."

The foundation of the principle is that after the repeal of the statute, no law exists which provides for the penalty or authorizes its enforcement. *Anding v. Levy*, 57 Miss. 56.

The repeal of an act imposing a penalty is itself a remission. *Maryland v. Baltimore, etc.*, R. Co., 3 How. (U. S.) 534; *Norris v. Crocker*, 13 How. (U. S.) 429.

A party has no vested right in the penalties inflicted by the revenue laws for the omission of another to place the proper revenue stamp upon an instrument, which cannot be taken away by an amendment of the act imposing the penalties. *Hoppock v. Stone*, 49 Barb. (N. Y.) 527.

A highly penal statute which made the officers of a corporation, in case they neglected to make certain reports, individually liable for all corporate debts contracted while they were such officers, whether the creditor was thereby injured or not, took away all existing rights of action thereunder, including one on which an action was brought before the passage of the repealing act. *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327.

Where a statute imposing a penalty upon any corporation therein named that neglected or refused to make the report for the purposes of taxation required by it, was repealed, it was held

begun<sup>1</sup> or not;<sup>2</sup> for there is no vested right in the penalty until its actual recovery by final judgment.<sup>3</sup>

In some cases, however, where the right to recover a penalty is destroyed by the repeal of the statute giving it, there may be still a recovery for the violation of the statute on common-law grounds. Thus, where a statute prohibits an act, and a violation of its provisions is such an act of negligence as, on common-law principles, subjects the offender to a civil action for damages on account of the loss or injury thereby caused, the repeal of the statute, while it destroys the right to recover the penalty, does not take away or impair a right of action which has already accrued by reason of such negligence.<sup>4</sup>

In cases where by statute it is made unlawful to demand and receive compensation, as interest, freights, duties, etc., in excess

that the right to collect such penalties was destroyed, although the repealing act saves the right to collect any tax accrued or accruing under the repealed act prior to its repeal. *Com. v. Standard Oil Co.*, 101 Pa. St. 119. See also *Belvidere v. Warren R. Co.*, 34 N. J. L. 196.

The repeal of an act of the assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. *Governor v. Howard*, 1 *Murph.* (N. Car.) 465.

In the case of a penalty imposed on a delinquent tax payer, taken away by repeal, he need not, when he offers to redeem, tender the amount nor interest thereon. *Snell v. Campbell*, 24 *Fed. Rep.* 580.

1. *Bay City, etc., R. Co. v. Austin*, 21 *Mich.* 390; *People v. Westchester County*, 4 *Barb.* (N. Y.) 64; *Van Dyck v. McQuade*, 86 N. Y. 38; *Smith v. Banker*, 3 *How. Pr.* (N. Y.) 141; *Fire Department v. Ogden*, 59 *How. Pr.* (N. Y.) 21; *Rood v. Chicago, etc., R. Co.*, 43 *Wis.* 147; *Dillon v. Linder*, 36 *Wis.* 344.

So, where the act giving a penalty was repealed after the verdict but before final judgment, the right of recovery was lost. *Bay City, etc., R. Co. v. Austin*, 21 *Mich.* 390.

No judgment can be rendered in any suit for a penalty after the repeal of the act by which it was imposed. The repeal of a statute puts an end to all suits founded upon it, even though commenced before the date of the repeal. *Schooner Rachel v. U. S.*, 6 *Cranch* (U. S.) 329; *The Irresistible*, 7 *Wheat.*

(U. S.) 551; *U. S. v. Preston*, 3 *Pet.* (U. S.) 57; *Pope v. Lewis*, 4 *Ala.* 489; *Lewis v. Foster*, 1 *N. H.* 61; *Rex v. London*, 3 *Burr.* 1456.

2. *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Smith v. Banker*, 3 *How. Pr.* (N. Y.) 141; *Fire Department v. Ogden*, 59 *How. Pr.* (N. Y.) 21.

3. *Com. v. Welch*, 2 *Dana* (Ky.) 330; *Yeaton v. U. S.*, 5 *Cranch* (U. S.) 281; *Tombeckbee Bank v. State*, 1 *Stew.* (Ala.) 347.

"There is no such thing as a vested interest in an unenforced penalty." *Gregory v. German Bank*, 3 *Colo.* 332; 25 *Am. Rep.* 760; *Denver, etc., R. Co. v. Crawford*, 11 *Colo.* 600. But see *Taylor v. Rushing*, 2 *Stew.* (Ala.) 161, in which a penalty accruing to an individual under a statute was held to be a vested right, and the repeal of the statute pending a writ of error was held not to divest the right; *distinguishing* *Yeaton v. U. S.*, 5 *Cranch* (U. S.) 281, and *Tombeckbee Bank v. State*, 1 *Stew.* (Ala.) 347, which held that the penalty must have been actually recovered to be vested, on the ground that in those cases the penalty was due to the state and not to an individual. See also *Eastman v. Clackamas County*, 32 *Fed. Rep.* 21.

4. *Grey v. Mobile Trade Co.*, 55 *Ala.* 387; 28 *Am. Rep.* 729; *Gorman v. McArdle*, 67 *Hun* (N. Y.) 484; *Vanderkar v. Rensselaer, etc., R. Co.*, 13 *Barb.* (N. Y.) 393.

The repeal of the statute requiring fire escapes, does not destroy a right of action for an injury caused by a prior accident due to the failure to provide fire escapes. *Gorman v. McArdle*, 67 *Hun* (N. Y.) 484.

of that named in the statute, from one who protests against it, and a penalty for a violation is given to the one wronged, the repeal of the statute, while it prevents the recovery of the penalty, does not affect the common-law right to recover the excess wrongfully received and detained.<sup>1</sup>

1. *Graham v. Chicago, etc., R. Co.*, 53 Wis. 486; *Smith v. Chicago, etc., R. Co.*, 49 Wis. 443; *Noyes v. State*, 46 Wis. 250; 32 Am. Rep. 710; *Whitaker v. Pope*, 2 Woods (U. S.) 463. See *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450; *Harris v. Townsend*, 56 Vt. 716.

In *Graham v. Chicago, etc., R. Co.*, 53 Wis. 487, it was held that the act of a railroad company demanding and receiving for services any sum in excess of the rates fixed by law, was an unlawful act; the money was therefore unlawfully received, and, upon the principles of common law, the right of action immediately accrued to recover the same back, which was not affected by the repeal of the statute making the act unlawful. In delivering the opinion of the court, Taylor, J., said: "This right of action to recover the excess paid above the legal rate of interest prescribed by the statute is not given by the statute, but is a result of the statute, and depends upon the principles of the common law for its maintenance. The statute makes it unlawful to take more than a fixed rate. All sums taken in excess of such fixed rate are unlawfully taken, and upon the principles of the common law a right immediately accrues to the person paying the unlawful excess to recover the same back. So the act of a railroad company demanding and receiving for services any sum in excess of the rates fixed by law is an unlawful act; the money is therefore unlawfully received, and, upon the principles of the common law, a right of action immediately accrues to the person who pays such unlawful charges to recover the same back again. The lawfulness of an act depends upon the state of the law at the time it is done, and, if it was unlawful then, we have seen, by the decisions of this court above cited, that no repeal of the law which rendered such act unlawful can make it lawful or valid. The plaintiffs' action to recover for the unlawful act does not depend upon the statute, except so far as the statute gives character to

the act at the time it was done. The only necessity of referring to the statute at all, for the purposes of sustaining the action, is to determine whether, upon the principles of the common law, a right of action exists in favor of the plaintiffs."

In *New York*, before distress for rent was abolished by statute, a penalty was imposed for the benefit of the landlord on one who assisted a tenant in removing goods from the leased premises in order to avoid the payment of rent. It was held that the right of the landlord to recover the penalty was not affected by the subsequent abolishment of the right of distress for rent. *Palmer v. Conly*, 4 Den. (N. Y.) 374; *aff'd* 2 N. Y. 182. Though this decision proceeded on the theory that the latter act did not operate retroactively on the prior statute, still the court stated that when a penalty is given to an individual as a satisfaction for injury done him in violating a statute, as well as punishment to the offender, the right to the penalty is vested in the injured person whether suit is begun or not, and is not affected by the subsequent repeal of the statute. *Citing Company of Cutlers v. Ruslin, Skin.* 363; *College of Physicians v. Harrison*, 9 B. & C. 524; 17 E. C. L. 433. In later cases, however, in the same state, it is decided that had the later statute actually repealed the first, the right to the penalty would have been destroyed. *Fisher v. New York, etc., R. Co.*, 46 N. Y. 656. See *Sturgis v. Spofford*, 45 N. Y. 446.

So where a usury law expressly provided that a person paying usurious interest might sue for and recover three times the excess of the money paid over and above the lawful interest, it was held that the borrower might waive his right under the statute and sue for and recover simply the excess over and above the legal rates fixed by the statute. *Lee v. Peckham*, 17 Wis. 383; *Wood v. Lake*, 13 Wis. 84. See *Gill v. Rice*, 13 Wis. 549; *Fay v. Lovejoy*, 20 Wis. 407; *Dole v. Northrop*, 19 Wis. 249.

**Payment Under Protest.**—Whether an

(6) **CRIMINAL OFFENSES.**—When a statute creating a criminal offense is expressly repealed, or any portion of it that is essential to sustain an indictment drawn under its provisions is stricken out by a law subsequently enacted, the former, unless a contrary intent on the part of the law-makers appears from an express saving clause, or by necessary implication from the language in the repealing statute,<sup>1</sup> will be held inoperative, even as to offenses committed before the passage of the later act;<sup>2</sup> and every step

excess voluntarily paid can be recovered back is doubtful, for the payment being voluntary the plaintiff can not complain of any force or wrong done by the defendant, but must rest his recovery entirely upon the unlawfulness of the act of the defendant in receiving the same in violation of the statute. *Graham v. Chicago*, etc., R. Co., 53 Wis. 486. See *Noyes v. State*, 44 Wis. 254; 32 Am. Rep. 710, where it was held that to recover back license fees paid under an invalid statute, the payment must have been made under protest, citing *Van Buren v. Downing*, 41 Wis. 122. Compare *Mobile*, etc., R. Co. v. *Steiner*, 61 Ala. 594, and cases cited, where it was said that the payment of excess of freight is from its nature involuntary and may be recovered though not paid under protest.

1. Where there is a sufficient saving clause in the repealing act, offenses committed before the repeal of a statute may be punished. *Com. v. Edwards*, 4 Gray (Mass.) 1; *People v. Gill*, 7 Cal. 357. See *supra*, this title, *Provisos, Exceptions, and Saving Clauses*.

2. *Freeman v. State*, 6 Port. (Ala.) 372; *State v. Allaire*, 14 Ala. 435; *Griffin v. State*, 39 Ala. 541; *Aaron v. State*, 40 Ala. 307; *Carlisle v. State*, 42 Ala. 523; *Hirschburg v. People*, 6 Colo. 145; *People v. Tisdale*, 57 Cal. 104; *Donaldson v. State*, 9 Fla. 402; *Higinbotham v. State*, 19 Fla. 557; *Bank of St. Mary's v. State*, 12 Ga. 475; *Taylor v. State*, 7 Blackf. (Ind.) 93; *State v. Lloyd*, 2 Ind. 659; *Howard v. State*, 5 Ind. 183; *Jones v. State*, 1 Iowa 395; *Com. v. Cain*, 14 Bush (Ky.) 525; *Speckert v. Louisville*, 78 Ky. 287; *Com. v. Welch*, 2 Dana (Ky.) 330; *State v. O'Connor*, 13 La. Ann. 486; *Heald v. State*, 36 Me. 62; *Com. v. McDonough*, 13 Allen (Mass.) 581; *Com. v. Pattee*, 12 Cush. (Mass.) 501; *Com. v. Marshall*, 11 Pick. (Mass.) 350; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Peo-*

*ple v. Hobson*, 48 Mich. 27; *Bay City*, etc., R. Co. v. *Austin*, 21 Mich. 390; *Wheeler v. State*, 64 Miss. 462; *Teague v. State*, 39 Miss. 516; *Mastronada v. State*, 60 Miss. 86; *Lindsey v. State*, 65 Miss. 542; *Lewis v. Foster*, 1 N. H. 61; *Den v. DuBois*, 16 N. J. L. 285; *State v. Massey*, 103 N. Car. 356; *State v. Cress*, 4 Jones (N. Car.) 421; *State v. Nutt*, Phill. (N. Car.) 20; *Governor v. Howard*, 1 Murph. (N. Car.) 465; *State v. Wise*, 66 N. Car. 120; *State v. Long*, 78 N. Car. 571; *State v. Baltimore*, etc., R. Co., 12 Gill & J. (Md.) 399; 38 Am. Dec. 319; *Keller v. State*, 12 Md. 322; 71 Am. Dec. 596; *Annapolis v. State*, 30 Md. 112; *Palmer v. Conly*, 4 Den. (N. Y.) 377; *Butler v. Palmer*, 1 Hill (N. Y.) 329; *Hartung v. People*, 22 N. Y. 95; *People v. Police Board*, 16 Abb. Pr. (N. Y.) 473; *Smith v. Banker*, 3 How. Pr. (N. Y.) 142; *People v. Van Pelt*, 4 How. Pr. (N. Y.) 36; *Calkins v. State*, 14 Ohio St. 222; *Com. v. Duane*, 1 Binn. (Pa.) 601; 2 Am. Dec. 497; *Abbott v. Com.*, 8 Watts (Pa.) 517; 34 Am. Dec. 492; *Genkinger v. Com.*, 32 Pa. St. 99; *Stoever v. Immell*, 1 Watts (Pa.) 258; *State v. Fletcher*, 1 R. I. 193; *State v. Cole*, 2 McCord (S. Car.) 1; *State v. Addington*, 2 Bailey (S. Car.) 516; 23 Am. Dec. 150; *Roberts v. State*, 2 Overt. (Tenn.) 423; *Bennett v. State*, 2 Yerg. (Tenn.) 472; *Brothers v. State*, 2 Coldw. (Tenn.) 201; *Montgomery v. State*, 2 Tex. App. 618; *Tuton v. State*, 4 Tex. App. 472; *Pinckard v. State*, 13 Tex. App. 373; *Mulkey v. State*, 16 Tex. App. 53; *Wall v. State*, 18 Tex. 682; 70 Am. Dec. 302; *Greer v. State*, 22 Tex. 588; *State v. Meader*, 62 Vt. 458; *Leftwich's Case*, 5 Rand. (Va.) 657; *Harrison v. Allen*, Wythe (Va.) 291; *Scott v. Com.*, 2 Va. Cas. 54; *State v. Ingersoll*, 17 Wis. 631; *Rood v. Chicago*, etc., R. Co. 43 Wis. 146; *Anonymous*, 1 Wash. (U. S.) 84; *U. S. v. Finlay*, 1 Abb. (U. S.) 364; *U. S. v. Passmore*, 4 Dall. (U. S.) 372; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450; *U. S. v. Tynen*, 11 Wall.



thereafter taken in a criminal proceeding will be utterly void.<sup>1</sup> The repeal of the law after the conviction of the offender, but before sentence, has the same effect, for the act punished must be criminal when judgment is demanded, and authority to render it must still reside in the court.<sup>2</sup>

(7) JUDGMENTS—APPEALS. —A final determination by judgment or sentence is vested and, therefore is unaffected by the subsequent repeal of the statute on which it depended.<sup>3</sup> Where the judg-

(U. S.) 88; *Norris v. Crocker*, 13 How. (U. S.) 429; *The Irresistible*, 7 Wheat. (U. S.) 551; *U. S. v. 6 Fermenting Tubs*, 1 Abb. (U. S.) 268; *Schooner Rachel* v. U. S., 6 Cranch (U. S.) 329; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *U. S. v. The Helen*, 6 Cranch (U. S.) 203; *R. v. Swann*, 4 Cox 108; *Rex v. London*, 3 Burr. 1456; *Miller's Case*, 1 W. Bl. 451; *Rex v. McKenzie*, R. & R. C. C. 429; *Reg. v. Denton*, 16 Q. B. 832; 18 Q. B. 761; 83 E. C. L. 761; *Charrington v. Meatheringham*, 2 M. & W. 228; *Reg. v. Mawgan*, 8 Ad. & El. 496; 35 E. C. L. 447.

Where an act amendatory of a previously existing criminal statute differs materially from the latter, an indictment drawn under the prior statute cannot be proceeded on after the passage of the amendatory act, even though it is provided by statute "that when a part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment." *State v. Massey*, 103 N. Car. 356.

The rule that the repeal of a criminal statute discharges all prisoners held under it, resting on the presumption of legislative pardon, does not exist where there is no room for such presumption; and, therefore, where a statute repealed is immediately re-enacted and is held to have continued from the beginning, criminal prosecutions under it are not abated. *State v. Brewer*, 22 La. Ann. 273.

1. *Hirschburg v. People*, 6 Colo. 145. In this case *habeas corpus* proceedings were held to lie to release the prisoner. A motion to quash the bill or indictment is the common proceeding in cases where the statute has been repealed pending the prosecution. *U. S. v. Finlay*, 1 Abb. (U. S.) 364.

2. *State v. Williams*, 97 N. Car. 455;

*State v. Long*, 78 N. Car. 571; *State v. Nutt*, Phill. (N. Car.) 20; *State v. Wise*, 66 N. Car. 120; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Hartung v. People*, 22 N. Y. 96; *Calkins v. State*, 14 Ohio St. 231; *Com. v. Duane*, 1 Binn. (Pa.) 601; 2 Am. Dec. 497; *Schooner Rachel* v. U. S., 6 Cranch (U. S.) 329; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *Norris v. Crocker*, 13 How. (U. S.) 429; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Wheeler v. State*, 64 Miss. 462; *Mulkey v. State*, 16 Tex. App. 53; *Key v. Goodwin*, 4 M. & P. 341.

3. *Broughton v. Branch Bank*, 17 Ala. 828; *Aaron v. State*, 40 Ala. 307; *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 239; *Taylor v. State*, 7 Blackf. (Ind.) 93; *State v. Loyd*, 2 Ind. 659; *Thompson v. Bassett*, 5 Ind. 535; *Wood v. Kennedy*, 19 Ind. 68; *State v. O'Conner*, 13 La. Ann. 486; *State v. Brewer*, 22 La. Ann. 273; *Saco v. Gurney*, 34 Me. 14; *Heald v. State*, 36 Me. 62; *Gaul v. Brown*, 53 Me. 496; *Foster v. Medfield*, 3 Met. (Mass.) 1; *Belvidere v. Warren R. Co.*, 34 N. J. L. 193; same case in error, 35 N. J. L. 584; *Fisher v. New York, etc., R. Co.*, 46 N. Y. 644; *State v. Cress*, 4 Jones (N. Car.) 421; *State v. Long*, 78 N. Car. 576; *Calkins v. State*, 14 Ohio St. 222; *State v. Fletcher*, 1 R. I. 193; *Greer v. State*, 22 Tex. 588; *Hubbard v. State*, 2 Tex. App. 506; *Mulkey v. State*, 16 Tex. App. 53; *Montgomery v. State*, 2 Tex. App. 618; *State v. Addington*, 2 Bailey (S. Car.) 516; 23 Am. Dec. 150; *State v. Ingersoll*, 17 Wis. 631; *State v. Gumber*, 37 Wis. 208; *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146; *State v. Campebl*, 44 Wis. 529; *State v. Van Stralen*, 45 Wis. 437; *Leschi v. Territory*, 1 Wash. Ter. 13; *Snell v. Campbell*, 24 Fed. Rep. 880; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *Rex v. McKenzie*, R. & R. C. C. 429; *Rex v. Heath*, 2 East P. C. 609; *Rex v. Davis*, 1 Leach C. C. 271.

In *State v. Addington*, 2 Bailey (S.

ment of an inferior court is *res adjudicata*, the repeal of the statute pending the appeal from the judgment does not prevent the enforcement thereof after the decision of the reviewing court;<sup>1</sup> but if final judgment cannot be given until the appeal is decided, an intermediate repeal of the statute will abate the proceedings.<sup>2</sup>

(b) **Connected with, but Independent of, Repealed Statute.**—While rights of action which are expressly given by statute and do not exist out-

Car.) 519; 23 Am. Dec. 150, Johnson, J., in delivering the opinion of the court, said: "After final judgment, there is no means by which the court can regain possession of the cause; an execution follows as a necessary consequence. If, for instance, the repealing law had intervened between the judgment or sentence and the execution, there is no process by which the court could reverse or modify the judgment."

In capital cases in states where the fixing of the date of execution is an essential part of the sentence (Russell v. State, 33 Ala. 372), if the execution does not take place on the day first settled, a repeal of the statute on which the conviction depends, before resentence, discharges the prisoner. Aaron v. State, 40 Ala. 307.

1. People v. Hobson, 48 Mich. 27. In this case, in which judgment under the old law was removed by *certiorari* to a higher court and there affirmed after the repeal of the statute, it was held not to be rendered void by the repeal, on the ground that no new judgment was given in the higher court.

2. Denver, etc., R. Co. v. Crawford, 11 Colo. 598; Gregory v. German Bank, 3 Colo. 332; Union Pac. R. Co. v. Proctor, 12 Colo. 194; Mulkey v. State, 16 Tex. App. 53; Pinckard v. State, 13 Tex. App. 373; Sheppard v. State, 1 Tex. App. 522; 28 Am. Rep. 422; Montgomery v. State, 2 Tex. App. 618; Freese v. State, 14 Tex. App. 31; Prather v. State, 14 Tex. App. 453; Tuton v. State, 4 Tex. App. 472; Hubbard v. State, 2 Tex. App. 506; Fitze v. State, 13 Tex. App. 372; Lewis v. Foster, 1 N. H. 61; Speckert v. Louisville, 78 Ky. 287; Com. v. Sherman, 85 Ky. 686; U. S. v. Peggy, 1 Cranch (U. S.) 103; Musgrove v. Vicksburg, etc., R. Co., 50 Miss. 677; State v. Daley, 29 Conn. 272; Atwell v. Grant, 11 Md. 104; Keller v. State, 12 Md. 325; 71 Am. Dec. 596; State v. Norwood, 12 Md. 195; Price v. Nesbitt, 29 Md. 263; Wade v. St. Mary's Industrial School,

43 Md. 178; Annapolis v. State, 30 Md. 112; Gilleland v. Schuyler, 9 Kan. 569; Hartung v. People, 22 N. Y. 95; Mouras v. Schooner A. C. Brewer, 17 La. Ann. 82; State v. King, 12 La. Ann. 593.

Even after the judgment of affirmance on appeal, when the repeal took place prior thereto but was not brought to the notice of the court before its decision, a motion to strike out the affirmance and enter a judgment of reversal made at the same term of the court was granted. Keller v. State, 12 Md. 322; 71 Am. Dec. 596.

In admiralty cases, an appeal suspends a sentence altogether; and it is not *res adjudicata* until final sentence of the appellate court be pronounced. Hence, the repeal of a statute after an appeal has been taken and before final judgment in such a case prevents the recovery of a penalty based on the statute. Yeaton v. U. S., 5 Cranch (U. S.) 281.

A final determination in an inferior court of admiralty where a right of appeal exists and has been claimed, is not a definitive condemnation within the meaning of the article of the convention of September 30, 1800, with France, and the court will, under a treaty made since the original, reverse the decree, although it was correct when made, and decree restoration of the property condemned. U. S. v. Peggy, 1 Cranch (U. S.) 103.

An act repealing the stamp laws removes all objection to a bond for want of a stamp, and authorizes the appellate court to reverse the decision of an inferior court refusing to admit the bond in evidence because it was not stamped, although the repealing act was not passed until after such decision. State v. Norwood, 12 Md. 195.

If laws which give the court jurisdiction in certain cases expire, the jurisdiction ceases, although an appeal is actually pending at the time of the expiration. U. S. v. Boisdore, 8 How. (U. S.) 121; McNulty v. Batty, 10 How. (U. S.) 79.

side thereof, are necessarily destroyed by a repeal, rights or causes of action which accrue to a party and indirectly depend upon the statute, but which can be enforced independently thereof, are not necessarily destroyed by its repeal. Under such circumstances the right to recover is based on the common law, not on the statute.<sup>1</sup>

c. OF REPEAL AND RE-ENACTMENT.—The re-enactment of a previous statute, or a provision of it, is construed not to be an implied repeal of the enactment, but a continuation thereof, so that all interests under the original statute remain unimpaired.<sup>2</sup> An express repeal and re-enactment of the same act has a similar ef-

1. *Graham v. Chicago, etc., R. Co.*, 53 Wis. 486; *Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729; *Coggeshall v. Groves*, 10 R. I. 18. See *Palmer v. Conly*, 4 Den. (N. Y.) 378; affirmed 2 N. Y. 182.

2. *Hancock v. Perry Dist. Tp.*, 78 Iowa 556; *Junction City v. Webb*, 44 Kan. 71; *Gorley v. Sewell*, 77 Ind. 319; *Kesler v. Smith*, 66 N. Car. 154; *State v. Sutton*, 100 N. Car. 474; *Forbes v. Board of Health*, 27 Fla. 189; *Callahan v. Jennings*, 16 Colo. 471; *Burwell v. Tullis*, 12 Minn. 572; *Barton v. Moscow School Dist.* (Idaho 1892), 29 Pac. Rep. 43; *State v. Wish*, 15 Neb. 448; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Randolph v. Larned*, 27 N. J. Eq. 557; *Capron v. Strout*, 11 Nev. 304; *In re Prime's Estate*, 1 36 N. Y. 347; *Calhoun v. Delhi, etc., R. Co.*, 28 Hun (N. Y.) 379; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335; *Fisher v. New York, etc., R. Co.*, 46 N. Y. 656; *Syracuse Sav. Bank v. Seneca Falls*, 86 N. Y. 317; *Goillotel v. New York*, 87 N. Y. 441; *People v. Montgomery County*, 67 N. Y. 109; *Moore v. Mansert*, 49 N. Y. 332; *Ely v. Holton*, 15 N. Y. 595; *Barclay v. Leas*, 9 Pa. Co. Ct. Rep. 314; *State v. Kibling*, 63 Vt. 636; *Cox v. North Wisconsin Lumber Co.*, 82 Wis. 141; *Fullerton v. Spring*, 3 Wis. 667; *Laude v. Chicago, etc., R. Co.*, 33 Wis. 640; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450; *Central Pac. R. Co. v. Shackelford*, 63 Cal. 261, following the rule of the Political Code, § 325, and apparently overruling, though not mentioning, *Billings v. Harvey*, 6 Cal. 381; *Billings v. Hall*, 7 Cal. 3; *Morton v. Folger*, 15 Cal. 284; *Clarke v. Huber*, 25 Cal. 594; *Bensley v. Ellis*, 39 Cal. 313; *People v. Tisdale*, 57 Cal. 104, which cases held that "the re-enactment creates anew the rule of action; and even if there was not the slightest differ-

ence in the phraseology of the two, the latter alone can be referred to as the law, and the former stands to all intents as if absolutely and expressly repealed." See dissenting opinion in *People v. McNulty*, 93 Cal. 427; *Wilkinson v. Ketler*, 59 Ala. 306.

Where an act of the legislature is repealed and is re-enacted at the same time with some changes, the act repealed has no force whatever only so far as it is continued in force by saving clauses and exceptions. *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559.

The repeal and simultaneous re-enactment of the same law is a mere affirmation of the first law, and all prosecutions and rights based on the first law, and prosecutions for offenses against provisions contained in it, which were committed before the repeal, are unaffected. *Lisbon v. Clark*, 18 N. H. 234; *Laude v. Chicago, etc., R. Co.*, 33 Wis. 640; *Fullerton v. Spring*, 3 Wis. 667; *Hurley v. Texas*, 20 Wis. 634; *State v. Gumber*, 37 Wis. 302; *Middleton v. New Jersey, etc., R. Co.*, 26 N. J. Eq. 269; *Randolph v. Larned*, 27 N. J. Eq. 562; *Dashiell v. Baltimore*, 45 Md. 615; *Ballin v. Ferst*, 55 Ga. 546; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 450; *Anding v. Levy*, 57 Miss. 59.

A city does not by releasing its charter under a prior legislative act and accepting one under a later act, release its right to priority of lien for taxes, although the later act specifies priority "from and after the passage of this act," where the two acts are identical; the later being a re-enactment and continuation of the earlier. *Barclay v. Leas*, 9 Pa. Co. Ct. Rep. 314.

A simultaneous repeal and re-enactment of a general corporation law does not terminate the existence of corporations formed under the first act. *United*

fect,<sup>1</sup> except where an interval of time comes between the two legislative operations.<sup>2</sup> In the latter case, it seems that the repeal follows the general rule and destroys all inchoate dependent interests.<sup>3</sup>

Hebrew, etc., *Assoc. v. Benshimol*, 130 Mass. 325.

The validity of the by-laws or ordinances of a town or city is not affected by the repeal and re-enactment of the law giving them power and authority to make them. *Chamberlain v. Evansville*, 77 Ind. 542; *Lisbon v. Clark*, 18 N. H. 234.

The rule in the text has been applied to general revisions of existing laws which are substantially re-enacted. *Scheffels v. Tabert*, 46 Wis. 439; *Middleton v. New Jersey, etc.*, R. Co., 26 N. J. Eq. 269; *Ballin v. Ferst*, 55 Ga. 546; *State v. Brewer*, 22 La. Ann. 273, citing *Holmes v. Wiltz*, 11 La. Ann. 439; *Stafford v. Creditors*, 11 La. Ann. 470; *State v. Clay*, 12 La. Ann. 431; *Levois v. Gerke*, 12 La. Ann. 828, *distinguishing State v. King*, 12 La. Ann. 593; *State v. Morgan*, 12 La. Ann. 712; *State v. O'Conner*, 13 La. Ann. 480. And to the repeal and re-enactment of criminal laws permitting punishment under the re-enactment of offenses committed under the old law. *State v. Wish*, 15 Neb. 448; *State v. Gumber*, 37 Wis. 208.

A re-enactment by an amendatory statute does not prevent a prosecution for a felony previously committed, where the two acts interfuse and blend so fully and completely that between them there is no period of intervening time in which the act was not an offense. *Sage v. State*, 127 Ind. 15.

It has been held where the repealing law had by its own operation accomplished its purpose, its re-enactment did not continue it. *Emporia v. Norton*, 16 Kan. 236.

The simple re-enactment of the law does not necessarily repeal it, for the general intent of the legislature must be followed. *Cordell v. State*, 22 Ind. 1; *Kesler v. Smith*, 66 N. Car. 156; *Cramer v. Milwaukee*, 18 Wis. 257; *Martindale v. Martindale*, 10 Ind. 566; *Alexander v. State*, 9 Ind. 337.

Of two inconsistent statutes re-enacted in a subsequent act, the one originally passed at the later date will prevail and operate as a repeal of the other; since even though the re-enactment purports to repeal all prior acts, such original statute will be treated,

not as new enactments but as continuations. *Northern Pac. R. Co. v. Ellison*, 3 Wash. 226.

**Re-enactment.**—A statute declaring that a repealed statute "is hereby re-enacted and declared to be in full force." is a valid enactment. *In re Barry*, 12 R. I. 51.

1. *Scheffels v. Tabert*, 46 Wis. 439; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225; *Fullerton v. Spring*, 3 Wis. 667; *Hurley v. Texas*, 20 Wis. 634; *Laude v. Chicago, etc.*, R. Co., 33 Wis. 640; *Glentz v. State*, 38 Wis. 549. *Contra*, *Hirschburg v. People*, 6 Colo. 145. In this case the court said: "The fact that the legislature substituted for the repealed section substantially a similar provision, can make no difference. If the repeal of a statute is effected by express and positive words, the only question is the effect of the repeal."

The substantial re-enactment by the second section of a statute, of the same act that was repealed by the first section, rendered the repeal inoperative and left the former law in force, and commissioners appointed under the old law and whose terms had not expired remained in office. *State v. Baldwin*, 45 Conn. 134.

When the legislature amended a certain section of the law, and then by a later section in the amendatory law directed that the original section be stricken out and made to read as follows, inserting the original section as it stood before amendment, it was held to be a mere re-enactment thereof unamended and not a repeal and re-enactment. *Cramer v. Milwaukee*, 18 Wis. 257.

2. *Kane v. New York, etc.*, R. Co., 49 Conn. 139. See *Sage v. State*, 127 Ind. 15.

3. *Kane v. New York, etc.*, R. Co., 49 Conn. 139. In this case, the facts were that an act imposing a duty on the railroad company whenever ordered by certain specified commissioners, was repealed, and then, a year later, re-enacted, and it was held that the obligation to perform the duty under an order of the commissioners, made while the repealed statute was in force, was discharged by the repeal and not revived by the re-enactment.

d. OF REPEAL OF REPEALING ACT—REVIVOR.—Where an act or a rule of the common law<sup>1</sup> is repealed, and the repealing enactment is afterwards expressly or impliedly<sup>2</sup> repealed by another, which manifests no intention that the first shall continue repealed, the rule at common law was that the repeal of the second act revived the first, and, moreover, revived it *ab initio*, and not merely from the time of the passage of the revived act.<sup>3</sup> This is still the rule where unchanged by statute.<sup>4</sup> The time the intermediate repealing statute is in force is regarded as a suspension only of the

1. Mathewson v. Phoenix Iron Foundry, 20 Fed. Rep. 281; State v. Rollins, 8 N. H. 550; Gray v. Obeare, 54 Ga. 231. *Contra*, State v. Slaughter, 70 Mo. 484. See Boismare v. His Creditors, 8 La. 315.

A man's natural rights taken away by statute are revived by the repeal of the statute. Den v. DuBois, 16 N. J. L. 285.

2. People v. Davis, 61 Barb. (N. Y.) 456.

3. Case of Bishops, 12 Rep. 7; Phillips v. Hopwood, 10 B. & C. 39; 21 E. C. L. 25; Tattle v. Grimwood, 3 Bing. 496; 13 E. C. L. 62; Fuller v. Redman, 26 Beav. 600.

**Revivor.**—The legislature may revive an act either expressly or conditionally, and make the revival dependent upon a future event; and when an act of Congress is revived, it is revived precisely in that form and with that effect which it had at the moment when it expired. The Aurora, 7 Cranch (U. S.) 382.

If a tax and the penalties which have accrued by reason of its non-payment have been swept away before their collection by the repeal of the law which authorized their assessment and collection, the tax itself may be reimposed by subsequent legislation, but the penalties for the past omission cannot be revived. State v. Jersey City, 37 N. J. L. 39.

Where a repealing law was declared unconstitutional, its subsequent repeal by the legislature was held not a revivor of the original act, where that would import to the legislature a different intent from that expressly declared in the latest repealing act. Patapsco Guano Co. v. Board of Agriculture, 52 Fed. Rep. 690.

4. Com. v. Getchell, 16 Pick. (Mass.) 452; Hastings v. Aiken, 1 Gray (Mass.) 163; Com. v. Churchill, 2 Met. (Mass.) 118; Com. v. Mott, 21 Pick. (Mass.) 492; Den v. DuBois, 16 N. J. L. 285; Poor

Directors v. R. Co., 7 W. & S. (Pa.) 236; *Ex parte* Doran, 2 Pars. Eq. Cas. (Pa.) 467; Zimmerman v. Perkiomen, etc., Turnpike Co., 81 Pa. St. 96; Durr v. Com. (Pa.), 11 Cent. Rep. 181; Doe v. Naylor, 2 Blackf. (Ind.) 32; Teter v. Clayton, 71 Ind. 237; Harrison v. Walker, 1 Ga. 32; People v. Wintermute, 1 Dakota Ter. 63; Brown v. Barry, 3 Dall. (U. S.) 365; Jones v. Buzzard, Hempst. (U. S.) 259; U. S. v. Philbrick, 120 U. S. 52; Ely v. Holton, 15 N. Y. 595; People v. Davis, 61 Barb. (N. Y.) 456; Wheeler v. Roberts, 7 Cow. (N. Y.) 536; Gale v. Mead, 4 Hill (N. Y.) 109; Van Denburgh v. Greenbush, 66 N. Y. 1; Brinkley v. Swicegood, 65 N. Car. 626; State v. Kent, 65 N. Car. 311; State v. Rogers, 94 N. Car. 862; State v. Sutton, 100 N. Car. 474; State v. Massey, 103 N. Car. 356; Laude v. Chicago, etc., R. Co., 33 Wis. 640; Fullerton v. Spring, 3 Wis. 667; Hurley v. Texas, 20 Wis. 634; Gilkey v. Cook, 60 Wis. 133; Alexander v. Big Rapids, 70 Mich. 224; Emigh v. State Ins. Co., 3 Wash. 122.

Special proceedings, out of the course of the common law, which depended for their validity on the original act, and were abated by its repeal, are not revived with it by the repeal of the repealing act. Com. v. Leech, 24 Pa. St. 55. See Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252.

When an act of Congress which has suspended a state law is revived the state law comes into force again. Henderson v. Spofford, 59 N. Y. 131; Sturgis v. Spoffard, 45 N. Y. 446; Board of Com'rs v. Pacific Mail S. S. Co., 52 N. Y. 609.

There is nothing in the state constitution of *New Jersey* that prevents the operation of the common-law doctrine that when a repealer is repealed, the original act is thereby revived. Wallace v. Bradshaw, 54 N. J. L. 175, *reversing* same case, 53 N. J. L. 315.

Where an act was amended and cer-

original law,<sup>1</sup> and offenses committed before the suspension may be punished after the revival of the original act.<sup>2</sup> But where the intent not to revive the original act is apparent, as from the fact that the act repealed was a re-enactment,<sup>3</sup> or a revision of the original act,<sup>4</sup> or from the fact that the repealing act was abrogated for the purpose of substituting new provisions in its place,<sup>5</sup> the rule of revivor does not apply.<sup>6</sup>

In many jurisdictions, moreover, it has been found expedient to provide that, in the absence of an express declaration to the contrary, the repeal, whether express or implied,<sup>7</sup> of a repealing

tain of its clauses retained in the amending law, and afterwards this law was repealed, the original law was revived. *In re Livingston St.*, 82 N. Y. 621.

1. *Winter v. Dickerson*, 42 Ala. 92; *Johnson v. Meeker*, 1 Wis. 436; *Shipman v. Henbest*, 4 T. R. 109; *Rex v. Phipoe*, 2 East P. C. 599; *Rex v. Morgan*, 2 East P. C. 601. See also cases in next note.

Where the statutes of a state adopted after a certain date, were suspended during the prevalence of martial law administered by a provisional governor, the subsequent removal of the martial law and their ratification by the legislature of the state statutes revive them. *Winter v. Dickerson*, 42 Ala. 92.

When the remedy upon a contract has been suspended by a statute, the repeal of the statute restores the remedy, except where rights have become vested by virtue of the statute repealed. *Johnson v. Meeker*, 1 Wis. 436.

Where there were two repealing acts, the repeal of one of them does not revive the original act. *Wheeler v. Roberts*, 7 Cow. (N. Y.) 536.

2. *Com. v. Getchell*, 16 Pick. (Mass.) 452; *Com. v. Mott*, 21 Pick. (Mass.) 492.

Where an offense was committed under the original law which imposed additional punishment on the offender for the particular offense, the offender was held liable to the additional punishment on a conviction had after the repeal of a repealing statute. *Com. v. Mott*, 21 Pick. (Mass.) 492; *Com. v. Getchell*, 16 Pick. (Mass.) 452. But on such a conviction for an offense committed under the intermediate repealing act, the offender is not liable to the additional punishment. *Com. v. Getchell*, 16 Pick. (Mass.) 452.

3. *People v. Montgomery County*, 67 N. Y. 109; *Harris v. Niagara County*, 33 Hun (N. Y.) 279; *Moody v. Sea-*

*man*, 46 Mich. 74; *Goodno v. Oshkosh*, 31 Wis. 127. See *People v. Assessors of Brooklyn*, 8 Abb. Pr. N. S. (N. Y.) 150.

But where by other provisions of the latest repealing act it is evident that it was the intention of the legislature that the original statute should be revived, then such an effect will follow as an exception to the exception in the text. *People v. Wilmerding*, 62 Hun (N. Y.) 391.

4. *Butler v. Russel*, 3 Cliff. (U. S.) 251.

5. *Com. v. Churchill*, 2 Met. (Mass.) 123.

6. *Milligan v. Cromwell*, 3 N. Mex. 327; *Seewald v. Reynolds*, 3 N. Mex. 344; *People v. Montgomery County*, 67 N. Y. 109; *Harris v. Niagara County*, 33 Hun (N. Y.) 279; *Moody v. Seaman*, 46 Mich. 74; *Goodno v. Oshkosh*, 31 Wis. 127; *Butler v. Russel*, 3 Cliff. (U. S.) 251; *Com. v. Churchill*, 2 Met. (Mass.) 123; *U. S. v. 25 Cases of Cloths*, *Crabbe* (U. S.) 356; *Warren v. Windle*, 3 East 205.

Where a statute repeals or supercedes certain sections of the previous statute, a mere declaration in a still later act that the repealing statute "shall not repeal" the specified section, is not a law reviving or re-enacting it. There can be no law without a legislative intent that it become a law; and such intent be manifested declaring the legislative will. *State v. Conkling*, 19 Cal. 501.

Where an act absolutely repealed a prior one and substituted other provisions which were to endure for only a limited time, the expiration of the time limited does not, in the absence of an express intention, revive the repealed act. *U. S. v. 25 Cases of Cloths*, *Crabbe* (U. S.) 356; *Warren v. Windle*, 3 East 205.

7. *Milne v. Huber*, 3 McLean (U. S.) 212; *Stirman v. State*, 21 Tex. 734.

law shall not revive the original act.<sup>1</sup> This rule is not applicable to cases where the first act was modified only and not repealed by the second, for by the repeal of the second, the original, so far as modified, is revived.<sup>2</sup>

**STAY LAW**—See also STAY OF PROCEEDINGS.—See note 3.

1. See statutes in various states and in *England*. And see generally *State v. Slaughter*, 70 Mo. 484; *Sullivan v. People*, 15 Ill. 233; *Smith v. Hoyt*, 14 Wis. 252; *Tallamon v. Cardenas*, 14 La. Ann. 514; *Witkouski v. Witkouski*, 16 La. Ann. 232; *Goodno v. Oshkosh*, 31 Wis. 127; *Heinssen v. State*, 14 Colo. 228; *Teter v. Clayton*, 71 Ind. 237; *Cassell v. Lexington, etc., R. Co.* (Ky. 1888, 9 S. W. Rep. 502.

The same rule applies to amendments of laws which constitute repeals. *Tallamon v. Cardenas*, 14 La. Ann. 514; *Goodno v. Oshkosh*, 31 Wis. 132.

An act suspending a repealing act is not within the statutory inhibition. *Brown v. Barry*, 3 Dall. (U. S.) 365.

A constitutional provision that no law shall be revived unless set out in the reviving act, prevents a revivor by mere repeal of the repealing statute. *Renter v. Bauer*, 3 Kan. 505; *Trosper v. Horr*, 4 Kan. 59.

2. *Bank for Savings v. Field*, 3 Wall. (U. S.) 495; *Smith v. Hoyt*, 14 Wis. 252; *Mount v. Taylor*, L. R., 3 C. P. 645. See *Mirfin v. Atwood*, L. R., 4 Q. B. 340; *Glaholm v. Barker*, L. R., 1 Ch. 229.

So where a statute merely excepts a particular class of cases from the provisions of a previously existing general law which continues to be in force, the repeal of the excepting statute operates to bring such cases under the general law. *Smith v. Hoyt*, 14 Wis. 252. See *Goodno v. Oshkosh*, 31 Wis. 132; *State v. Hoeflinger*, 31 Wis. 262; *Bank for Savings v. Field*, 3 Wall. (U. S.) 495.

3. In times of extended and severe financial trouble the legislatures of some of the states have endeavored to give debtors some protection against the oppressive enforcement of laws for the collection of debts by the enactment of laws suspending certain judicial remedies, as by providing that foreclosure suits shall not be commenced for a certain period of time, or that execution shall not issue in certain cases. Laws of this nature are popularly called stay laws. *Abbott's L. Dict.* In the early days after the Revolution and in the southern states in the years immediately succeeding the Civil war such laws

were not uncommon (but they were very generally held to be unconstitutional). See the article STAY OF PROCEEDINGS in this volume, where the question is exhaustively treated. A good example of such laws is found in the *Wisconsin* statute of 1862, exempting from civil process all persons who had or might volunteer or enroll themselves as members of any military company mustered into the service of the *United States* or of the state, during their service. The act was held to be unconstitutional. The court, by Cole, J., said: "We have quite recently had occasion to inquire into the extent of the power of the state legislature to change, modify, or alter the laws governing proceedings in courts of justice, both in respect to past and future contracts. The rule extracted from the cases was, that this power was unrestricted so long as a substantial remedy was afforded according to the course of justice as it existed at the time the contract was made. But the legislature must give some remedy, and not destroy the legal force and obligation of a contract, taking away all existing remedies. This would seem to be quite a plain proposition. The objection to the law in question is, that it takes away all existing remedies for enforcing the obligation of contracts, while the debtor is in the military service of the *United States* or of this state. So long as this military service continues, the creditor is without redress. Should the debtor continue in the service, three, five, ten, or twenty years, he is, under the law, exempted from all civil process. It is very evident that this is a suspension for an indefinite period of all remedies whatever. And such being the character of the law, we cannot see upon what ground its validity can be sustained. It is claimed that the act is amply justified by the perils which threaten our national existence, and the imperious necessity which exists for obtaining a military force adequate to the defense of the country. Giving to these political considerations all the weight which has been claimed for them, they surely do not show that the exemption should be for an indefinite period."

**STAY OF PROCEEDINGS.**—For stay of proceedings pending appeal, see **SUPERSEDEAS**.

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**I. DEFINITION.**—Stay of proceedings usually imports an order of court made in the cause and as a part of its course suspending further action in it; and is generally conditional or temporary, as, until some other order of court has been complied with, until a party shall give required security, or the like. It is distinguishable from injunction to restrain proceedings at law, which is in the nature of an equitable decree in another court, that the party stayed shall proceed no farther, because his action is deemed contrary to equity; and from prohibition, which is a mandate of a superior court to an inferior one, commanding it to refrain from proceedings because they have been in excess of its jurisdiction.<sup>1</sup>

**II. STAY OF INTERMEDIATE PROCEEDINGS**—1. **Absolute Stay**—a. **UPON PAYMENT OF DEBT AND COSTS.**—In many cases where the

1. Abbott's L. Dict.

The act of stopping or arresting a judicial proceeding by order of the court or judge. Burr. L. Dict.

But the stay may be by consent of the parties. *Stet processus* is an entry on the roll in the nature of a judg-

ment, of a direction that all further proceedings shall be stayed (that is, that the process may stand), and it is one of the ways by which a suit may be put an end to by an act of the party, as distinguished from the termination of it by judgment, which is



amount of the debt is certain, or capable of being rendered certain, and the defendant does not dispute the cause of action or the amount of the debt, proceedings will be stayed upon defendant's motion and upon his paying the amount of the debt and costs.<sup>1</sup> And in some cases, courts have granted absolute stays upon payment of the debt without costs; as where an action was brought without a previous demand, or for the purpose of making costs, without giving the defendant an opportunity to pay.<sup>2</sup> Even in actions for unliquidated damages, proceedings may be stayed where the defendant pays all that the plaintiff could recover under any aspect of the case, with all costs; or after verdict, pays the amount of the verdict with costs. But there is some conflict of authority on this point.<sup>3</sup> Such a rule or order is not a matter of right, but is within the discretion of the court,<sup>4</sup> and when defendant seeks this relief he must make prompt application for it and render prompt compliance with the conditions imposed.<sup>5</sup>

**b. FOR BREACH OF FAITH.**—If the parties make a definite agreement to settle and one of them seeks to proceed, notwithstanding such agreement, the court may stay all further proceedings upon compliance with the terms of the agreement by the other

the act of the court. *Brown's L. Dict.*

1. Where the writ is indorsed for a larger sum than is due, by which the defendant is misled and prevented from settling the claim, the court may stay the proceedings on payment of the real debt with the costs of the writ only. *Elliston v. Robinson*, 2 D. P. C. 241; 2 C. & M. 343.

The staying proceedings in an action on a bond for the performance of covenants, and the like, on payment of the penalty and costs, is a very usual exercise of power. *Oshiel v. De Graw*, 6 Cow. (N. Y.) 63, *citing* 1 *Dunlap's Pr.* 338.

2. If the defendant, after verdict, tender the amount recovered, with all the costs up to the time, the court will order further proceedings to be stayed. *Hatfield v. Baldwin*, 1 Johns. (N. Y.) 506.

In an action brought against a sheriff for money levied under a *feri facias* without any previous demand, the court will stay the proceeding on payment of the sum levied, without costs. *Jefferies v. Sheppard*, 3 B. & Ald. 696; 5 E. C. L. 426.

3. *Hatfield v. Baldwin*, 1 Johns. (N. Y.) 506; *Oshiel v. De Graw*, 6 Cow. (N. Y.) 63.

*Contra.*—An order cannot be made

for staying proceedings on payment of debt and costs for unliquidated damages. *Fisher v. Pyne*, 1 M. & G. 265; 39 E. C. L. 437; nor in such case after verdict, on payment of amount of verdict and costs. *Peat v. Mangnall*, 2 B. C. Rep. 325; 6 D. & L. 261.

4. A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the court in its discretion may think proper. *Jones v. Shepherd*, 3 D. P. C. 421.

5. Application to stay proceedings on payment of debt must be made within four days after service of process. *Bowdridge v. Slaney*, 2 Scott 197; 2 Bing. N. Cas. 142; 29 E. C. L. 285; *Hayter v. Moat*, 5 D. P. C. 329.

The judge has no power before declaration to order that proceedings be stayed on payment of debt and costs within a certain time, otherwise judgment for plaintiff. *Reynolds v. Sherwood*, 8 D. P. C. 183.

A judge has no authority without the consent of the plaintiff to make an order to stay proceedings in an action upon payment of the debt and costs on a subsequent date. *Morton v. Fraser*, 2 M. & G. 916; 40 E. C. L. 69; *Kirby v. Ellison*, 2 D. P. C. 219. But the debtor

party;<sup>1</sup> but the agreement to settle must be unconditional.<sup>2</sup> So, the court may punish the offending party by staying proceedings brought against good faith, though the agreement, in fraud of which the action was brought, was made while the parties were not under the authority of the court;<sup>3</sup> and an agreement between the parties to stay further proceedings may be enforced on summary application.<sup>4</sup>

c. IN SECOND ACTION FOR SAME CAUSE.—In rare cases, the courts have sometimes stayed proceedings in a second action after a recovery for the same cause in a former action; and this has been done although the plaintiff in the former action recovered only nominal damages;<sup>5</sup> and where relief was claimed that had already been claimed in another action, proceedings were stayed except as to relief not claimed in the former action.<sup>6</sup> Usually, however, the courts refuse to interfere and compel the defendant to plead the former adjudication if he seeks to take advantage of it as a defense.<sup>7</sup>

d. FOR VEXATIOUS PROCESS.—The court will stay proceedings in an action where the manifest purpose of the plaintiff is to annoy and vex the defendant and not to enforce a just demand;<sup>8</sup> as where one brings simultaneous actions for the same cause, even though one of the actions be in a foreign jurisdiction,<sup>9</sup> or where plaintiff repeatedly sues in the same jurisdiction on the same cause of action.<sup>10</sup>

is not obliged to pay *instantly*; he is entitled to a reasonable time to get the money. *Perkins v. National Ins., etc., Assoc.*, 26 L. J. Exch. 182.

1. *Ponting v. Watson*, 1 Jur. N. S. 1139.

2. *Webster v. Acton*, 11 W. R. 114.

3. *Cocker v. Tempest*, 7 M. & W. 502; 9 D. P. C. 306.

Where the defendant had received a letter not to pay except on written order of plaintiff, the proceedings were stayed on payment of the money into court. *Newton v. Matthews*, 4 D. P. C. 237.

4. *Eden v. Naish*, 7 Ch. Div. 781; 47 L. J. Ch. 325.

5. *Wait's Pr.*, vol. 2, p. 619, citing *Longridge v. Brewer*, 1 Bing. 307; 8 E. C. L. 521.

6. *Morton v. Quick*, *In re Aird*, 26 R. W. 441. See also *Haigh v. Paris*, 16 M. & W. 144; 4 B. & L. 325; 16 L. J. Ex. 37.

7. 2 *Wait's Pr.*, p. 619, citing *Harrington v. Johnson*, 2 Cowp. 744; *Pechell v. Layton*, 2 T. R. 512. See *RES JUDICATA*, vol. 21, p. 127.

8. *Jacobs v. Raven*, 30 L. T. 366; *Edmunds v. Attorney Gen'l*, 47 L. J. Ch. 345; 38 L. T., N. S. 213.

9. *Cox v. Mitchell*, 7 C. B., N. S. 55; 29 L. J. C. P. 33; 97 E. C. L. 55.

10. As equity would decree an injunction after three trials in ejectment, so will the courts in *Pennsylvania* stay further proceedings by their summary powers for the ends of justice. *Cherry v. Robinson*, 1 Yeates (Pa.) 521, citing 2 Eq. Cas. Abr. 222; 1 Wms. 672; 2 Bro. Parl. Cas. 217; 1 Stra. 404; Bunb. 115.

Although a party has a right, as a general rule, to bring suit upon a prior judgment, still the supreme court has such control over its own process that it ought not to permit it to be perverted or used for an improper purpose. Where a person who has recovered a judgment, brings successive suits thereon, in different courts, without issuing execution, and he admits that such suits were brought for the purpose of coercing payment of his debt by accumulating costs, the court in which the last suit is brought will grant a perpetual stay of proceedings in all the suits in that court except the first. The plaintiff will not be allowed to make use of the costs of the suit by way of penalty, in order to compel a defendant to pay his debt. *Keeler v. King*, 1 Barb. (N. Y.) 390.

2. *PENDING OTHER ACTIONS FOR SAME CAUSE.*—Where several actions are brought on the same cause of action, the court may stay proceedings on all but one;<sup>1</sup> or will stay proceedings on all until the plaintiff elects to discontinue in all but one.<sup>2</sup> And this will be done where the plaintiff of record is not the same person in all the actions, if it appears that the actions are all under the control of one person and for his benefit.<sup>3</sup> If the plaintiff is the defendant in another suit where the same questions are involved, he can not be compelled to elect between the two actions.<sup>4</sup> But the court may stay proceedings in one of two cross-actions and order the counterclaim to be delivered by the party who has not the burden of proof on the issues, if the points at issue are the same in the two actions.<sup>5</sup>

The mere fact that there is another action involving the same issues pending between the same parties in a foreign country, is not sufficient ground for staying proceedings, unless it appears that one of the parties is seeking to prevent the course of justice.<sup>6</sup> But it seems to be within the sound discretion of the court to stay proceedings when there is another action between the same parties and involving the same issues pending in a court of a sister state or in a court of the United States.<sup>7</sup> In order to authorize any court to stay proceedings on account of a suit pending in another court, the two proceedings must be practically identical.<sup>8</sup>

1. *Jones v. Pritchard*, 6 D. & L. 529; 18 L. J. Q. B. 104; *Sowter v. Dunston*, 1 M. & R. 508; 17 E. C. L. 26; *Carne v. Legh*, 6 B. & C. 124; 9 D. & R. 126; 13 E. C. L. 118; *Burlington v. Parce*, 12 Hun (N. Y.) 149; *Flanagan v. Flanagan*, 13 N. Y. St. Rep. 432; *Cushman v. Leland*, 93 N. Y. 62; *Brown v. May*, 17 Abb. N. Cas. (N. Y.) 205; *Oroville, etc., R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354.

The court may order suspension of action against a garnishee until attachment proceedings are disposed of. *McFadden v. O'Donnell*, 18 Cal. 160; *Pierson v. McCahill*, 21 Cal. 123; *McKeon v. McDermott*, 22 Cal. 667; 83 Am. Dec. 86.

In a suit on the assignment of a promissory note, the declaration averred that the plaintiff had sued the maker, that the latter had obtained judgment on account of a want of consideration for the note, and that notice of the suit against the maker had been given to the indorser, etc. A motion was made by the now defendant in the circuit court to stay proceedings until a writ of error, which had been taken to said judgment and which was shown by affidavit to be pending in the su-

preme court, should be determined. *Held*, that the motion should be granted. *Scott v. Herald*, 8 Blackf. (Ind.) 129.

The court will not stay proceedings until another action between the parties brought upon the act against usury shall be determined. *Shoemaker v. Shirtliffe*, 1 Dall. (Pa.) 127.

2. *Hammond v. Baker*, 3 Sandf. (N. Y.) 704; *Litchfield v. Smith*, 7 Robt. (N. Y.) 306.

3. *Soule v. Corning*, 11 Paige (N. Y.) 412; *Mariposa Co. v. Garrison*, 26 How. Pr. (N. Y.) 448.

4. *Botts v. Cozine*, 2 Edw. Ch. (N. Y.) 583; *Mariposa Co. v. Garrison*, 26 How. Pr. (N. Y.) 448.

5. *Thomson v. South Eastern R. Co.*, 9 Q. B. Div. 320; 51 L. J. Q. B. 322; *Adamson v. Tuff*, 44 L. T. 420.

6. *Republic of Mexico v. De Arangoiz*, 5 Duer (N. Y.) 634; *Cox v. Mitchell*, 7 C. B. N. S. 55; 29 L. J. C. P. 33; 97 E. C. L. 55; *McHenry v. Lewis*, 22 Ch. Div. 397; 52 L. J. Ch. 325.

7. *Bell v. Donohue*, 47 N. Y. Super. Ct. 458; *Parmalee v. Wheeler*, 32 Wis. 429.

8. *Campbell, J.*, in *People v. Judges*,

27 Mich. 406; 15 Am. Rep. 195, makes the following critical review of the authorities on this point: "No case has been cited, and we have not been able to find any, wherein it has been held that a common law court has any right to prevent a person from enforcing a common law remedy on account of the pending of any but common law proceedings. It being his absolute right to sue at common law if he chooses, the common law will protect him in it. And inasmuch as proceedings to enforce a security are in their nature collateral to proceedings to establish a personal liability, there is always a possibility at least that whether the personal claim will be made out or not, the remedy against the security may not be established, or if established may not be adequate. And while a double satisfaction can never be obtained in any court, concurrent and cumulative remedies are by no means unknown and are not universally forbidden. Questions have frequently arisen on this subject and the decisions do not sustain the right of courts to interfere with the lawful action of parties suing. Admiralty and common law remedies have not been regarded as so far alike in their rules and effect as to stand on the same footing. In the case of *The Kalorama*, 10 Wall. (U. S.) 204, it was held, the pending of proceedings *in personam* should not suspend proceedings *in rem* in admiralty. And in *Harmer v. Bell* (*The Bold Buccleugh*), 22 Eng. L. & Eq. 62, the same doctrine was held by the privy council, who said that proceedings *in rem* and *in personam* were essentially different and one should not suspend the other.

"Neither, until satisfied, will even a judgment *in rem* or *in personam* prevent further proceedings on the same claim. *Toby v. Brown*, 6 Eng. 308; *The Bengal*, Swabey 469; *The John & Mary*, Swabey 471; *Nelson v. Couch*, 15 C. B., N. S. 99; 109 E. C. E. 99.

"The latter case contains a very full discussion of the subject and shows the necessity of the rule. And if this be true, it must necessarily follow that justice will rather be subserved than defeated by permitting the ascertainment of both classes of liabilities without needless delays. Upon this proposition, also, the cases are harmonious and courts have constantly refused to stay any action at com-

mon law, on any claim that in courts not proceeding according to the common law, or even in other common law actions involving a part but not all of the same issues, the main questions were to be decided.

"In *Sowter v. Dunston*, 1 M. & R. 508; 17 E. C. L. 269, the court refused to stay a suit against one defendant while another suit for the same cause of action against him and another jointly was pending.

"In *Wise v. Prowse*, 9 Price 393, an action against a defendant sued jointly with others as drawers was held no ground for staying an action against him as acceptor.

"*Henry v. Nash*, 1 Exch. 826; *Giles v. Tooth*, 3 C. B. 665; 54 E. C. L. 665; *Newton v. Belcher*, 9 Q. B. 612; 58 E. C. L. 611, were cases where numerous individual suits were brought against directors and others, who were jointly liable on the same single cause of action; and stays were refused which were applied for to abide the trial of one of the causes which was at issue on the facts. In the first, there were pleas in abatement overruled before the motion. In the second, there was no plea of non-joinder but the merits were shown to be the same in all the suits except as to the individual liability for membership, which had to be made out as to each. In the third case, a stay of proceedings which had been granted was set aside as beyond the authority of the court. In the latter cause of *Newton v. Belcher*, a judgment was obtained for £877 beyond a sum of £1,000 paid into court. Pending a motion for a new trial, a motion for a stay of proceedings was made in still another case of *Newton v. Liddiard*, 9 Q. B. 616, note a; 58 E. C. L. 614, which was refused for the same reason given in *Newton v. Belcher*, 9 Q. B. 612; 58 E. C. L. 611. Coleridge, J., gave a further reason, also before referred to, that there was no certainty that the plaintiff would be able to collect his debt without suing all. This is the same reason underlying the shipping cases before cited.

"And on this same ground, it was held in *Great Northern R. Co. v. Kennedy*, 4 Exch. 417, and in *Ingils v. Great Northern R. Co.*, 16 Eng. L. & Eq. 55, that the forfeiture of shares was no suspension of action for calls, although when the company should realize, the defendant would be entitled to an accounting for the pro-

ceeds. The court liken the forfeiture to a mortgage claim.

"In *Covington v. Hogarth*, 7 M. & G. 1013; 49 E. C. L. 1011, it was held that proceedings should not be stayed at common law by reason of the same plaintiffs having proceeded in bankruptcy for the same debt, and although before the time to plead expired, the defendant had paid the debt, it was held there could be no stay unless he paid the costs also.

"In *Wade v. Simeon*, 1 C. B. 610; 50 E. C. L. 610, a suit had been brought in the exchequer on two checks, and a stipulation was made for payment or judgment at a given time, and a judge's order was made in pursuance of the agreement to that effect. This order being afterwards set aside and the defendant allowed to defend, the plaintiff sued on this agreement in the common bench, and that court held it had no right to stay the action. The language used in this case is to the same effect as that found in many of the others; viz., that the courts cannot interfere with the right of the party to have a common law trial in the ordinary course. Tindal, C. J., says: 'It appears to me that the plaintiff has a *prima facie* cause of action on an agreement which he sets out in his declaration, and that he has a right by the law of the land to insist upon having the judgment of the court thereon, either upon a demurrer or by the verdict of a jury, or the judgment of a court of error upon a bill of exceptions, or otherwise, according to the ordinary course of practice.' And it was intimated by the chief justice and other members of the court that nothing but bad faith in breaking an agreement, or in some other similar way, would justify interference.

"This same principle has been applied in equity. In *Ostell v. Le Page*, 21 Eng. L. & Eq. 640, a stay of proceedings granted by a vice-chancellor on account of proceedings which had passed to a decree in India, was set aside as granted without right because it did not appear clearly that the Indian proceedings covered the whole ground that might have been covered by the English chancery cause. Lord Cranworth said: 'But when the court interferes upon motion to stop the plaintiff from proceeding, it is taking upon itself a very delicate jurisdiction, and one in which it ought to see that by no possibility can it be do-

ing injustice. Looking at this decree, and at the present bill, I think that the decree could not be pleaded so as to bar the plaintiff from all the relief which she is seeking by the present suit.'

"In *Miles v. Bristol*, 3 B. & Ad. 945; 23 E. C. L. 227, where, after suit was brought to the queen's bench, another precisely similar was brought and pending in the exchequer, and a motion was made in the queen's bench to stay proceedings and order a discontinuance, Lord Tenterden, said: 'This court cannot interfere absolutely to prevent the plaintiff's proceeding in an action which was properly brought here, nor have we any control over the action in the exchequer. But we have authority to say in the action pending in our own court, that he shall not proceed further in that, unless he abandon the one in the exchequer. He must, therefore, make his election' . . .

"In *Dicas v. Jay*, 6 Bing. 519; 19 E. C. L. 155, it appears that in a previous action a reference was had by rule of court which forbade bringing a new action, and an award was made in favor of plaintiff, which he deemed too small; whereupon he brought a new action and a motion was made in the new cause for a stay of proceedings; but the court held it had no power to grant the stay if the party insisted on proceeding, although an opinion was intimated that the award would turn out to be a bar. Tindal, C. J., said: 'We have no right to prevent him from proceeding if he chooses to do so, and, therefore, this rule must be discharged without costs.'

"It has also been held expressly that a court of common law will not stay proceedings because of the pendency of proceedings in other than common-law courts. Thus, in *Foreman v. Jeyes*, 5 B. & Ad. 835, where a verdict having been entered on an award, the plaintiff had been enjoined from proceeding to judgment, the queen's bench held they had no authority to prevent him from proceeding to judgment and could not discharge the defendant who was afterward relieved in the court of chancery from his arrest on the execution.

"So in *Davis v. Salter*, 2 C. & M. 466, where executors were enjoined from proceeding to dispose of assets, it was held a common-law court could not stay proceedings against them at law before judgment. In *Murphy v. Ca-*

*f. UPON DISCHARGE IN BANKRUPTCY.*—If a defendant is declared a bankrupt, proceedings should be stayed in an action then pending against him, if a motion for that purpose be seasonably made.<sup>1</sup> While the mere pendency of proceedings in bankruptcy is not sufficient ground for a stay,<sup>2</sup> yet after an adjudication, the State court should stay proceedings to await the determination of the bankrupt's discharge, unless he makes unreasonable delay in applying for a discharge, or the court allows the proceedings to go on for the single purpose of ascertaining the amount due.<sup>3</sup> If the defendant has the opportunity he must plead his discharge as a defense, but if he fails to do so, a judgment obtained against him will not be disturbed.<sup>4</sup> But it has been held that a plea in bar that defendant had been adjudged a bankrupt and that plaintiff had proved his debt in bankruptcy, was insufficient, because the debt still existed, and that the proper relief was a stay of proceedings against defendant to wait his discharge.<sup>5</sup> If neither the bankrupt nor his assignee in bankruptcy applies for a stay of proceedings, the court may proceed to judgment.<sup>6</sup> And if there is unreasonable delay in making the motion for a stay, the relief may be denied.<sup>7</sup>

*g. FOR IRREGULARITY.*—In some cases proceedings may be stayed on account of some irregularity brought to the notice of the court. An application for a stay on this ground must be made within a reasonable time after the irregularity occurred;<sup>8</sup> and the rule applies as well to prisoners as to others;<sup>9</sup> and what is a reasonable time is entirely within the discretion of the court.<sup>10</sup> But a party may usually apply for relief at any time before the party guilty of the irregularity has taken a further step, if the

del, 2 B. & P. 137, it was also held that proceedings at law could not be stayed on account of the pendency of a suit in equity.

"In *Smidt v. Ogle*, 6 Taunt. 74, the court refused to stay an action pending proceedings in the mayor's court of London. Heath, J., said: 'It is a common law right of the plaintiff to sue here, and we shall not restrain it.' The same rule was followed in *Laughton v. Taylor*, 6 M. & W. 695.

"And in those cases where the rules differ at common law and in admiralty, it has been held that even a verdict or judgment in the one court has no force in the other.

"As in collision cases, the rule at common law allows no recovery in favor of a party at all in fault, while admiralty divides the loss if both are faulty, and therefore a decision in either court concludes nothing in the other if the doctrine is correctly stated in *The Ann and Mary*, 2 W. Rob. 189; *General Steam Nav. Co. v. Tonkin*, 4

*Moore* 321, in both of which it was so held."

1. *Lenihan v. Hamann*, 55 N. Y. 653; *Clifton v. Foster*, 103 Mass. 233; 4 Am. Rep. 539; *Imlay v. Carpentier*, 14 Cal. 173; *Ray v. Wight*, 119 Mass. 426; 20 Am. Rep. 333.

2. *Maxwell v. Faxon*, 4 Nat. Bankr. Reg. 210.

3. *Hill v. Harding*, 107 U. S. 631.

4. *Revere Copper Co. v. Dimock*, 90 N. Y. 33; *Dimock v. Revere Copper Co.*, 117 U. S. 559.

5. *Brandon Mfg. Co. v. Frazer*, 47 Vt. 88; 19 Am. Rep. 118.

6. *Hill v. Harding*, 107 U. S. 631, citing *Doe v. Childress*, 21 Wall. (U. S.) 642; *Eyster v. Gaff*, 91 U. S. 521; *Norton v. Switzer*, 93 U. S. 355.

7. *Monroe v. Upton*, 50 N. Y. 593.

8. *Claridge v. McKenzie*, 2 D. N. S. 898; 6 Scott N. R. 171.

9. *Primrose v. Baddelly*, 2 D. P. C. 350; 2 C. & M. 468.

10. *Lane v. Newman*, 1 B. C. Rep. 93; 10 Jur. 925.

latter is not prejudiced by the delay.<sup>1</sup> Also where the action is so brought as to be a fraud on the court, proceedings may be stayed on the defendant's motion; as where an attorney has brought an action without the knowledge or consent of the plaintiff,<sup>2</sup> or where an action for one kind of relief is authorized and the attorney brought an action for relief entirely different.<sup>3</sup>

**2. Conditional Stay**—*a.* FOR NON-PAYMENT OF COSTS.—When the plaintiff has failed in one action and brings another action against the same party for the same, or what is substantially the same, cause of action, the court will stay proceedings in the second action until the costs in the first are paid.<sup>4</sup> The rule is not confined to cases where the second action is brought in the same court in which the first one was brought, but extends to all courts

1. *Dand v. Barnes*, 6 Taunt. 5; 1 Marsh. 403.

2. *Delhi v. Graham*, 3 Hun (N. Y.) 407.

3. *Lyons v. Cole*, 3 Thomp. & C. (N. Y.) 431.

4. *Weston v. Withers*, 2 T. R. 511; *Corbett v. Warner*, 2 L. R. Q. B. 108; 36 L. J. Q. B. 86; 16 L. T. 150; *Hoare v. Dickson*, 6 D. & L. 577; 7 C. B. 164; 18 L. J. C. P. 158; 62 E. C. L. 163; *Prowse v. Loxdale*, 3 B. & S. 806; 32 L. J. Q. B. 227; 113 E. C. L. 806; *Clark v. Dixon*, 4 Jur. N. S. 715; *Can-not v. Morgan*, 1 Ch. Div. 1; 45 L. J. Ch. 50; *Edwards v. Ninth Ave. R. Co.*, 22 How. Pr. (N. Y.) 444; *Richardson v. White*, 27 How. Pr. (N. Y.) 155; *Kentish v. Tathan*, 6 Hill (N. Y.) 372; *Dresser v. Brooks*, 5 How. Pr. (N. Y.) 76; *Ripley v. Benedict*, 4 Cow. (N. Y.) 19; *Ex parte Stone*, 3 Cow. (N. Y.) 381; *Cuyler v. Vanderwerk*, 1 Johns. Cas. (N. Y.) 247; *Taylor v. Vandervoort*, 9 Wend. (N. Y.) 449; *Kerr v. Davis*, 7 Paige (N. Y.) 53; *Lawrence v. Dickinson*, 2 Cow. (N. Y.) 580; *Jackson v. Edwards*, 1 Cow. (N. Y.) 138; *Perkins v. Hinman*, 19 Johns. (N. Y.) 237; *Fleming v. Pennsylvania Ins. Co.*, 4 Pa. St. 475; *Altman v. Altman*, 12 Pa. St. 246; *Henderson v. Griffin*, 5 Pet. (U. S.) 151; *Gerrish v. Pratt*, 6 Minn. 53; *McIntosh v. Hoben*, 11 Wis. 400 (*Vilas & Bry*, 418); *State v. Howe*, 64 Ind. 18; *Cooper v. Sheppard*, 9 N. J. L. 96; *Swing v. Alloway's Creek*, 10 N. J. L. 58; *Robinson v. Merchants, etc., Transp. Co.*, 16 R. I. 217.

In *Sooy v. McKean*, 9 N. J. L. 88. *Ewing, C. J.*, said: "The stay of proceedings in a second action until the costs of a former are paid, is founded on sound and just principles. The practice first fully obtained in the ac-

tion of ejectment. In the case of *Roberts v. Cook*, 4 Mod. 379, which was in ejectment, the court said: 'If the verdict had been against the party bringing the second action, or he had been nonsuited, he should not have brought another action before the costs of the first had been paid, because it was a vexation to bring a new action.' In *Keene v. Angel*, 6 D. & E. 740, Lord Kenyon said: 'The only question in these cases is whether the second ejectment is in substance brought to try the same title; if so, the rule is of course to stay the proceedings until the costs of the former ejectment have been paid.' For a time the extension of the practice to other actions was questioned. The policy and propriety of it, however, did not long remain a doubt. In *Weston v. Withers*, 2 D. & E. 511, the plaintiff having been nonsuited in an action of trespass for taking goods, brought a second action for the same cause and sued *in forma pauperis*. On a rule to show cause why the second action should not be stayed, it was objected that it could only be done in ejectment. But the court made the rule absolute, and Justice Buller read two cases where the like rule had been made in other actions than ejectment. In the case of *Grovesnor v. Cape*, cited in 2 Bel. Rep. 741, and in 3 Wils. 150, trover was brought to try a question in bankruptcy. The merits were fully gone into, the opinion of the court was with the defendant, and judgment had. A new action was brought, in case, for money had and received, and not in trover, lest the former judgment should be pleaded in bar, but professedly to try the same question of bankruptcy over again. The court refused to permit the second

within the jurisdiction,<sup>1</sup> and to courts of the United States held in and for the State;<sup>2</sup> but it does not extend to courts of another State or a foreign country.<sup>3</sup>

In order to justify such stay, the causes of action in the two cases must be the same<sup>4</sup> and the parties must be the same, or at least there must be a privity to the parties to the former action.<sup>5</sup> Where one action is legal and the other equitable, the rule will not be applied.<sup>6</sup> The rule applies notwithstanding new parties defendant have been entered in the second action,<sup>7</sup> or a new cause of action has been added.<sup>8</sup> But where the party seeking the stay has assigned his interest in the costs, the relief will not be granted.<sup>9</sup>

The foregoing rules apply also where the plaintiff has been nonsuited.<sup>10</sup>

*b. WHERE MATERIAL EVIDENCE WITHHELD.*—Where the plaintiff fraudulently withholds material evidence, or destroys documents containing evidence material to the defendant's case,

action to proceed until the costs of the former should be paid. For a time it was questioned whether the proceedings could be stayed, unless in the first action the merits had been examined and decided, either by nonsuit or verdict. But sound reason prevailed over this difficulty. It could not fail to be seen that if the first action was ended by the neglect of the plaintiff to pursue it with regularity and diligence, his neglect should afford him no title to escape the payment of costs. In the case of *Baldwyn v. Richards*, 2 D. & E. 511, n., a second action was stayed after judgment as in case of nonsuit, for not going to trial in the first, which was for malicious prosecution. The same rule is pursued in the supreme court of New York. *Cuyler v. Vanderwerk*, 1 Johns. Cas. (N. Y.) 247; *Perkins v. Hinman*, 19 Johns. (N. Y.) 237.

1. *Swing v. Alloways Creek*, 10 N. J. L. 58; *Taylor v. Vandervoort*, 9 Wend. (N. Y.) 449; *Perkins v. Hinman*, 19 Johns. (N. Y.) 237.

2. *Jackson v. Carpenter*, 3 Cow. (N. Y.) 22.

3. "The enforcement of that rule has been confined to courts within the state and not always applied even here where the different courts proceeded by different modes of practice or were governed by different principles in their decisions. With much more force it may be said that it should not be applied to cases where the courts were in different states, and, perhaps, governed by entirely different modes

of proceeding. The rule has never been extended to costs in actions pending in other states or countries, and there are good reasons why it should not be." *Julio v. Ingalls*, 15 Abb. Pr. (N. Y.) 429.

4. *Vetterlein v. Barnes*, 43 Hun (N. Y.) 437; *Arnold v. Clark*, 6 Daly (N. Y.) 259.

5. *Vetterlein v. Barnes*, 43 Hun (N. Y.) 437; *Richardson v. White*, 27 How. Pr. (N. Y.) 155; *Taylor v. Vandervoort*, 9 Wend. (N. Y.) 449; *Zimmerman v. Kebler*, 9 Pa. Co. Ct. Rep. 128.

6. *Rankin v. Thompson*, 8 Pa. Co. Ct. Rep. 201; *Davis v. Duffie*, 3 Abb. Pr. (N. Y.) 363; 5 Duer (N. Y.) 688; *Kerr v. Davis*, 7 Paige (N. Y.) 53; *Demarest v. Wynkoop*, 2 Johns. Ch. (N. Y.) 461; *Wild v. Hobson*, 2 Ves. & B. 112.

7. *Kentish v. Tatham*, 6 Hill (N. Y.) 372.

8. *Ripley v. Benedict*, 4 Cow. (N. Y.) 19.

9. *Simpson v. Brewster*, 9 Paige (N. Y.) 245.

10. *Robinson v. Merchants', etc. Transp. Co.* (R. I.), 14 Atl. Rep. 560; *Jackson v. Edwards*, 1 Cow. (N. Y.) 138; *Jackson v. Carpenter*, 3 Cow. (N. Y.) 22; *Perkins v. Hinman*, 19 Johns. (N. Y.) 237; *Gummer v. Omro Trustees*, 50 Wis. 247; *Smith v. Allen*, 79 Me. 536; *Morse v. Mayberry*, 48 Me. 161. See also *Janeway v. Skerritt*, 30 N. J. L. 97; *Stirk v. Central R. & Banking Co.*, 79 Ga. 495. See also *COSTS*, vol. 4 p. 313; *NONSUIT*, vol. 16, p. 720.



the court may stay proceedings until such documents, or true copies of them are produced.<sup>1</sup>

c. **FOR DISCOVERY AND COMMISSIONS TO TAKE TESTIMONY.**—Proceedings in a suit by a foreign government may be stayed until the means of discovery are secured in a cross suit.<sup>2</sup> But a stay of proceedings in the original suit will not be granted where an officer of such government is made a defendant in a cross suit for the sole purpose of discovery.<sup>3</sup> So upon the issuance of a commission to take testimony, a stay of proceedings may be granted;<sup>4</sup> but the party applying for it must show clearly the necessity for the delay and the materiality of the evidence sought.<sup>5</sup> The order for a commission to take testimony is not *per se* a stay of proceedings.<sup>6</sup>

d. **UNTIL HEARING OF MOTION.**—A stay of proceedings may be granted to await the hearing of a motion in the progress of a cause. In such case, the stay is merely a means to the end sought to be accomplished by the motion, and the application for it should be founded on a case showing at least a *prima facie* right to some relief, which can only be effectually obtained by staying the proceedings of the opposite party until the application for such relief can be properly made.<sup>7</sup>

3. **Application for Stay—In What Court Made.**—An application to stay proceedings must be made in the court in which the action is pending. No other judge or court has jurisdiction to stay proceedings.<sup>8</sup>

4. **Remedy for Abuse of Discretion.**—An order of the trial court

1. *Edgington v. Nixon*, 2 Scott 507; 2 Bing. N. Cas. 316; 29 E. C. L. 348;

2 *Wait's Pr.*, p. 622, *citing* *Premo v. Smith*, 10 Abb. N. S. (N. Y.) 90; 40 How. Pr. (N. Y.) 480.

3. *Republic of Peru v. Weguelin*, *Weguelin v. Republic of Peru*, L. R., 20 Eq. 140; 44 L. J. Ch. 583; 32 L. T. 426.

4. *Republic of Costa Rica v. Erlanger*, 1 Ch. Div. 171; 45 L. J. Ch. 145; 34 W. R. 151; *reversing* 33 L. T. 632.

5. *Starbuck v. Hall*, 1 How. Pr. (N. Y.) 58; *Pomeroy v. Lowndsbury*, 1 How. Pr. (N. Y.) 30; *Rathbun v. Ingersoll*, 34 N. Y. Super. Ct. 211.

6. *Forrest v. Forrest*, 3 Bosw. (N. Y.) 666.

7. *Maynard v. Chapin*, 7 Wend. (N. Y.) 520; *Jackson v. Woodworth*, 18 Johns. (N. Y.) 136.

8. *Kirby v. Cogswell*, 1 Cai. (N. Y.) 505; *Schenck v. McKie*, 4 How. Pr. (N. Y.) 246; *Chubbuck v. Morrison*, 6 How. Pr. (N. Y.) 367; *Sales v. Woodin*, 8 How. Pr. (N. Y.) 349; *Ackroyd v. Ackroyd*, 3 Daly (N. Y.) 38.

8. *Garbutt v. Fawcus*, 1 Ch. Div. 155; 45 L. J. Ch. 133; *In re Morrison Patent Fuel Co.*, W. N. 1877, 20; *In re South of France Pottery Works Syndicate*, 37 L. T., N. S. 260; *In re People's Garden Co.*, 1 Ch. Div. 44; 45 L. J. Ch. 129; *Walker v. Banagher Distillery Co.*, 1 Q. B. Div. 129; 45 L. J. Q. B. 134; *Rose v. Garden Lodge Coal, etc., Co.*, 3 Q. B. Div. 235; 47 L. J. Q. B. 338.

*Contra.*—*Kingchurch v. People's Garden Co.*, 1 C. P. Div. 45; 45 L. J. C. P. 131; *Needham v. River Protection, etc., Co.*, 1 Ch. Div. 253; 45 L. J. Ch. 132. The *Judicature Act* provides that all actions must be stayed by the court in which the action is pending. Nevertheless, it is held in the two cases last above cited, that where proceedings are instituted in the chancery division for the winding up of the company, and pending such proceedings a creditor brings an action at law against the company, the chancery division may stay proceedings in the action at law until the winding up proceedings are determined.

staying proceedings in a cause is a discretionary order, and, as such, is not appealable. But where there has been an abuse of discretion and such order has been made without sufficient cause, the appellate court will award a *mandamus* in the nature of a *procedendo* to compel the trial court to proceed with the cause.<sup>1</sup> It has been held, however, that an order staying proceedings permanently in an action, being a final determination of the action, affects a substantial right and is appealable.<sup>2</sup>

**III. STAY OF EXECUTION.**—See EXECUTIONS, vol. 7, p. 117. For stay of execution pending appeal, see SUPERSEDEAS.

**1. Definition and Kinds.**—Stay of execution may be defined to be a suspension of the legal process prescribed by law for carrying a judgment into effect.<sup>3</sup> The word stay is often used by itself to mean the period of time during which no execution can issue on a judgment.<sup>4</sup> In criminal cases, stay of execution means much the same as reprieve or respite.<sup>5</sup> What are commonly called stay laws are acts of the legislative powers of states, prescribing a stay of judicial proceedings in certain cases, being designed for the protection and relief of debtors in times of financial trouble.<sup>6</sup>

In civil cases there are several classes of stays, resulting from an order of court or agreement of the parties, or compliance with statutory provisions. These will be treated in their order.<sup>7</sup>

**2. Stay by Order of Court**—*a.* **POWER OF COURT TO GRANT STAY.**—All courts of general jurisdiction have inherent power to stay execution of their own judgments. This power is derived from the court's entire control over its own process and is necessary in order to prevent oppression and abuse. For this purpose it should be exercised liberally but cautiously, and only when it seems in the sound discretion of the court necessary to promote

1. *Imlay v. Carpentier*, 14 Cal. 173; *Rhodes v. Craig*, 21 Cal. 419; *Avery v. Contra Costa Co. Ct.*, 57 Cal. 247; *Dunphy v. Belden*, 57 Cal. 427; *Rose v. Nevada Co. Ct.*, 65 Cal. 570; *People v. Judges*, 27 Mich. 406; 15 Am. Rep. 195; *Culver v. Judge*, 57 Mich. 25; *Budd v. New Jersey R., etc., Co.*, 14 N. J. L. 467.

A writ of error does not lie to an order of the court below to stay the proceedings finally. But the court will award a *mandamus nisi* in the nature of a *procedendo*. *Livingston v. Dorgenois*, 7 Cranch (U. S.) 577.

But *mandamus* will not lie to compel allowance of a stay of proceedings. *State v. Judge*, 22 La. Ann. 116; *People v. Judge*, 24 Mich. 408.

2. "It is urged that this order is not appealable. I think it is. It is an absolute unconditional stay, without limit, and necessarily prevents the en-

try of a judgment. This order in effect determines the action and prevents a judgment from which an appeal might be taken. Such plainly is the purpose of the injunction from the district court and this order is made in compliance with that direction. It is said that this order may be modified or reversed upon some application of the plaintiffs for a rehearing or otherwise. The same may be said with the same force of almost any other appealable order. That does not prevent an appeal. It is then very clearly appealable." *Peckham J., in Knowlton v. Providence, etc., S. S. Co.*, 53 N. Y. 76.

3. Abb. L. Dict.

4. Bouv. L. Dict.

5. Abb. L. Dict.

6. Black L. Dict.

7. Stay of execution by injunction is not included in this article. See INJUNCTIONS, vol. 10, p. 884 *et seq.*

the ends of justice.<sup>1</sup> A trial court may not stay execution of the judgment of an appellate court after a mandate or remittitur, or

1. *Sawin v. Mount Vernon Bank*, 2 R. I. 382; *Com. v. Magee*, 8 Pa. St. 240; 44 Am. Dec. 509; *Eaton v. Cleveland*, etc., R. Co., 41 Fed. Rep. 421; *Davis v. Tiffany*, 1 Hill (N. Y.) 642; *Welch v. Tittsworth*, 22 How. Pr. (N. Y.) 474; *Knox v. Hexter*, 42 N. Y. Super. Ct. 496; *Kramer v. Holster*, 55 Miss. 243.

A lower court has no power to grant a *supersedeas* to a judgment or decree of the higher court, any more than a justice of the peace can supersede a judgment of the circuit court. *Dibrell v. Eastland*, 3 Yerg. (Tenn.) 507; *Mayor, etc., of Marysville v. Buchanan*, 3 Cal. 212.

The refusal of a court to grant a stay of execution when the motion is addressed to its judicial discretion is not appealable. A motion to temporarily stay an execution was made by a judgment debtor on the ground that attachments had been laid in his hands as garnishee of the judgment creditor, and that the execution should therefore be stayed until the rights of the parties were settled in the court issuing the attachment. The motion was refused. This refusal was not the subject of appeal. The motion was addressed to the legal discretion of the court below, which will take care that no injustice is done. *Early v. Rogers*, 16 How. (U. S.) 599.

The refusal of the court below to stay proceedings, the motion being addressed to the judicial discretion of the court cannot be assigned as error. As well might the refusal of a judge to allow an injunction or grant a writ of *habeas corpus* be assigned as error. *Branigan v. Rose*, 8 Ill. 123; *Granger v. Craig*, 85 N. Y. 619.

In *Freeman on Executions*, § 32, it is said: "Each court has such general control of its process as enables it to act for the prevention of all abuse thereof. The power of courts to temporarily stay the issuing of executions is exercised in an almost infinite variety of circumstances in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ."

In *Eaton v. Cleveland, etc., R. Co.*, 41 Fed. Rep. 421, the court, by Thayer J., said: "In these cases motions for

a temporary stay of execution on the judgments have been filed. When the motions were argued, counsel strenuously contended that the court had no power to grant a temporary stay of execution, and that it would be a clear violation of the rights of the judgment creditors to withhold execution, even for a short period. A cursory examination of that question satisfies me, however, that all courts of common law have power to temporarily stay executions on judgments by them rendered, whenever it is necessary to accomplish the ends of justice. In *Sawin v. Mount Vernon Bank*, 2 R. I. 383, the court said: 'We are satisfied that the court has entire control over its own process, and that it is in the discretion of the court to grant a stay of the execution in each case according to the circumstances. But this discretion must be judicially exercised,' etc. . . . In *Robinson v. Yon*, 8 Fla. 355, the court said: 'Courts of law have full power to revoke, correct, restrain or quash their process in the course of their own ordinary jurisdiction.' While the power to temporarily stay executions on its judgments resides in every court, it must be conceded that it is a power that ought to be cautiously exercised, and only in those cases where it seems necessary to promote the ends of justice. In other words, it ought not to be arbitrarily used, nor should an execution be withheld merely because it is inconvenient for a judgment debtor to pay his debts. The question to be determined, therefore, is whether the circumstances justify the court in withholding execution for a short period."

In *New York* it is held that the code does not abridge the power that the supreme court has always had over its own judgments; it may in its discretion stay proceedings pending an appeal without the prescribed security; and the exercise of this discretion, unless capricious or the discretion be abused, is not reviewable in the court of appeals. *Granger v. Craig*, 85 N. Y. 619. Justices of the peace nowhere have discretionary powers to stay execution.

It was held in *Hudson v. Smith*, 9 Wis. 122, that the power of the appellate court to stay proceedings in any matter appealed to it does not

otherwise interfere with it except to make the orders necessary to carry it into execution.<sup>1</sup> But it has been held that a *nisi prius* court may stay execution on its own judgment after it has been affirmed by the appellate court.<sup>2</sup>

*b. PERPETUAL STAY.*—A perpetual stay of execution is granted in many cases where an execution ought not to be enforced under

altogether depend upon statutory enactment, but is inherent in the court. The circuit court having refused defendant a stay of proceedings, this court grants him that relief on condition that he file a proper undertaking within a certain period. It is the general policy of the law to allow a defendant to stay proceedings under a decision of an inferior tribunal against him, from which he has appealed, on his giving proper security. *Levy v. Goldberg*, 40 Wis. 308.

A judge at chambers cannot set aside and perpetually stay an execution. *Bond v. Pacheco*, 30 Cal. 530; but may suspend it until motion to quash can be heard. *Sanchez v. Carriaga*, 31 Cal. 170.

A judge may not make an *ex parte* order recalling or staying execution. *Livermore v. Hodgkins*, 54 Cal. 637.

A chancellor has no jurisdiction to stay proceedings under an execution issued upon a delivery bond taken under an execution indorsed "no security to be taken." A court of law can render full redress by a writ of error *coram vobis* or motion to quash. *Poston v. Southern*, 7 B. Mon. (Ky.) 289.

1. "Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it further than to settle so much as has been remanded. (1 S. C. 194, 197; 1 H. & N. 557; 3 Menif. 228.)" Justice Baldwin, in *Sibbald v. U. S.*, 12 Pet. (U. S.) 488.

"There has been some discussion at the bar as to the principles by which a circuit court of the United States is to be governed when executing a mandate from the supreme court. Undoubtedly the mandate must be its guide. It is the judgment of this

court transmitted to the circuit court. And when the direction contained in the mandate is precise and unambiguous, it is the duty of the circuit court to carry it into execution and not to look elsewhere for authority to change its meaning." Taney, C. J., in *West v. Brashear*, 14 Pet. (U. S.) 51.

In *Dibrell v. Eastland*, 3 Verg. (Tenn.) 507, it was held that a judge of a state circuit court was without authority to grant an order for a *superseas* to the judgments or decrees of the supreme court.

In *Marysville v. Buchanan*, 3 Cal. 214, the court, by Wells, J., said: "The present appeal is from an order of the district court, refusing to set aside an order of the judge at chambers, staying proceedings upon an execution for costs, issued by the clerk of the district court, upon a *remittitur* from this court filed with him, and from an order of the district court quashing said execution. . . . Neither the district court nor the district judge have any authority to prevent the immediate execution of the judgment of this court. So far as the appeal is concerned and the costs consequent thereon, the judgment of this court is final. . . .

The order of the district court must be reversed, and the order of the district judge, staying proceedings, set aside, and the plaintiffs can have their execution for the costs of this appeal."

2. In *Blackburn v. Reilly*, 48 N. J. L. 84, the court, by Van Syckle, J., said: "The mandate of the court of errors is substantially the same in form as that of the Supreme Court of the United States. The plaintiff relies upon *West v. Brashear*, 14 Pet. (U. S.) 52, and *Sibbald v. U. S.*, 12 Pet. (U. S.) 488, to support his position. The doctrine of these cases, that whatever was before the superior court, and there disposed of, must be regarded as finally settled, and that the inferior court cannot review or interfere with any matter decided on the appeal, or give other or further relief in that respect, must be conceded to be a correct exposition of the law.

any circumstances; as where there has been an abuse of process in obtaining the judgment,<sup>1</sup> or the judgment is void,<sup>2</sup> or where

It must also be admitted that the circuit court has no power to reverse or annul its own final judgment for errors of law or fact, after the term in which it has been rendered, unless for clerical mistakes in the entry. But the plaintiff must establish the more advanced position that after *remittitur* the circuit court is constrained to issue execution, and cannot control the judgment, as in other cases, for the equitable purpose of setting it off against a judgment at that time held by the defendant against the plaintiff. If this cannot be successfully maintained the argument is without force. . . . The practice, I think, is also well settled, that the circuit court can control its own judgment and stay execution, to enable a defendant to recover his counter-claim, and set it off, that full justice may be done. Are these rights lost to the defendant through deprivation of the power of the circuit court consequent upon the affirmance of its judgment by the court of last resort? The judgment of the court of errors was simply a judgment of affirmance. No execution can issue out of the court of errors. The record is remitted, and the judgment stands henceforth as an unappealable judgment of the circuit court. How can affirmance deprive the inferior court of any power which, by established practice, it exercises over its final judgments, and which does not impeach their finality? How does it impair the general power of the court below? How can the fact that the circuit court was right in its judgment serve to degrade its authority in this case. The judgment after affirmance has all the attributes of a final judgment, nothing more. It has no higher qualities than a final judgment unappealed from, except that its validity cannot be questioned or reviewed. The only question adjudged in the appellate court was that in the record and proceedings below no error appeared. . . . The circuit court being the proper forum in which the defendant must apply for relief, there is nothing in the *remittitur* which can operate to extinguish this control with which the law invests the circuit court over final judgments. This in no wise impeaches the judgment; it is recog-

nized as final and conclusive and the court deals with it as such. There is no higher right to execution because the judgment has been affirmed."

1. The plaintiff got judgment against the defendant and then sued on that judgment, and then brought suit on the second judgment, and so on until there were eight judgments, and the costs were largely increased. On motion, the court ordered a perpetual stay of proceedings on all judgments except the first, and said: "The court has such a control over its own process that it ought not to allow it to be perverted or used for any improper purpose." *Keeler v. King*, 1 Barb. (N. Y.) 390.

Execution was issued against a certain farm which had been sold by the defendant to a party who held the property under the court's decision, free from any lien of the judgment. This being clear, the court granted a perpetual stay of execution, on the ground that an attempt to draw the purchaser's title into question in that manner was an abuse of its process. *Davis v. Tiffany*, 1 Hill (N. Y.) 642.

2. *Logan v. Hillegass*, 16 Cal. 201; *Ketchum v. Crippen*, 37 Cal. 223; *Murdock v. De Vries*, 37 Cal. 527.

A suit was brought to restrain a sale under execution issued upon a judgment on the ground that the execution is void upon its face, and that the judgment upon which it was issued was void. The court said: "We think the complaint presents no case for an injunction. If the judgment upon which the execution is based and the execution itself are void upon their face, the county court has ample power to afford speedy and adequate relief. If the judgment is void, the court has entire control over its process and can arrest it. The county judge also has authority to order a suspension of the execution of the writ until a motion before the court to recall or quash it can be heard." *Sanchez v. Carriaga*, 31 Cal. 170.

An appeal from a judgment of a justice of the peace was taken after the time allowed by law and the circuit court acquired no jurisdiction in the case. Judgment was nevertheless entered in the circuit court and execution was issued. Upon motion, a

the plaintiff after decree is found to have no title,<sup>1</sup> or where the assignor of a debt has reduced it to judgment,<sup>2</sup> or where the judgment was obtained in violation of a stipulation.<sup>3</sup> Where the judgment has been satisfied in fact but not of record, the court may stay execution thereon.<sup>4</sup> And, generally, where it is clear that it would be unjust to enforce a judgment, the court will perpetually stay execution thereon.<sup>5</sup> But the court will not inter-

stay of execution was granted. The court said: "It was proper for the circuit judge to order the execution described in the petition to be stayed. Every court possesses the inherent power to prevent an abuse of its process. A motion to quash the execution was unnecessary. Quashing an execution is no bar to a subsequent execution. The better course for the defendant is to procure an order vacating the void judgment so as to save himself from further executions upon it; but if he sees proper to take the risk of this and to apply for an order to stay the execution as often as one may be issued, no law denies to him the right to pursue this course." *Kramer v. Holster*, 55 Miss. 243.

1. In *Houseman v. Houseman*, 1 Ch. Div. 535; 34 L. T. 33, James, L. J., said: "It seems to me that the plaintiff was well warranted in taking out letters of administration, believing himself to be the next of kin. But before the bill was filed, he had ascertained that there was a person claiming to be the intestate's widow. If he then took proceedings, they were *suo periculo*; and he did take proceedings knowing that his right might at any moment be determined. His right as plaintiff was displaced by the court of probate. The administratrix then said that she wanted the suit stayed and without loss of time took out a summons accordingly. The plaintiff ought to have submitted to have such an order made in chambers. The order made must be varied and must be that proceedings are to be stayed and the applicant is to have her costs of staying the proceedings and of the appeal."

2. A assigned to B, by way of security for a loan of ten thousand pounds, two sums of five thousand pounds each, due from C to A under two several indentures, and afterwards brought debt against C upon those indentures. The court refused to stay the proceedings in the action at the instance of B and C and suggested that the proper course was to apply

after judgment to stay execution. Maule, J., said: "I incline to think that the defendant can have no relief even in equity until judgment has been obtained and execution is about to issue." Tindal, C. J., said: "I think my brother Maule has suggested the right course. The application must be after judgment to restrain the plaintiff from suing out execution." *Seppings v. Nokes*, 2 C. B. 292; 52 E. C. L. 291.

3. A plaintiff who obtains judgment in violation of his written stipulation on file dismissing the action, may be restrained by the court in which judgment was obtained from enforcing it. *McLeran v. McNamara*, 55 Cal. 508.

4. Where judgment is attempted to be enforced by execution which has been satisfied or released, the execution may be suspended by *supersedeas*, and, on motion, satisfaction may be entered in the courts from which the execution emanated. *Marsh v. Haywood*, 6 Humph. (Tenn.) 210.

5. *Rutland v. Pippen*, 7 Ala. 469; *Smith v. Page*, 15 Johns. (N. Y.) 395; *Lansing v. Orcott*, 16 Johns. (N. Y.) 4; *Welch v. Tittsworth*, 22 How. Pr. (N. Y.) 475; *Baker v. Taylor*, 1 Cow. (N. Y.) 165; *Harrison v. Soles*, 6 Pa. St. 393.

In *Rutland v. Pippen*, 7 Ala. 469, the court said: "In *Lockhart v. McElroy*, 4 Ala. 572, it was held that an execution may be superseded for an unjust or improper use attempted to be made of it, although it be authorized by the judgment; and the objection may be shown by extrinsic proof, even if it be mere oral testimony. This is an authority conclusive to show that the objection to the evidence by which the satisfaction of the judgment was shown is clearly untenable."

The court will order a perpetual stay of the *ca. sa.* where the defendant is discharged under the Act (sess. 42, ch. 101), intermediate the verdict and judgment. But if the discharge is objected to by the plaintiff, they will open the cause so as to give him a chance to try

fare unless the defendant's right to a stay is very clearly shown.<sup>1</sup>

Frequent instances of such perpetual stays arise where executions are issued on judgments after a discharge of the defendant in bankruptcy or insolvency, when such discharge comes too late to be set up as a defense to the action.<sup>2</sup>

the question, the judgment standing as security. *Baker v. Taylor*, 1 Cow. (N. Y.) 165.

The court, to prevent fraud or great injustice, will order a perpetual stay of an execution provided the facts are made clearly to appear to the court so that complete justice can be done to all the parties concerned. Otherwise, the execution may be stayed for a definite time so as to give the party an opportunity to apply to the court of chancery for relief. *Lansing v. Orcutt*, 16 Johns. (N. Y.) 4.

Where an execution has irregularly issued, the proper course is to apply to the judge of the court from which it issued to stay proceedings, and not by injunction. *Greenup v. Brown*, 1 Ill. 252.

An execution improvidently issued will be stayed on motion at law, and chancery will not interfere unless it be until the motion can be made. *Lasselle v. Moore*, 1 Blackf. (Ind.) 226.

1. The court will not interpose summarily to stay an execution, unless the defendant's case is made out entirely to their satisfaction. If it is doubtful, he must resort to his action. *Pearce v. Affleck*, 4 Binn. (Pa.) 344.

A stay of proceedings after entry of judgment will not be granted because defendant is applying in another court for a discharge from his debts under the "Two-third Act." *Eastman v. Starr*, 22 Hun (N. Y.) 465.

A sheriff sold a house and lot belonging to defendant under a judgment and execution against him, and executed a deed to the purchaser. He afterwards seized the same lot on another execution issued on a prior judgment against the defendant and advertised the same for sale. The court refused on motion of the first purchaser to stay proceedings, but left him to his remedy by action. *Myers v. Kelsey*, 19 Johns. (N. Y.) 197.

The indulgence of a creditor to one of two defendants in a judgment, if such defendants are not principal and surety, as to each other, does not entitle the other defendant to a stay of proceedings on the execution against

him, although he has paid a moiety of the debt and but for the indulgence of the plaintiff the other moiety would have been collected of the other defendant. *Bank of Lansingburgh v. Russell*, 5 Wend. (N. Y.) 128.

A motion to restrain the sheriff from selling property upon execution, upon the ground that execution on the same judgment had already been issued in another county, denied, where it appeared doubtful whether the execution in such other county produced any satisfaction. *Mills v. Thursby*, No. 4, 11 How. Pr. (N. Y.) 119.

When a non-resident is permitted, after judgment, to come in and defend, that fact does not of itself open the judgment or stay proceedings upon the execution. *Carswell v. Neville*, 12 How. Pr. (N. Y.) 445.

As a general rule, execution will not be stayed for matters not apparent on the proceedings without an affidavit and bond to indemnify the party issuing it. *Piernas v. Milliet*, 10 La. Ann. 286.

A party to stay a writ of possession issued from the district on a judgment from the supreme court, must show affirmatively that it issued in contravention of the latter's decree. *Crane v. Allen*, 11 La. Ann. 496.

The alleged indebtedness of the plaintiff in an execution to the defendant, together with the plaintiff's insolvency, is no ground for an indefinite stay of execution, if security to the amount of the execution is offered by the plaintiff. *Patterson v. Patterson*, 27 Pa. St. 40.

2. A discharge in bankruptcy must be pleaded as a defense to an action, or it will be treated as waived. But if the defendant has no opportunity of pleading his discharge, as if it came too late, the practice is to permit the defendant to avail himself of it by a motion for a perpetual stay of execution. *Cornell v. Dakin*, 38 N. Y. 253; *Monroe v. Upton*, 50 N. Y. 593; *Imlay v. Carpentier*, 14 Cal. 177; *Graham v. Pierson*, 6 Hill (N. Y.) 247.

D. recovered a judgment against B., who appealed the case; soon after-

c. **TEMPORARY STAY.**—The power of the court to grant a temporary stay of execution is discretionary and is exercised in a great variety of circumstances in order to promote the ends of justice and prevent the inequitable use of the writ.<sup>1</sup> In many cases, this relief may be made to operate almost as a substitute for equitable proceedings; as where the plaintiff is insolvent and

wards B. obtained his discharge under the bankrupt law, without notifying his attorney in the appealed case, supposing that by these proceedings the judgment debt had been discharged. The judgment was affirmed by the appellate court, and D. issued an execution thereon. B. then moved that the execution be perpetually stayed. The appellate court, holding B.'s neglect to avail himself of the discharge before the judgment of affirmance to be satisfactorily explained, granted the motion, upon the terms of B.'s paying the costs of all the proceedings in that court. *Bostwick v. Dodge*, 2 Dougl. (Mich.) 331.

G. obtained judgment against P. who appealed, but the judgment was affirmed. Between the argument of the case and the decision of the court affirming the judgment, P. was discharged in bankruptcy. Upon his motion for a perpetual stay of execution the court said that the motion should be granted in the exercise of an equitable power over its judgment. *Parks v. Goodwin*, 1 Mich. 35; *Bangs v. Strong*, 1 Den. (N. Y.) 619.

A delivery made on an execution against a bankrupt, which issued previous to his obtaining his discharge, but after the filing of his petition, will be quashed by the court out of which it issued, on motion. *McDougald v. Reid*, 5 Ala. 810. See also *Ewing v. Peck*, 17 Ala. 339; *Roden v. Jacob*, 17 Ala. 344; *Brown v. Branch Bank*, 20 Ala. 420; *Curtis v. Slosson*, 6 Pa. St. 265; *Alcott v. Avery*, 1 Barb. Ch. (N. Y.) 347.

Where, after a verdict in assumpsit, a defendant petitioned for a discharge in bankruptcy, and while his petition was pending and before he was declared a bankrupt judgment was entered in the suit and he was subsequently discharged, the court on motion refused to order the judgment to be cancelled, but directed a perpetual stay of execution as to all property acquired by defendant after decree in bankruptcy. *Mechanics Banking Assoc. v. Lawrence*, 1 Sandf. (N. Y.)

659. See also *Palmer v. Hutchins*, 1 Cow. (N. Y.) 42; *Baker v. Taylor*, 1 Cow. (N. Y.) 165; *Baker v. Judges*, 4 Johns. (N. Y.) 191; *Dresser v. Brooks*, 3 Barb. (N. Y.) 429; *Francis v. Ogden*, 22 N. J. L. 210.

1. The owner of a judgment which was a lien upon several parcels of land, one of which had been conveyed to a bona fide purchaser, levied upon and sold the latter property, knowing that the judgment could be collected out of the other unincumbered land of the defendant. The court set the sale aside, and ordered a stay as to the land in question, until the creditor had exhausted his remedy against the other land. This was done in furtherance of justice, and in the exercise of the court's equitable powers over its own process. *Welch v. Tittsworth*, 22 How. Pr. (N. Y.) 474. And see also *Smith v. Page*, 15 Johns. (N. Y.) 395.

A, who was insolvent, recovered judgment against B, who had a suit pending against A. A stay of execution was granted on A's judgment against B, until the decision of B's suit against A. *Steere v. Stafford*, 12 R. I. 131.

H. obtained a judgment against K., and K. then obtained a judgment against H. The latter judgment was reversed on appeal to an intermediate court, and K. then appealed to the highest court. Pending the determination of this appeal a stay was granted to prevent the collection of the judgment of H. against K. *Knox v. Hexter*, 42 N. Y. Super. Ct. 496.

The owner of a judgment against two partners, applied for an execution, by collusion with one of them, upon the property of the other partner, contrary to the equities between the partners. The execution was stayed until a bill of equity could be filed to determine the rights of the parties. *Sawin v. Mount Vernon Bank*, 2 R. I. 382.

Where judgments had been obtained by two persons against a railroad company, and twenty or more suits against the same property were pending, but



judgments had not been reached, but would be reached in a few days, the court temporarily stayed the executions on the first two judgments until the other claims were reduced to judgment, in order to prevent a sacrifice of the railroad company's interests, and to avoid numerous sales under different executions, and to be clear of complications of titles that would result from a sale. *Eaton v. Cleveland, etc., R. Co.*, 41 Fed. Rep. 421.

It is the equitable control which courts are authorized to exercise over the parties and proceedings in causes before such courts and to promote equity and to prevent injustice, which allows the granting of stays. It is difficult to perceive why a stay of execution on a judgment should not be granted for a brief period until judgment has been obtained by the defendant in a cross-action, so as to enable him to make an offset. *Knox v. Hexter*, 42 N. Y. Super. Ct. 496.

Upon a motion for a stay the court held that as there were so many parties interested, and as the facts were so complex that justice could not be done to all concerned, there should be a stay for three months in order that all parties might apply to a court of chancery for relief. *Lansing v. Orcott*, 16 Johns. (N. Y.) 4.

Upon proof that a sale is about to be made, under an execution, in an irregular manner, contrary to the statutory provisions, the court will order a stay. *Robinson v. Yon*, 8 Fla. 350; *Robinson v. Chesseldine*, 5 Ill. 332.

An agreement was made between a plaintiff and the judgment debtor, by which the latter gave additional security, and in consideration thereof was to be allowed further time in which to make payment. The plaintiff violated this agreement by issuing an execution before the time had expired. The court stayed the execution until the plaintiff did justice by carrying out his agreement. *Harrison v. Soles*, 6 Pa. St. 397.

The defendants were the owners of a piece of ground 25 feet front by 100 feet deep, which was entirely covered by a brick building. The execution and levy did not embrace the whole house, but omitted almost four feet in width the entire length of the house. The court said that a ruinous sacrifice would attend a sale made in this manner, and would not allow its process to be abused in that way, and therefore

ordered a correction to be made so as to embrace the entire lot. *Phillips v. Evans*, 64 Mo. 24.

If the plaintiffs include in the bill of costs items to which they are not entitled, the remedy of the defendants is to move to retax the costs and to strike out the objectionable items, and the court under its general power over its own process and writs could order a stay of execution until such motion could be heard and determined. *Meeker v. Harris*, 23 Cal. 285.

The court in an equitable action on adjudging that the plaintiff is the owner of a fund in dispute, may stay the execution of the judgment for a specified period to afford the defendant an opportunity of establishing by legal proceedings a claim of the defendant against the plaintiff for money alleged to have been received from him. *Markey v. Markey*, 13 N. Y. Supp. 925.

When a judgment is rendered on a lost instrument, it is the duty of the court in *Tennessee* to stay execution on the judgment until the plaintiff files a bond of indemnity for the benefit of the defendant. *Lowry v. Medlin*, 6 Humph. (Tenn.) 450.

The plaintiff in an action against the defendant obtained a judgment, which on appeal by the defendant was affirmed. Before the appeal was heard the defendant preferred an indictment against two of the plaintiff's witnesses for perjury in the trial of the case, and moved for a stay of execution until the trial of the indictment. The motion was denied, and Lord Ellenborough said that it would be highly dangerous to grant it; "for," said he, "this would be a receipt to every person after verdict and judgment against him how to delay the fruit of such judgment by indicting some of the plaintiff's witnesses for perjury." *Warwick v. Bruce*, 4 M. & S. 140.

In *Chitty's General Practice*, vol. 1, p. 667, it is said: "The court will sometimes even stay execution in an action till judgment had been obtained by the defendant therein, i. e. a cross-action, so as to enable the latter to obtain a set-off." Referring to this, it is said in *Knox v. Hexter*, 42 N. Y. Super. Ct. 505, that if no possible injury results to the parties by a stay of proceedings, it seems difficult to perceive why a stay of execution on a judgment for a brief period should not be granted, until a judgment has

the defendant has an action pending against him;<sup>1</sup> but the stay will not be granted where the second action is in tort.<sup>2</sup> Orders granting temporary stays of execution, being discretionary, are not ordinarily appealable, but if they are unreasonably and

been obtained by the defendant in a cross-action to enable him to make an offset.

If an execution has issued irregularly and informally, the most speedy and easiest mode to obtain relief is to apply to a judge to stop all proceedings on it until an application can be made to the circuit court to arrest or vacate the proceedings of the sheriff. *Greenup v. Brown*, 1 Ill. 252.

Although the affidavit of the defendant in execution alone may be sufficient ground for an order in vacation for a stay of execution, yet when the motion to quash comes up for final hearing, such affidavit is not, if unsupported, sufficient to warrant the court in calling back its process. *Keefer v. Mason*, 36 Ill. 406.

Upon an application to a judge in vacation to obtain a stay of execution, the proper mode of proceeding is by summons in the nature of a rule *nisi* fixing a day for hearing, which should be served on the opposite party, and without this be shown, the judge ought not to interpose his power unless the order applied for is a matter of course. *Com. v. Magee*, 8 Pa. St. 240; 44 Am. Dec. 509.

Execution may issue before the termination of a conditional stay where there is breach of the condition. *Holmes v. Delabourdine*, 1 Browne (Pa.) 130; *Kaylor v. Holloway*, 5 Phila. (Pa.) 530.

The execution of an order remanding a cause for further proceedings upon the reversal of a judgment of an inferior court, may be stayed by the court in which the petition in error is filed to reverse the judgment of reversal, or by a judge thereof, as provided by § 22, ch. 1, art. 4 of the act of May 14, 1878.

An order staying the execution of a judgment on final order, as provided for in said section, will only be granted on good cause shown, and the mere pendency of a petition in error to reverse the judgment of reversal is not a sufficient ground for an order granting such stay. *Texas B'd'g Assoc. No. 2 v. Aurora F. & M. Ins. Co.*, 34 Ohio St. 291.

Obtaining an order permitting the filing of a complaint *nunc pro tunc* is a violation of a stay of proceedings granted upon an order to show cause why judgment should not be vacated because entered without a complaint. *Wards v. Sands*, 10 Abb. N. Cas. (N. Y.) 60.

A stay of proceedings upon judgment of foreclosure pending appeal to the general term, is discretionary and plaintiff is not entitled as a matter of right to a deficiency undertaking. Where the foreclosure is upon leasehold premises and there is a receivership for application of the rents, the discretion granting a stay was fairly exercised. *Wilson v. Grant*, 59 How. Pr. (N. Y.) 350.

Notice that a motion will be made to set aside an execution is not a stay of proceedings, but an order to that effect must be obtained to prevent the sale. *Bryan v. Berry*, 8 Cal. 130.

The execution of a judgment cannot be suspended on a rule to show cause. A suspensive appeal will not lie from a judgment dismissing such a rule. *Wiley v. Woodman*, 19 La. Ann. 210.

A prior general attachment may be a just reason for suspension of a levy on land under an execution against one of the defendants in attachment. *Wadsworth v. Williams*, 97 Mass. 339.

1. "It appears that the defendant in this suit has a suit pending against the plaintiff, and the motion is for a stay of execution in this case until the other can be decided. In the circumstances it being represented that the plaintiff is insolvent, we think the motion should be granted." *Potter, J., in Steere v. Stafford*, 12 R. I. 131; *Knox v. Hexter*, 42 N. Y. Super. Ct. 496.

But the alleged indebtedness of the plaintiff in an execution to the defendant, together with the plaintiff's insolvency, is no ground for an indefinite stay of execution, if security to the amount of the execution is offered by the plaintiff. *Patterson v. Patterson*, 27 Pa. St. 40.

2. A judgment against A was assigned to B to secure money lent to A, and which A covenanted by articles of

capriciously made, the appellate court will sometimes review them.<sup>1</sup>

**3. Stay by Agreement of the Parties.**—A stay of execution upon a judgment is frequently agreed upon between the parties to an action, the stay to be effective for a certain period. Such an agreement may be incorporated into the judgment, or may be a matter of record upon the court docket, or may be made privately between the parties. In either case the court will prevent any use of its process intended to violate the stay.<sup>2</sup>

agreement to repay on a certain day. The court refused to stay execution upon this judgment to give A time to obtain a verdict against B for damages in consequence of tortious acts by him in breach of his covenants in the same articles, though it seems they would if A's claim was for money paid, or any other accounts susceptible of liquidation. *Dunlop v. Speer*, 3 Binn. (Pa.) 168.

1. *Livermore v. Hodgkins*, 54 Cal. 637; *Granger v. Craig*, 85 N. Y. 619.

2. The safest practice is to have the provision for a stay incorporated into the judgment, as in this way no controversy can arise as to the validity of an agreement to stay, which requires all the elements of a valid contract. In a case in which the plaintiff agreed to a stay of execution for six months, there being no consideration therefor, the agreement was invalid and the court held that the judgment was operative during the time in which it was agreed that it should be stayed. *Leverich v. Bates*, 6 Ala. 480, as stated in *Sanford v. Ogden*, 34 Ala. 118.

An undertaking for a stay, executed after the time allowed by law, in pursuance of an agreement of the parties, is valid as a common law contract, if supported by a sufficient consideration, although not effective as a statutory undertaking. *Boling v. Young*, 38 Ohio St. 135.

A statement in a judgment as follows: "The attorney of the plaintiff in this suit declares he has been instructed not to seize or sell the said property before the end of the year," was held in *Louisiana* to operate as a stay of execution, as it formed part of the judgment and was as authoritative as any other recital in it. *Townsend v. Fontenot*, 42 La. Ann. 890.

An agreement was made by which the defendant in the judgment was to give additional security and was to be allowed further time for settlement.

The plaintiff violated this by issuing an execution which the court stayed until the plaintiff did justice by performing his agreement. *Harrison v. Soles*, 6 Pa. St. 397.

An execution issued in violation of an agreement that it should not be issued except upon a certain contingency which had not occurred, will be set aside. *Feagley v. Norbeck*, 127 Pa. St. 238.

If at the time a judgment is obtained the parties agree that an execution shall not issue for a certain time, which is duly entered of record, the time within which a plaintiff can take out his execution is extended twelve months and a day from the termination of the specified time, and no execution can regularly issue in the meantime except by order of the court. When a judgment is confessed upon terms which are duly entered, it is in effect a conditional judgment and the court will take notice of the terms and enforce them. *Wood v. Bagley*, 12 Ired. (N. Car.) 83.

Where a judgment is entered against a defendant to be released on his performance of a certain act, and he neglects to perform that act within a reasonable time, the plaintiff may take out execution without applying to the court, but the court will interfere in a summary way should it be necessary to prevent injustice and enforce the terms on which the judgment was entered. Under such circumstances the defendant cannot object that a year and a day have elapsed since the entry of judgment and that no *scire facias* has been issued. *Miller v. Milford*, 2 S. & R. (Pa.) 35.

If execution is stayed by the agreement of the parties, the year and a day runs only from the time when such stay expires, and this whether there is an entry of *cesset* on the record or it is a matter of private agreement out of court. The court will

**4. Statutory Stays—*a*. CONSTRUCTION OF STATUTES.**—A stay of execution is a privilege in derogation of the common law rights of the plaintiff, and the party claiming the privilege must bring himself strictly within the statute granting it.<sup>1</sup> An under-

take notice of such an agreement though not on record. *Dunlop v. Speer*, 3 Binn. (Pa.) 169.

Under the *Maryland* act of 1778, ch. 21, no agreement for the stay of execution on a judgment which is not entered on the docket at the time the judgment is rendered, can make it unnecessary to issue a *scire facias* to revive the judgment when a year and a day has passed from the time such judgment was rendered. *Salmon v. Yates*, 1 Har. & J. (Md.) 488.

Where an execution, upon a release of errors, was agreed to be stayed until a subsequent time unless the defendant consented for its issue sooner, and it was issued without any regard to the agreement and property sold, on motion for an appropriation of the money to the satisfaction of a junior judgment, it was held that the presumption must be that the execution issued with the consent of the defendants. *Jones v. Bailey*, 5 How. (Miss.) 564.

**Attorney's Authority.**—An attorney at law has no right without special authority to that effect to destroy his client's lien by stay of execution. Where an attorney at law has stayed his client's execution and the marshal has so returned it, it will not be presumed that the attorney had special power to stay it. He who so maintains, must show it by other proof. *Doe v. Ingersoll*, 11 Smed. & M. (Miss.) 249; 49 Am. Dec. 57.

1. *Erie City Bank v. Compton*, 27 Pa. St. 195; *The Roanoke*, 3 Blatch. (U. S.) 390; *Pratt v. Western Stage Co.*, 26 Iowa 241. An undertaking for a stay before a justice of the peace, executed after the time allowed by law, by agreement between the parties is valid as a common-law contract if supported by a sufficient consideration, although not effective as a statutory undertaking to stay execution. *Boling v. Young*, 38 Ohio St. 135; *Duckwall v. Rogers*, 15 Ohio St. 544.

See *State v. Finn*, 19 Mo. App. 557; *Gawtry v. Adams*, 10 Mo. App. 30; *Vincennes Nat. Bank v. Cockrum*, 80 Ind. 355; *Robinson v. Narber*, 65 Pa. St. 85.

A judgment entered for \$145 but

stayed for \$80 does not bind the stayor. To become stayor is to confess judgment. The judgment confessed by the stayor cannot be for a less amount than the judgment against the original defendant. *Smith v. Martin*, 7 Coldw. (Tenn.) 272. See also *Skinner v. Jayne*, 24 Miss. 567. The judgment cannot be stayed by halves. *Vincennes Nat. Bank v. Cockrum*, 80 Ind. 361; *Sterne v. McKinney*, 79 Ind. 578.

In *Wilson v. Davis*, 1 Mich. 156, security was given in the nature of a *superseatas* to stay an execution upon a confessed judgment. The judgment not being upon a written confession was void, and the court held that no action could be maintained upon the undertaking to stay it, as there was no consideration for the undertaking to stay execution upon a void judgment.

In *Shadbolt v. Bronson*, 1 Mich. 85, a judgment was stayed for six months, instead of three months, as the statute required. This could not operate as a stay of the execution, and being insufficient for that purpose must be held to be entirely inoperative and void. It cannot be said to be good for the purpose of rendering the person who executed it liable to an execution if the judgment was not paid, and yet ineffectual to stay the issuing of such execution.

An appeal bond on which no recovery can be had by the obligee cannot operate to stay execution; hence where an appeal bond was conditioned to prosecute an appeal to the "county court for Anne Arundel county," there being at the time the bond was executed no such court in existence, the bond was void and an execution might issue. *Tucker v. State*, 11 Md. 331.

Under the *Indiana* statutes a defendant may have a stay of execution by entering a replevin bail on the docket of the justice of the peace issuing the execution. It is only by this provision of the statute that a judgment can be replevied, and the mode prescribed by the statute must be strictly followed. Hence, as the statute says, "entering the bail on the docket," this requirement is not satisfied by writing

taking to stay execution on one half of a judgment is invalid.<sup>1</sup> The time within which the stay may be taken is a vital provision of the statute and courts have no equitable power to change it.<sup>2</sup> The time during which the stay may continue is computed from the rendition of the judgment;<sup>3</sup> but the stay bond binds the property of the surety only from the date of its execution.<sup>4</sup> A

an undertaking on a separate piece of paper or attaching it to the docket by pinning it to it. *Lockwood v. Dills*, 74 Ind. 56, citing *McCormick v. Cassell*, 16 Ind. 408.

The *Nebraska* code gives the right to the debtor to stay execution by adopting the proceedings mentioned in the code, but if these fail in any respect to conform to the code, the court may permit an amendment. A bond was signed by one surety instead of two, as required by the code; the plaintiff demanded execution on the judgment on account of this defect, but the court refused to grant it because the defendant moved to amend the bond by adding an additional surety, which the court allowed. *State v. Russell*, 17 Neb. 201.

A bond intended to be a *supersedeas* bond, and regarded as such by all parties, did not contain a certain condition required by the statute in such cases. The court held that the bond did not lawfully operate to supersede the judgment. *Gill v. Sullivan*, 62 Iowa 529.

1. A written undertaking entered upon the back of an execution to pay one half of a judgment upon which the execution issued, is invalid as a recognition of replevin bail and does not authorize an execution to issue upon such undertaking. *Vincennes Nat. Bank v. Cockrum*, 80 Ind. 355; *Vincennes Nat. Bank v. Hargrove*, 80 Ind. 364.

2. In *Sage v. Central R. Co.*, 83 U. S. 412, the court, by Waite, C. J., said: "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. *Hogan v. Ross*, 11 How. (U. S.) 297; *Baltimore, etc., R. Co. v. Harris*, 7 Wall. (U. S.) 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means

of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law. While the court may enter an order in a cause *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court, it is never done where the parties themselves have been at fault or where it will work injustice. To make an order *nunc pro tunc* effectual for purposes of a *supersedeas* it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done."

Where an appeal was taken in a common-law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error to bring the case up to the supreme court, it was error in the court below to quash the execution and supersede the judgment. The appeal did not remove the case, and the writ of error was sued out too late to stay the execution. It is immaterial whether it was a mistake of the party or the court. There is no equitable power in the court to stay execution on the ground that a mistake as to the time or manner of removing the case was committed. The tribunals of the United States are not authorized to dispense with the express provisions of the act of Congress regulating appeals upon any equitable ground. *Saltmarsh v. Tuthill*, 12 How. (U. S.) 387.

The *Pennsylvania* statute required as a condition that bail should be entered within thirty days from the rendition of the judgment. A judgment was entered on February 23, 1856, and the bail was not entered until March 26, 1856. It was held that this was too late, and that the court below was in error in setting aside the execution. *Erie City Bank v. Compton*, 27 Pa. St. 195.

3. *Okey v. Sigler*, 82 Iowa 94.

4. *Hayden v. Anderson*, 57 Ga. 378.

valid undertaking to stay execution is in effect a confession of a new judgment by the surety, and, as a rule, final process may issue thereon at the expiration of the stay.<sup>1</sup> And where the undertaking is insufficient, for want of strict compliance with the statutory provisions, yet the surety may be bound by it as a common law bond if a stay is actually had, or there is other consideration to support the bond.<sup>2</sup> Where a stayor is obliged to pay the amount of the judgment in order to prevent the seiz-

1. The effect of a recognizance of replevin bail for the stay of execution upon a judgment, is that of a judgment confessed by the recognizor for the amount of the judgment with interest thereon and costs accrued and to accrue. Such a recognizance is of statutory origin, being unknown at common law. *Vincennes Nat. Bank v. Cockrum*, 64 Ind. 229.

The stay of execution is in effect a confession of judgment, and the stayor is liable under the law applicable to such judgment and not otherwise. It cannot be for a part of the debt only, or for a greater or less term than that limited by law, or otherwise varied from the general rule. A conventional stay of execution which varies from the general law is a mere contract, and not the final or conclusive judgment which the law contemplates. So, where a stayor consented to stay the whole debt for a shorter period than the eight months allowed by law, he incurred the obligation of stayor, but no execution can be issued against him until the full period of eight months has elapsed. *Roberts v. Cross*, 1 Sneed (Tenn.) 233.

It seems clear from the authorities that it is within the power of the legislature to provide that the execution of a bond to stay a judgment shall be taken as the confession of a new judgment upon which final process may issue at the end of the stay without further inquiry. *McGlothlin v. Madden*, 16 Kan. 466; *Lusk v. Ramsey*, 3 Munf. (Va.) 417; *Bank of U. S. v. Patton*, 5 How. (Miss.) 200; 35 Am. Dec. 428; *Brown v. Clarke*, 4 How. (U. S.) 4; *Cavender v. Smith*, 5 Iowa 157; *Rickman v. Williams*, 10 Ired. (N. Car.) 126; *Murray v. Edmonston*, 6 Jones (N. Car.) 515; *Williams v. Hall*, 2 Dana (Ky.) 97; *Roberts v. Cross*, 1 Sneed (Tenn.) 235; *Hennegar v. Mee*, 4 Sneed (Tenn.) 33; *Morgan v. Coleman*, 3 Head (Tenn.) 352; *Robinson v. Yon*, 8 Fla. 350.

2. An undertaking for stay of execution of a judgment on the docket of a justice of the peace, executed after the time allowed by law in pursuance of an agreement of the parties, is valid as a common law contract if supported by a sufficient consideration, though it may not be effective as a statutory undertaking. *Boling v. Young*, 38 Ohio St. 135.

The release of a levy and further delay of execution on the judgment for the period fixed by the statute, is a sufficient consideration for such undertaking. *Duckwall v. Rogers*, 15 Ohio St. 544.

To operate as a strictly statutory stay of execution; the undertaking must be given within the time limited by law. But a stay may be effected afterwards by agreement of the parties upon a sufficient consideration. If by agreement the undertaking is given afterwards and the stay is thereby obtained, the defendant having received the benefits of the contract will not be permitted to repudiate the obligation thereby assumed. *Cameron v. Sandwich Mfg. Co.*, 6 Neb. 444.

Security entered for a stay of execution under the *Pennsylvania* act of June 16, 1836, must in all cases be approved of by the court in which the judgment was obtained or by a judge thereof. And unless it so appear upon the record, execution may issue. *Eichman v. Belvidere Bank*, 3 Whart. (Pa.) 67.

In *Stroop v. Gross*, 1 W. & S. (Pa.) 139, the court said: "But the approbation of the court being designed for the advantage of the creditor, he may waive, either expressly or impliedly, by an acquiescence in the claim of the debtor to it, the benefit of the *cesset*. But this privilege is not extended to the debtor, for it would be against common justice that he should take advantage of the defect which has arisen upon his own default after he has, by the forbearance

ure and sale of his own property, he may be subrogated to the rights of the plaintiff and have execution against the property of the defendant.<sup>1</sup> A stayor may be discharged by the bad faith of the judgment creditor,<sup>2</sup> but not, it seems, by his failure to take out execution in time to seize the property of the judgment debtor.<sup>3</sup>

It has been held that no stay of execution can be claimed upon a judgment in an action of debt on a judgment of another state.<sup>4</sup> But upon a judgment on a recognizance to obtain a stay of execution, a defendant is entitled to a stay of execution.<sup>5</sup>

*b. RIGHT OF APPEAL AFTER TAKING STAY.*—It seems that a defendant may avail himself of his right to a statutory stay of

or with the assent of the creditor, derived every benefit which would have resulted from a recognizance executed and approved with all the formalities required by the act. Nor can we perceive that the bail, who has identified himself with his principal, is in any better situation than the principal himself whose duty it was to perfect the recognizance."

1. A stayor compelled to pay an execution on a judgment for the amount of a note secured by an express lien on land, is entitled to be subrogated to the rights of the vendor in the enforcement of the lien. And if the proceeds of the sale are not sufficient to satisfy all the notes given for the land, he may receive a share *pro rata*. *Ellis v. Roscoe*, 4 Baxt. (Tenn.) 418.

Where, upon a judgment against several, all of whom appear as principals, a party becomes replevin bail at the request of some of the judgment defendants, without notice that one not making the request is, in fact, surety for the others, he may, if compelled to pay the judgment, have execution against all the judgment defendants, under *Indiana Rev. Stat.*, 1881, § 1214, and the one who is in fact surety is equally liable thereto with the others. *Reissner v. Dessar*, 80 Ind. 307.

2. A stayor will be discharged if prior execution was levied on property of the principal sufficient to pay the debt and abandoned without his consent. *Holt v. Manier*, 1 Lea (Tenn.) 488; so he will be released when, by the active interference of the creditor, the burden of the debt has been shifted from the property of the principal, after a specific lien has been fixed thereon, so as to throw it onto

the surety. *Watson v. Reed*, 4 Baxt. (Tenn.) 49.

3. The stayor who fails to pay the debt and take judgment over against his principal, is not discharged from liability by the plaintiff's failure to issue execution against the principal in time, although the stayor pointed out property for that purpose. *Anderson v. Lithgo*, 5 Baxt. (Tenn.) 603.

4. *Sloat v. Prentice* (Pa.), 2 Am. L. Reg. 446.

5. The *Pennsylvania* court said: "The argument that the creditor might be indefinitely delayed by consecutive stays of execution is entitled to but one answer: the contingency is scarcely within the range of possibility, nor, in point of reason, does the bail stand in the place of a defendant who has already had his indulgence. He engages that another with whom he has had no connection in the course of the action, and with whom he has no personal connection but what results from relation of principal and bail, shall do one of two specific acts, and his engagement has all the freshness of an original one; why, therefore, should it not have its incidents? He expressly waives none of them, and there is no reason to suppose he does so implicitly. It is not his act, but the act of the law, that is to delay the creditor, for the law which sanctions it as the defendant's privilege, makes the act its own, and as he deprives the plaintiff of no legal advantage he is not supposed to relinquish any. He stands in the peculiar attitude of a surety against whom there is to be no equitable interpretation, because, having contracted gratuitously, he is supposed to have contracted only on the conditions expressly stated; and here there was no condition that he should

execution without forfeiting his right to have the case reviewed on appeal or writ of error,<sup>1</sup> unless the exercise of both these rights in one cause is expressly<sup>2</sup> or impliedly<sup>3</sup> prohibited by statute.

**c. WAIVER OF RIGHT TO STAY BY CONTRACT.**—It has been

waive any incidental advantage. I take it, therefore, that the defendant was entitled to a stay of execution by the spirit as well as the letter of the act." *Wolfe v. Nesbit*, 4 W. & S. (Pa.) 312, *overruling* *Gorgas v. Zeop*, 2 Miles (Pa.) 101.

1. In *Gardipie v. Lessard*, 9 Wis. 200, it is said: "It will be seen that the only question raised is whether the defendant by procuring execution to be stayed in the justice's court thereby waived or was estopped from exercising his right of appeal. The right of appeal is conferred by the statute, and if exercised within the time and in the manner prescribed is absolute. It is a right which is favored by the courts, and we are of opinion that the staying of execution should not be regarded as a waiver of it. The act of staying execution by no means implies that the party does not intend to appeal.

In *New York* it has been held that the paying or settling of a judgment before a justice of the peace would not prevent the bringing of a certiorari to reverse it. *Clark v. Ostlander*, 1 Cow. (N. Y.) 437. If payment of the judgment would not preclude a party from proceeding to reverse it, it would seem that the staying of execution ought not to do so."

In *Nealy v. Sexton*, *Wright* (Ohio) 314, it was held that taking a stay of execution under the statute did not affect the right to appeal, and that a party against whom there is a judgment may stay execution and appeal also.

In *Russell v. Giles*, 31 Ohio St. 293, it was held, following *Nealy v. Sexton*, *supra*, that the act of entering bail for a stay of execution was not a satisfaction or affirmation of the judgment, or a release of errors. *Welch, C. J.*, said: "If the defendant during the ten days allowed for appeal may stay execution without waiving his right of appeal, it would seem to follow that he may during the three years allowed for proceedings in error stay execution without waiving his right to such proceedings in error." To the same effect is *White v. Blum*, 4 Neb. 555.

2. In *Miller v. Hyers*, 2 Brown (Neb.) 474; *Sullivan Sav. Inst. v. Clark*, 12 Neb. 578; *Banks v. Hitchcock*, 20 Neb. 315, it was held, construing § 5 of an act approved Feb. 3, 1875, p. 50, Laws of '75, that no appeal could be taken after taking stay of execution.

In *Seacrest v. Newman*, 19 Iowa 323, it was said that the right of appeal after taking the benefit of the stay law was cut off by § 3294 of the Revision of the Laws of Iowa.

3. In *People v. Judges*, 1 Mich. 134, it was held that a defendant who had taken a statutory stay of execution might not afterwards appeal. *Wing, J.*, said: "The relator by entering stay of execution in effect admitted that the judgment was right and the debt honestly due to the respondent. He has entered into a formal written engagement, together with his surety, that the debt shall be paid within a specified time. By this act a new party is added to the judgment, and by it, and as a compensation to the respondent for the indulgence granted the relator, additional security is acquired for the payment of the debt. The respondent had no power to control the choice of the relator, but when once a choice is made and security is given, it becomes like a recognizance, a solemn undertaking, a statutory judgment acknowledged to the respondent who is a party to it, and without whose consent it cannot be annulled." The court distinguished between the case at bar and the case of *Nealy v. Sexton*, *Wright* (Ohio) 314, saying: "By the laws of *Ohio* the judgment creditor might issue execution the moment judgment was rendered. By the 77th section of our act this is prohibited, except in one case, until the expiration of five days; so that there is not the same necessity for giving stay to get time for reflection with us as in *Ohio*. Again, in *Ohio* the surety for a stay of execution enters into a recognizance, and if the debt is not paid by the time specified in the recognizance, execution does not issue against the principal and surety as with us, but



decided that a waiver of stay laws or appraisalment and exemption laws gives the plaintiff no right to have such contractual provision incorporated into a judgment.<sup>1</sup> But a law giving a stay of execution, notwithstanding a waiver of the same by express contract, is unconstitutional as impairing the obligation of contracts.<sup>2</sup>

4. STAY LAWS—CONSTITUTIONALITY OF.—At several periods of financial distress, the legislatures of many of the states have passed laws providing for stay of execution and foreclosure proceedings for a time, in order to prevent hardship and save debtors from financial ruin. During the war of 1812 between Great Britain and the United States such statutes made their appearance in this country,<sup>3</sup> and during the late civil war many of the Southern and some of the Northern States enacted similar statutes to encourage volunteers to enlist in their respective armies.

Strong as may be the arguments in favor of such laws on the grounds of humanity and public policy, most of them have fallen under the inhibition in the Federal Constitution against laws which violate the obligation of contracts. It is true that such laws appear to affect a remedy rather than a right, and that the courts have made a distinction in that regard, holding that where a substantial remedy remains or is provided, a law which changes

suit must be brought on the recognition, as in other cases." The logic of this case is criticized by the reporter in a note.

1. *Develin v. Wood*, 2 Ind. 102; *McLane v. Elmer*, 4 Ind. 239. The court said, that "courts of law, as a general rule, do not enforce the specific performance of agreements, unless specially authorized to do so by statute, but award damages for the breach of agreements." In these cases, which were actions on promissory notes, the defendants had expressly waived in the notes all benefit of stay of execution or appraisalment or valuation laws.

Parties regulate their own conduct by their stipulations, but they cannot prescribe rules of proceeding for public officers nor demand that the courts of justice shall depart from the usual modes of enforcing their decrees. If before judgment the creditor may stipulate the manner in which the same shall be executed, the principle will sanction an endless variety of modes of execution of judgment; and, indeed, the parties may waive all formalities and all delays and may even consent that some other person than the sheriff shall sell the property of the debtor and execute the decree of the court. And if a decree giving effect to such a contract be legal, then also the sale

under it will be legal, and other creditors may find themselves deprived of their common pledge without notice. *Levicks v. Walker*, 15 La. Ann. 245; 77 Am. Dec. 187.

2. Where a judgment note contained a waiver of stay of execution, and when due an attachment in execution was issued thereon, it was held error to stay the writ on the ground that the defendant was at the time a soldier and in military service. *Thompson, J.*, said: "Treating this attachment execution for the present as an execution within the meaning of the *Pennsylvania* act of May 21, 1861, this case is directly ruled by *Billmeyer v. Evans*, 40 Pa. St. 324. In the case in hand, as in that, a stay of execution was expressly waived. Without the waiver, the parties signing the note would have been entitled to a stay on the judgment entered on the note of six months. We held in the case cited that the proviso to the first section of the act allowing the stay in favor of a soldier, notwithstanding a waiver, was unconstitutional as impairing the obligation of the contract. The case is directly in point and rules this one. The stay ordered was wrong and the order must be reversed." *Lewis v. Lewis*, 47 Pa. St. 127.

3. *Jones v. Crittenden*, 1 Car. L.

or modifies a remedy existing at the time of the making of the contract is not on that account obnoxious to the constitution. The question presented in these cases has, therefore, been, whether or not a substantial remedy was left to the creditor for the collection of the debt due him. The general rule is that where a statute authorizes a stay of execution for an indefinite or unreasonable time on judgments rendered on contracts made before its passage, it is unconstitutional and void as taking away all remedy during the stay.<sup>1</sup> But where the statute is designed to stay execution of such judgments only as are rendered on contracts made after the passage of the act, it may be upheld on the

Rep. (N. Car.) 385; 6 Am. Dec. 531; Johnson v. Duncan, 3 Martin (La.) 530; 6 Am. Dec. 675.

1. Hudspeth v. Davis, 41 Ala. 389; *Ex parte* Pollard, 40 Ala. 77; Johnson v. Duncan, 3 Martin (La.) 530; 6 Am. Dec. 675; Barnes v. Barnes, 8 Jones (N. Car.) 366; Jacobs v. Smallwood, 63 N. Car. 112; Miller v. Gibson, 63 N. Car. 635; Dormire v. Cogly, 8 Blackf. (Ind.) 177; Strong v. Daniel, 5 Ind. 348; Gentry v. Bailey, 1 Mo. 164; 13 Am. Dec. 484; Brown v. Ward, 1 Mo. 209; Bumgardner v. Circuit Court, 4 Mo. 50; Stevens v. Andrews, 31 Mo. 205; Bunn v. Gorgas, 41 Pa. St. 441; Lapsley v. Brashears, 4 Litt. (Ky.) 47; Pool v. Young, 7 T. B. Mon. (Ky.) 588; Grayson v. Lilly, 7 T. B. Mon. (Ky.) 10; Stephenson v. Barnett, 7 T. B. Mon. (Ky.) 50; Hasbrouck v. Shipman, 16 Wis. 296; State v. Carew, 13 Rich. (S. Car.) 506; Garlington v. Priest, 13 Fla. 559; Webster v. Rose, 6 Heisk. (Tenn.) 93; 18 Am. Rep. 583; Townsend v. Townsend, Peck (Tenn.) 1; Taylor v. Stearns, 18 Gratt. (Va.) 244; Coffman v. Bank of Kentucky, 40 Miss. 30; 90 Am. Dec. 311; Sequestration Cases, 30 Tex. 688; Jones v. McMahan, 30 Tex. 720; Aycock v. Martin, 37 Ga. 124; Cutts v. Hardee, 38 Ga. 350; People v. Hays, 4 Cal. 127; Banks v. Quackenbush, 1 N. Y. 129; Bronson v. Kinzie, 1 How. (U. S.) 317; Edwards v. Kearzey, 96 U. S. 595.

In Johnson v. Duncan, 3 Martin (La.) 530; 6 Am. Dec. 675, the court said: "The obligation of contracts consists in the necessity under which a man finds himself to do, or to refrain from doing, something. This obligation exists generally both *in foro legis* and *in foro conscientiae*; though it does at times exist in one of these only. It is certainly of the first, that *in foro legis*, which the framers of the consti-

tution spoke when they prohibited the passage of any law impairing the obligation of contracts. Now a law absolutely recalling the power which the creditor enjoys of compelling his debtor *in foro legis* to perform the obligation of the contract would be a law destroying the obligation of the contract *in foro legis*, since a right without legal remedy ceases to be a legal right. It would impair the obligation of the contract by destroying its legal obligation; in other words, by reducing an obligation both *in foro legis* and *in foro conscientiae* to an obligation *in foro conscientiae* only; a legal and moral right to a moral right only. The remedy *in foro legis* constituting the legal right of the creditor constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation is one which *in foro legis* destroys the obligation. It appears, therefore, to me incorrect to say that the legislature may effectually do as to the remedy or effect of the obligation that which it cannot do as to the right; and I conclude that a law destroying or impairing the remedy is as unconstitutional as one affecting the right in the same manner, for *in foro legis* the effects of both laws must be the same. Likewise, procrastinating the remedy, generally speaking, destroys part of the right. He pays less who pays later. *Minus solvit qui serius solvit*. Neither is the procrastination properly compensated by the allowance of interest in the meanwhile. To many men in many circumstances there is a wide difference between \$100 payable to-day and \$106 payable in a twelve-month, whatever may be the certainty that no disappointment will occur; and in many cases the delay is likely to be

ground that the law in force at the time of making the contract is supposed to be in the contemplation of the parties, and is a part of the considerations and conditions upon which the con-

productive of considerable danger to the solvability of the debtor. I, therefore, find no difficulty in concluding that an act of the state legislature, the obvious object of which is to relieve debtors by postponing their recovery, and consequently, the payment of debts impairs the obligation of contracts, and as such is unconstitutional."

In *Webster v. Rose*, 6 Heisk. (Tenn.) 93, *overruling* *Farnsworth v. Vance*, 2 Coldw. (Tenn.) 108, and *approving* *Townsend v. Townsend*, Peck (Tenn.) 1, the court, after referring to the statement in *Farnsworth v. Vance*, 2 Coldw. (Tenn.) 108, that the legislature may in their discretion vary the extent and nature of the remedy so that always some substantive remedy in fact be left, said: "We think, perhaps, the true principle is more properly stated thus: that the legislature have complete control over the form of the remedy, the mode of proceeding by which the legal obligation is enforced, and in all that pertains to this may alter, change, or modify its laws as discretion may dictate. If the legislature can enlarge the time one day in which the party is to perform what the legal obligation of his contract requires at the time it is entered into, it may do it for a hundred days, and if for this period, it may equally well do it for a hundred years. There can be no difference in principle in the one case from that of the other, and thus the legal obligation is not only impaired, but practically destroyed. Can this tremendous power be fairly held to lurk within the principle of legislative power over the remedy for enforcement of a contract? We think not."

The above cases seem to indicate that no statute will be valid which grants a stay of execution on a judgment recovered on a contract made prior to the passage of the act. Many courts have modified the rule by sustaining statutes which provide for a stay for a reasonable time. See *Chadwick v. Moore*, 8 W. & S. (Pa.) 50.

The courts have sustained if possible such statutes passed in time of war, where they did not provide for an indefinite stay of execution. *Breitenbach v. Bush*, 44 Pa. St. 313; 84 Am.

Dec. 442; *Coxe v. Martin*, 44 Pa. St. 322.

In *Bunn v. Gorgas*, 41 Pa. St. 441, an act of the *Pennsylvania* legislature of May 21, 1861, which directed the courts to grant a stay of execution against a defendant on proof of an agreement in writing to that effect by a majority of his creditors, whose demands exceeded two-thirds of defendant's indebtedness, was held in violation of that portion of the state and national constitutions which protects the inviolability of contracts. The court said: "Though addressed to the remedy, it touches the contract in a most vital point and impairs its obligation as directly as if it annihilated it. It was this circumstance, the unlimited duration of the possible stay, that led to the condemnation of the *Illinois* statute in *McCracken v. Hayward*, 2 How. (U. S.) 608, and it was the absence of this feature from our Stay Law of 1842 that rescued it in *Chadwick v. Moore*, 8 W. & S. (Pa.) 50. Gibson, C. J., put his opinion in that case on this very distinction. He speaks of the act of 1842 as prohibiting for a time sheriffs' sales of property for less than two-thirds of the appraised value, and says, very pointedly, if the prohibition of execution were perpetual he would not hesitate to pronounce the act unconstitutional." See also *McCormick v. Rusch*, 15 Iowa 127; 83 Am. Dec. 401; *Johnson v. Duncan*, 3 Martin (La.) 530; 6 Am. Dec. 675; *Hasbrouck v. Shipman*, 16 Wis. 296; *Clark v. Martin*, 49 Pa. St. 299.

In *Breitenbach v. Bush*, 44 Pa. St. 313 and *Coxe v. Martin*, 44 Pa. St. 222, it was held that an act staying all civil process against volunteers who had enlisted in the national service for three years or during the war was valid; during the war being construed to mean unless the war should sooner terminate. But a general law that all suits pending should be continued until peace between the Confederate States and the United States was held void. *Burt v. Williams*, 24 Ark. 94. See also *Taylor v. Stearns*, 18 Gratt. (Va.) 244; *Hudspeth v. Davis*, 41 Ala. 389; *Aycock v. Martin*, 37 Ga. 124; *Coffman v. Bank of Kentucky*, 40 Miss.

tract is made. In such case the statute violates no obligation of the contract.<sup>1</sup> It has been held that a statute authorizing a stay of execution of judgments obtained on contracts in which the debtor had waived the right to a stay was unconstitutional.<sup>2</sup>

**5. Effect of Stay—*a.* SUSPENSIVE EFFECT UPON JUDGMENT.**—A stay of execution does not vacate the judgment upon which the execution issued,<sup>3</sup> nor discharge the debt,<sup>4</sup> but merely suspends the execution. It does not, like a reversal, annul the judgment, but only suspends its efficacy. Its object and effect are to stay further proceedings and not to undo what has already been done. It has no retroactive operation, so as to deprive the judgment of its force and authority from the beginning, but only suspends them while it is itself effectual.<sup>5</sup>

***b.* EXECUTION PENDING STAY.**—An execution issued during the period of a stay is wholly irregular and will be set aside upon motion. Whatever is done under a judgment pending a stay, should be set aside.<sup>6</sup> But a sale made under an execution pend-

29; *Jacobs v. Smallwood*, 63 N. Car. 112; *Cutts v. Hardee*, 38 Ga. 350; *Sequestration Cases*, 30 Tex. 688.

A law suspending the jurisdiction of the courts from May 24, '61, to January 1, '62, was held valid in *Johnson v. Higgins*, 3 Metc. (Ky.) 566, on the ground that the law related not to the remedy for enforcing the contract, but to the courts which administered the remedy.

1. *Barry v. Iseman*, 14 Rich. (S. Car.) 129; 91 Am. Dec. 262; *Wardlaw v. Buzzard*, 15 Rich. (S. Car.) 158; 94 Am. Dec. 148; *Burns v. Crawford*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441.

2. *Billmeyer v. Evans*, 40 Pa. St. 324; *Lewis v. Lewis*, 47 Pa. St. 127; *White v. Crawford*, 84 Pa. St. 433. But Judge Cooley remarks in his *Constitutional Limitations* (6th ed.), p. 355, "It seems to us that an agreement to waive a legal privilege which the law gives as a matter of state policy cannot be binding upon a party, unless the law itself provides for the waiver." *Citing Conkey v. Hart*, 14 N. Y. 22; *Handy v. Chatfield*, 23 Wend. (N. Y.) 35.

3. *Curtis v. Root*, 28 Ill. 377.

4. *M'Ginnis v. Lillard*, 4 Bibb (Ky.) 490.

Stay for three months after levy made does not release the judgment nor prevent the plaintiff from issuing a *fi. fa.* after the expiration of the time. *Burks v. Bass*, 4 Bibb (Ky.) 338.

5. *Runyon v. Bennett*, 4 Dana (Ky.) 598; 29 Am. Dec. 431.

An appeal from a judgment of the circuit court and a *supersedeas* thereon will not have the effect to extend the judgment lien beyond the time prescribed by statute; the judgment lien operates just as though no *supersedeas* had been given. *Christy v. Flanagan*, 87 Mo. 670.

In *Barroilhet v. Hathaway*, 31 Cal. 395; 89 Am. Dec. 193, it was held that the filing of a stay bond on appeal suspends the running of the time during which the judgment remains a lien until the filing of the *remittitur* from the appellate court, and the time during which proceedings are stayed by order of the court or by a stay bond on appeal must be excluded from the computation of the time during which the judgment remains a lien.

The effect of a *supersedeas* is to prevent further proceedings in the lower court; it does not operate to nullify or reverse an injunction. *Slaughter House Cases*, 10 Wall. (U. S.) 273; *Whitney v. Mowery*, 3 Fisher Cas. N. S. 157.

An original judgment is not merged or destroyed by a judgment of *supersedeas*; the plaintiff may pursue his remedy either in the original or *supersedeas* judgment, the only restraint being that he shall have but one satisfaction for the same debt. *Smith v. Anderson*, 18 Md. 520.

6. *Runyon v. Bennett*, 4 Dana (Ky.) 598; 29 Am. Dec. 431; *Millikin v. Brown*, 10 S. & R. (Pa.) 188; *Stockton v. Bishop*, 2 How. (U. S.) 74. In the latter case it is said that an execution

ing the stay is not void; it is merely voidable, and then only when impeached by the defendant in the same proceeding in which the judgment was rendered.<sup>1</sup>

c. EFFECT UPON JUDGMENT LIEN ON REAL ESTATE.—When a judgment is a lien upon real estate the granting of a stay does

issued in a lower court after a writ of error and bond had been filed may be quashed either in the supreme court or in the court below.

1. In *Oakes v. Williams*, 107 Ill. 154, followed in *Shirk v. Metropolis, etc.*, Gravel Road Co., 110 Ill. 661, an execution was issued on a stayed judgment and a sale was made of the defendant's land. In an ejectment suit brought by a subsequent purchaser of the land from the defendant, against the purchaser at the execution sale, the court held that while the proceedings were irregular and might have been quashed on motion by the defendant in the court which rendered the judgment, yet that the sale was valid if not attacked in that way and could not be questioned by any one else in a collateral proceeding. See also *Manton v. Hoyt*, 43 Md. 254.

In *Swiggart v. Harber*, 5 Ill. 364; 39 Am. Dec. 418, it was held that a sale under execution, after a judge's order staying further proceedings, is not a nullity, but is only voidable, and cannot be set aside in a collateral proceeding. Where a defendant in a *fiery facias* has submitted to such irregularities, a stranger to the record cannot avail himself of them; although a judgment may be erroneous and an execution thereon so irregular as to require it to be quashed on motion by the defendant, yet neither can be inquired into and declared invalid at the suit of a stranger.

In *O'Donnell v. Mullin*, 27 Pa. St. 199; 67 Am. Dec. 458, the court held that if a justice of the peace issues execution on a judgment within the time allowed for an appeal, and the appeal is taken afterwards, it is the duty of the justice to revoke the execution. "The appeal strikes the execution dead, and everything done afterwards in the way of levy or sale is void. A purchaser thereof at the constable's sale takes no title." But in *Wilkinson's Appeal*, 65 Pa. St. 189, the court, by Thompson, C. J., said: "Since the decision of *Stewart v. Stocker*, 13 S. & R. (Pa.) 199; 15 Am. Dec. 589, the question in this case has not been re-

garded as an open one. It is therefore settled, if anything can be, that an erroneous judgment or an irregular execution, not void, can be set aside only by direct and appropriate action by parties having an interest in the same and not by a collateral attack. As to an irregular execution, nobody but the defendant can object to it or take advantage of the irregularity. If he does not object, to all the world he stands as consenting, and as to him the maxim *consensus tollit errorem* controls." In *Stewart v. Stocker*, 13 S. & R. (Pa.) 199; 15 Am. Dec. 589, the execution was issued before the stay had expired; the court held this to be irregular, but not void, and its validity cannot be called in question by another creditor who sues the sheriff for the proceeds.

In *Bowman v. Tallman*, 28 How. Pr. (N. Y.) 482, the appellate court orally announced its decision in a case, affirming the judgment appealed from, to stay the execution on which bond had been given. Thereupon, and before the final entry of affirmance was made, an execution was issued, and the defendant moved to quash the same. The court held that when the execution was issued the stay upon the judgment was not removed, and, in effect, said: "An execution could not regularly issue until after the decision of affirmance. The mere oral announcement of a decision by the judges and the mere entry of such decision in the minutes of the clerk is not such a judgment of the appellate court as will authorize action under it. A formal judgment which embraces the decision must be entered, and such judgment only removes the stay of proceedings. There was, however, a valid judgment to support the execution. Its operation and effect and the rights of the plaintiff to enforce it were merely suspended pending the appeal and it was an irregularity to enforce it. But it was an irregularity merely. The practice of the court has required that motions to vacate process irregularly issued in a cause shall be made at the first opportunity after the irregularity has been discovered, otherwise the ir-

not affect that lien either as to its priority or binding force.<sup>1</sup> Any extension of time or stay of execution to a time short of the statutory period of limitation may be made without prejudice to the creditor.<sup>2</sup> Hence the granting of a stay will not enable subsequent judgment creditors to obtain a priority, even though executions on the subsequent judgments are issued against the property before one is issued on the stayed judgment.<sup>3</sup>

d. EFFECT UPON EXECUTION ON PERSONAL PROPERTY.—A lien upon personal property is acquired by the execution, and not merely, as in the case of real estate, by the judgment. If an execution is returnable upon a certain day, and before that day the writ is stayed, and the return day passes without a levy having been made, the execution is dead, and the lien is lost,<sup>4</sup> and a subsequent judgment creditor who seizes the same property pending the stay is entitled to the goods or proceeds of sale.

regularity will be deemed to be waived. Here the execution was issued May 30, 1864, and was the same day levied; but the defendant took no steps to have the execution set aside until October 5, following. He was thus too late, and should be deemed to have waived the irregularity."

Where executions were issued on the same day the judgments were rendered by a justice of the peace upon an insufficient affidavit, and were therefore premature under the *Tennessee* statutes, and were levied upon land, and the same was sold by order of the county court, it was held that as to third parties the sale was good. *Stanley v. Nelson*, 4 *Humph. (Tenn.)* 484. The objection that the execution was prematurely issued cannot be made by a garnishee. *Cowan v. Lowry*, 7 *Lea (Tenn.)* 620; *Carpenter v. Mechanics' Sav. Bank*, 1 *Lea (Tenn.)* 203; *Miller v. O'Bannon*, 4 *Lea (Tenn.)* 398. See also *Dixon v. Watkins*, 9 *Ark.* 139; *Girard v. Hirsch*, 6 *La. Ann.* 651; *Gardiner Mfg. Co. v. Heald*, 5 *Me.* 381; 17 *Am. Dec.* 248; *Green v. Cutright*, *Wright (Ohio)* 738.

1. *Low v. Adams*, 6 *Cal.* 277; *Brewster v. Clamfit*, 33 *Ark.* 72. So declared by the statutes of several states. In *Curtis v. Root*, 28 *Ill.* 377, it was held that an appeal and bond, operating as a stay, did not destroy the lien of the judgment. It merely suspended its execution. It was in full force all the time as a vital judgment of the court, not only capable of holding all liens to which it attached at the time of its rendition, but it was capable of attaching to other property of which the judg-

ment debtor might become the owner in the meantime, and thus subject such newly acquired property to its influence. This decision was approved in *Oaks v. Williams*, 107 *Ill.* 154.

2. *Marshall v. Moore*, 36 *Ill.* 321.

3. *Love v. Harper*, 4 *Humph. (Tenn.)* 113, in which the plaintiff agreed to grant a stay of execution for four months, and the execution was returned "stayed by order of plaintiff." It was held that the lien of the judgment upon the real estate was not lost or suspended by such stay of execution so as to give other judgments recovered at the same term a priority. Nor does mere delay in issuing execution after the expiration of the stay discharge the lien of the judgment. *Parish v. Elwell*, 46 *Iowa* 162.

4. In *Sturges' Appeal*, 86 *Pa. St.* 413, an execution was issued May 12, returnable on June 5; by an order of court the execution was stayed without actual levy being made. By this course the execution, being returned stayed, expired on the return day. Execution was issued on another judgment on May 31, returnable after June 5, and this latter was allowed to obtain all the property. The court said: "The plaintiff had a right to have execution of his judgment. He issued execution and for apparent cause shown to the court, rule was granted and execution on the writ stayed. The writ was returned unexecuted. Afterwards the plaintiff's goods were sold on another execution. Such consequences should induce judges to observe the oft-repeated admonition on staying executions, to direct levy to be

But if a levy be actually made the lien is preserved; it is therefore the duty of the court to direct a levy to be made in such cases so as to preserve the lien during the pendency of the stay.<sup>1</sup>

But a stay of execution by order of court before a levy is made, does not of itself destroy the lien of the execution where the writ is not returned by the officer without making a levy.<sup>2</sup> And it has been held that a stay of execution by order of court suspends the running of the time within which the writ must be

made, when not done, and preserve liens."

And in *Ross v. Weber*, 26 Ill. 221, personal property was under execution and in the hands of the sheriff, and whilst it was so in his hands the creditor agreed to stay the execution for six months, without a sale. Afterwards and during the stay the sheriff received another execution, which continued in his hands after the prior execution had expired. It was held that by the stay of the former execution it became dormant and lost its priority of lien and the property became liable to sale for the satisfaction of the junior execution.

If a stay of the sale of personal property under an execution could be made by the creditor beyond the lifetime of the execution, it might be used as the most effectual means of hindering and delaying creditors in the collection of their debts. *Marshall v. Moore*, 36 Ill. 321.

1. In *Steere v. Stafford*, 12 R. I. 131, the court, by Potter, J., said: "The plaintiff objects that having made an attachment on his original writ he may lose his attachment by the stay under the *Rhode Island* statute, which provides that whenever final judgment is rendered for the plaintiff in any suit in which the writ was served by attachment, the execution shall be levied on the property so attached; but if the same shall not be so levied before the return day thereof, the property attached shall be discharged of such attachment. If the court stays execution under its general power, the party should not lose his levy by the act of the court. If after the execution issued and before levy an order was made for staying the proceedings, and such stay should be continued beyond the return day of the execution, it might be questionable whether the attachment would not be discharged. It has been so decided in *Pennsylvania*. But even in that case the levy might

be preserved by staying proceedings after the levy instead of before."

In *Batdorf v. Focht*, 44 Pa. St. 195, it is said that a *feri facias* which is a lien on defendants' goods does not lose its priority over subsequent executions by reason of a judicial order staying it, until a rule taken on part of the defendants should be disposed of, although there was no stipulation in the order staying the execution that the lien should remain. It is usual to accompany such orders with a stipulation that the lien of the writ shall remain until the motion has been disposed of; and this is a prudent and proper practice. But where it is omitted the lien must nevertheless be regarded as preserved, for it is one of the vested legal rights of the plaintiff and can no more be sacrificed by an edict of the court without a hearing than any of his other civil rights whether of liberty or property. The above was affirmed in *Bain v. Lyle*, 68 Pa. St. 66.

See also *Sedgwick's Appeal*, 7 W. & S. (Pa.) 260; *Pott's Appeal*, 20 Pa. St. 253.

2. After a judgment by default had been entered, an execution was issued and placed in the hands of the sheriff; before a levy was made, the defendants were permitted to come in and plead, and proceedings on the execution were stayed by order of the court, but the judgment and execution were ordered to stand as security for the amount, if any, that might be found due to the plaintiffs on the trial of the cause. Another execution against the defendants afterwards came to the hands of the sheriff, under which he levied upon and sold the real and personal property of the defendants. It was held that the proceeds of the sale must first be applied in satisfaction of the amount which had been found due by the jury upon the trial of the issue joined in this cause and for which the execution in favor of the plaintiffs had been ordered to stand as security.

returned.<sup>1</sup> A stay by agreement of the parties before levy, if made in good faith, will not destroy the lien of the execution;<sup>2</sup> but an indefinite stay, or one tainted with fraud, will postpone the plaintiff's right to the rights of subsequent execution creditors of the defendant.<sup>3</sup>

*c.* EFFECT UPON EXECUTION PARTLY PERFORMED.—At common law a *supersedeas* should be obtained before levy if it were desired to stay the execution; if a levy were made, and then the *supersedeas* were granted, the execution would not be stayed thereby. By the levy the debtor was deprived of his property, and an execution being entire in its nature could not be superseded after it once began, but must go on to completion.<sup>4</sup>

This common-law rule has been generally abrogated by statute or change of practice. The usual rule now is that whenever a

Richards v. Morris Canal, etc., Co., 20 N. J. L. 136.

1. A sheriff to whom an execution has been delivered for collection, is entitled to sixty days within which to perform the duties enjoined upon him, and any stay which restrains him from enforcing the execution suspends, while it lasts, the running of the time in which he is required to return the writ. *Ansonia Brass, etc., Co. v. Conner*, 103 N. Y. 502.

2. The goods of a defendant in execution are bound from the time of the delivery of the writ to the sheriff, even against subsequent *bona fide* purchasers, unless sold under circumstances equivalent to a sale in market overt. An agreement made in good faith by a plaintiff in execution before levy, to stay proceedings upon terms, does not discharge or suspend the lien. *James v. Burnet*, 20 N. J. L. 635.

The plaintiff, when he delivers his execution to the sheriff or afterwards, may direct the sheriff not to proceed to a sale without further orders from him, or unless urged on by younger executions without thereby losing his priority, if done in good faith. *Cumberland Bank v. Hann*, 19 N. J. L. 166.

An assignee for the benefit of creditors cannot hold property as a purchaser who, without notice of an execution, purchases the property in good faith and pays for the same before an actual levy is made. The rights of the execution creditor are not affected in such case if the levy has been delayed by a temporary agreement between him and a defendant. *Van Waggoner v. Moses*, 26 N. J. L. 570.

3. An indefinite stay of an execution by plaintiff's orders, although there be

a levy under it, if the property levied on remain with the plaintiff's consent in defendant's possession and under his control, is such a suspension of the plaintiff's lien that a subsequent execution shall have the preference if proceeded upon before the sheriff is ordered to execute the first writ. *Cook v. Wood*, 16 N. J. L. 254.

Where the circumstances show that an execution was fraudulently kept on foot to hinder subsequent creditors, it is void as to them. *Fischel v. Keer*, 45 N. J. L. 507.

4. Nothing is better settled at common law than that a *supersedeas* in order to stay proceedings on an execution must come before there is a levy made under the execution; for if it comes afterwards the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods. The cases are admirably summed up in *Meriton v. Stevens*, Willes 271. Here a levy on a *feri facias* was made a week before the injunction to stay execution was granted, so that according to the course of the common law it ought not to operate as a *supersedeas* to the *venditioni exponas*. *Boyle v. Zacharie*, 6 Pet. (U. S.) 659.

The levy of an execution is not defeated by a subsequent writ of *supersedeas*. *Freeman v. Dawson*, 110 U. S. 264.

If an execution be begun before a writ of error or *supersedeas* be delivered, the sheriff ought to proceed to complete the execution so far as he has gone, but not to proceed any further, hence he must proceed to sell the goods already levied upon and return the money into court. *Meriton v. Stevens*, Willes 282. To the same



*supersedeas* is granted, as, for example, on appeal, an uncompleted execution is wholly stayed.<sup>1</sup>

When a stay is obtained by a statutory *supersedeas* it is held that property previously seized by the sheriff under the execution is discharged from the lien of the execution, and that the bond is substituted in lieu of the property, which the defendant may therefore dispose of as he sees fit. There are in many states statutory provisions to this effect.<sup>2</sup>

effect, see *Kinnie v. Whitford*, 17 Johns. (N. Y.) 34; *Delafield v. Sandford*, 3 Hill (N. Y.) 473; *Beatty v. Chapline*, 2 Har. & J. (Md.) 7 (since overruled by statute); *Eakle v. Smith*, 24 Md. 339.

**1. Statutory Provisions.**— See the statutory provisions of the various states. In *Kentucky* it was held, without the aid of a statute, that when a sheriff collected money from a defendant upon an execution which was afterwards superseded, it was his duty to return it to the defendant. *Trueman v. Berry*, 6 B. Mon. (Ky.) 536. In *Virginia*, the code (§ 3595) provides that when money is received by a sheriff under an execution and not paid over to the plaintiff and the defendant obtains the *supersedeas*, the money shall be repaid to the defendant.

In *Minnesota*, a stay does not annul what has been done under a writ of execution previously levied. It simply checks the sheriff from further proceedings, the sheriff retaining the property until the further order of the court. Hence where an execution was levied upon personal property, and then an appeal was taken and bond given, a motion by the defendant to show cause why the property should not be released from levy was denied. *Northwestern Express Co. v. Landes*, 6 Minn. 564.

In *People v. Judges*, 1 Wend. (N. Y.) 81, a judgment was obtained and an execution was issued. The defendants then sued out a writ of error and perfected their bail and applied for a *supersedeas*. The court, by Sutherland, J., said: "The relators had four days after the perfecting of the judgment to sue out their writ of error and put in and perfect bail; and, having complied with the rule, they are entitled to be protected from the enforcement of the judgment against them until the determination of the suit in error. A party may sue out execution in four days, but it is at the peril of a

*supersedeas* of execution and restitution of property if error is brought and bail perfected within that time. There may have been some doubt heretofore as to the practice in a case like this growing out of the notion which has long prevailed in *England*, that an execution, being an entire thing, cannot be divided; and that when a levy is made under a *fiery facias*, the sheriff shall not be stayed, but shall proceed and sell the goods. But since the decision of this court in *Jackson v. Schaubert*, 7 Cow. (N. Y.) 417, it was supposed that the practice of this court would be considered settled. The motion for a *supersedeas* is granted." In the last mentioned case it was explicitly determined that an execution will be set aside, although issued and a levy made under it previous to the suing out or filing of the writ of error, if the latter be sued out and bail perfected within the time allowed by law. See the reporter's note to *People v. Judges*, 1 Wend. (N. Y.) 81, for a review of the cases upon the subject.

Where an appeal is taken after execution has issued on the judgment appealed from, proceedings under such execution may be stayed, but the execution should not be set aside absolutely. *Livingston v. New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 191.

**2. Biscoe v. Sandefur**, 14 Ark. 588; *Hamilton v. Henry*, 5 Ired. (N. Car.) 218; 43 Am. Dec. 476; *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118; 43 Am. Dec. 476.

In *Parker v. Dean*, 45 Miss. 408, the bill stated that on the same day that the levy under the execution was made the debtor executed a *supersedeas* bond and sued out a writ of error. The effect of that was to stay absolutely the sheriff from further proceeding under the execution, as has been the practice in this state; the execution of such a bond is on a mo-

But a different rule applies to forthcoming bonds provided for by the statutes of various states. Under these bonds, the property remains in the possession of the defendant, but subject to the lien of the execution and in the custody of the law.<sup>1</sup>

*f. EFFECT UPON EXECUTION FULLY PERFORMED.*—A stay prevents further proceedings under an execution, but does not interfere with what has already been done. Whatever is done according to the terms of the execution and before the stay takes effect is upheld by the authority of the judgment and is not overruled by the stay. The stay does not undo the performance of a judgment that has already been performed.<sup>2</sup>

tion of a levy upon personal property, the bond being considered security for the debt and ample indemnity to the creditor for arresting the action of the sheriff under the writ. Similarly when a stay of execution is obtained by an injunction, the property levied upon is released and the lien is lost. *Eldridge v. Chambers*, 8 B. Mon. (Ky.) 411. And this is the case whether the injunction be obtained at the suit of the defendant in the execution or by a third person. *Telford v. Cox*, 15 Lea (Tenn.) 298.

1. In *Hagan v. Lucas*, 10 Pet. (U. S.) 400, execution was issued against certain property which was claimed by a third party, who gave bond for the forthcoming of the property if it should be found subject to the execution. The property was then delivered to the claimant, but was afterwards seized under another execution. It was insisted that the bond was substituted for the property, and that the property was released from the levy, and thus could be subjected to another execution. But the court held that the law provided that the property should be delivered into the possession of the claimant on his giving bond and security that he would return it to the sheriff if it should be found subject to the execution. The bond cannot be taken as a substitute for the property, as the condition requires its return to the sheriff. On the giving of the bond the property is placed in the possession of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other process of execution as it would have been in the hands of the sheriff.

If a *feri facias* be issued and levied upon personal property and the defendant gives a forthcoming bond to entitle him to a stay of execution, and the same is so returned by the sheriff and within a year an execution issues at the suit of another plaintiff and the same property is levied on and sold, the first execution will be entitled to the proceeds of sale. *Sedgwick's Appeal*, 7 W. & S. (Pa.) 260. Hence the taking of the forthcoming bond is not a dissolution of the levy; and a postponement of the execution sale of the property to a time before the return day, being but an adjournment, will not avoid the right of the execution creditor, for the benefit of a subsequent execution creditor, it being consistent with an intention to levy the debt under the writ. An indefinite postponement of a sale is inconsistent with the legitimate end of an execution which is to have the money at the return of the writ, or for good reasons stated in the writ, to hold the property for another writ. *Lantz v. Worthington*, 4 Pa. St. 153; 14 Am. Dec. 682.

Other cases to the effect that the taking of a forthcoming bond to stay execution does not release the property from the lien of the execution are *Brush v. Seguin*, 24 Ill. 254; *Lusk v. Ramsay*, 3 Munf. (Va.) 417; *Bain v. Lyle*, 68 Pa. St. 66. See also generally, FORTHCOMING BOND, vol. 8, p. 565.

2. *Boisé Co. v. Gorman*, 19 Wall. (U. S.) 661. In this case an officer was ousted from his office on February 3, by virtue of a writ on a judgment rendered on the previous January 20. Subsequent to the ousting under the writ, and on the same day, a *superse-deas* bond was filed by the officer. Upon the principle that a stay under a *superse-deas* does not interfere with what has already been done, the peti-

**STEAL**—(See also LARCENY, vol. 12, pp. 760, 815; LIBEL AND SLANDER, vol. 13, p. 345; RECEIVING STOLEN PROPERTY, vol. 20, p. 440; REWARDS, vol. 21, p. 389).—The word "steal" has a uniform signification, and in common as well as legal parlance means the felonious taking and carrying away of the personal goods of another.<sup>1</sup>

**STEAMSHIP**—(See also NAVIGATION, vol. 16, pp. 271, 298).—A steamship is a vessel whose principal motive power is steam, and not sails.<sup>2</sup>

**STEER**—(See also CATTLE, vol. 3, p. 43).—A steer is "a castrated taurine male from two to four years old."<sup>3</sup>

tion of the ousted officer for relief was denied.

In *Kreglo v. Fulk*, 3 W. Va. 74, a judgment in ejectment was rendered in favor of the plaintiffs. The execution of the judgment was suspended for a certain time, after which execution was issued and the possession of the property was delivered to the plaintiffs. Defendants then appealed and superseded the judgment, and moved for a writ of restitution of the property. The court denied the motion, holding that the *supersedeas* only stayed the proceedings in the state they were when it was allowed; but if the judgment in favor of the plaintiffs were reversed on appeal it would then be proper to award a writ of restitution to the defendants.

In apparent conflict with the above it was held that when a sheriff collected money from a defendant upon an execution which was afterwards superseded, it was his duty to return it to defendant. *Trueman v. Berry*, 6 B. Mon. (Ky.) 536; and this is made the duty of the sheriff by statute in *Virginia*. *Virginia Code*, § 3595. And where the term of office of the clerk and master of a chancery court had not expired when his successor was appointed, and the latter procured a warrant directing the seizure of the official books and papers, on application for a writ of error from the judgment, on which the warrant issued, a *supersedeas* will issue, though the warrant has been fully executed, with a direction to restore the books and papers; that being the only method of preserving the rights of the parties as they were before the making of the order. *Stafford v. Williams* (Tenn. 1889), 13 S. W. Rep. 793; *Runyon v. Bennett*, 4 Dana (Ky.) 598; 29 Am. Dec. 431;

*Polk Co. v. Johnson*, 21 Fla. 577; *Arch-er v. Hart*, 5 Fla. 254.

1. *State v. Chambers*, 2 Greene (Iowa) 311.

"The natural and most obvious import of the word 'steal' is that of the felonious taking of property, or larceny. But it may be qualified by the context." In that case, an action for slander, it was held that where defendant charged that plaintiff "stole my patents to get up his castings by," it was for the jury and not for the court to decide whether he intended to charge the crime of larceny. *Dunnell v. Fiske*, 11 Met. (Mass.) 551. See also *Alexander v. State*, 12 Tex. 540; LARCENY, vol. 12, p. 761.

2. *Fraser v. Telegraph Construction Co., L. R.*, 7 Q. B. 566; 3 Moak's Rep. 203. In that case goods were shipped by plaintiffs on board of defendants' vessel under a bill of lading stating that the said vessel was a "steamship." It was held, in accordance with the definition given above, that a ship depending chiefly upon its sails, though using an auxiliary screw, did not answer the description of the vessel in the bill of lading.

**Steam Dredge.**—See MARITIME LIENS, vol. 14, p. 411.

3. *Webster Dict. quoted in Milligan v. Jefferson Co.*, 2 Mont. 546, in which case it was held that "steer" did not include "calf," within a statute requiring a taxpayer to give a list of his "steers," "heifers," etc.

**Steers and "Working Cattle" are Synonymous.**—"In common parlance, and in every day conversation, steers and working cattle are applied and used to designate one and the same thing, to wit, cattle that have worked." *Wes-sels v. Territory*, 1 Kan. 525.

## STENOGRAPHERS.

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|--|---|
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**I. DEFINITION.**—A stenographer is one who writes in shorthand by using abbreviations and characters for whole words. As an officer of the court, a stenographer is a shorthand writer who officially takes down testimony, and the rulings and charges in a case on trial.<sup>1</sup>

**II. APPOINTMENT; DUTIES; REMOVAL.**—Statutes have been passed in many of the states providing for the appointment and regulating the duties of court stenographers, with a general view to securing more rapid and unabating progress in the trial of causes, and superseding the necessity, otherwise placed upon court and counsel, of taking notes of the proceedings.<sup>2</sup> These statutes generally confer the power of appointment upon the court; as to minor regulations, reference must be had to the statutes themselves.<sup>3</sup>

1. 2 Bouv. L. Dict. 665; Cummings v. Armstrong, 34 W. Va. 1; And. L. Dict. 973.

A stenographer is one skilled in the art of writing shorthand by using abbreviations and characters for whole words, and the term does not come within the common-law definition of the word "clerk." *In re Appropriations*, 25 Neb. 662.

2. Chase v. Vandergrift, 88 Pa. St. 217; Cummins v. Armstrong, 34 W. Va. 1.

3. For an example of these statutes, see *New York Code Civ. Proc.*, §§ 251-262; *Pennsylvania Pub. Laws* (1874), p. 182.

The common council of Newark may authorize a committee, appointed by itself to take testimony in contested elections of members, to employ a stenographer to assist it in that matter; and if the committee employs the stenographer before the resolution conferring the authority becomes effective, the council may subsequently ratify the action. *State v. Haynes*, 50 N. J. L. 97.

In *Georgia*, it seems that in some circuits the reporter, or stenographer, of the court, is allowed, in order to aid the solicitor-general, to propound questions to jurors on their *voire dire*, the accepting or rejecting being done by the solicitor-general. Where a stenographer inadvertently put the juror

upon the defendant after questioning him, and the defendant immediately accepted him, without waiting for the solicitor-general to accept or reject, the court held that the reporter had no authority to accept, and the mere inadvertence on his part did not deprive the solicitor-general of his right to challenge. *West v. State*, 79 Ga. 773.

In *State v. Ford*, 41 Mo. App. 122, the following points were decided: The office of stenographer is legislative, not constitutional, and may be modified, controlled, or abolished by the power that created it. The duties are to be entered upon under oath and may not be performed by an unsworn deputy. Such deputy, under the terms of the act relating to stenographers, was not intended to take charge of the business in another court or division, but only as assistant in the court or division for which his principal is appointed. The act authorizing the appointment of such official stenographers for circuit courts in counties of not less than 45,000, nor more than 100,000 inhabitants, designed to have as many such officers as there were, or should be, circuit courts or divisions thereof; and the act is a general law, which applies to those counties which shall thereafter have the required population as well as to those which then had it. It was also obviously intended

In the absence of a statute making it the duty of the court to appoint a stenographer, there is no error in a refusal to appoint, though there may be one present, and the accused offers to pay his fees.<sup>1</sup> It has been held that where the trial judge, in certifying a bill of exceptions, recognizes the stenographer who takes the evidence as the official reporter of the court, the stenographer is *de facto* reporter, and the fact that he is not regularly appointed by the judge will not avail as an objection to the bill of exceptions.<sup>2</sup>

**III. COMPENSATION.**—The rate of compensation to be allowed official stenographers in legal proceedings is either governed directly by statute, or fixed by the court under authority conferred by statute;<sup>3</sup> the statutes also provide the mode of pay-

that where the court of one of these counties should be divided, each division should have a stenographer appointed by the judge. See *Missouri Acts*, April 2, 1883.

1. *Schoenfeldt v. State*, 30 Tex. App. 695.

2. *Etter v. O'Neil*, 83 Iowa 655.

**Removal.**—Rev. Sta. of *Missouri* of 1880, ch. 153, art. 2, providing for the appointment of official stenographers, contains a provision also "That the judge shall at any time have power to remove such stenographer upon proper charges entered of record for incompetency or any misconduct in office, specifying such misconduct and giving such stenographer an opportunity of being heard." Also that "It shall be the duty of such stenographer to attend the sessions of the court" and that he "may appoint one or more deputies to assist him in the discharge of his duties, and shall not be allowed any additional compensation on account of such deputies." Const. of 1875, art. 2, § 18, provides that no person elected or appointed to any office or employment of trust or profit under the law of the state shall hold such office without personally devoting his time to the performance of the duties to the same belonging. It was held that where an official stenographer did not devote his personal attention to the duties of his office but left them to be performed by his deputy, this was cause for his removal from office by the judge who appointed him. *State v. Slover* (Mo. 1892), 20 S. W. Rep. 788. Where a stenographer is thus removed he is not entitled to compensation for the time between the preferring of charges against him and the time when the entry of the order

for removal is made. *State v. Slover* (Mo. 1892), 20 S. W. Rep. 790.

3. *Michigan Comp. Laws*, p. 1528; *Pennsylvania Act*, 1876, § 3; *New York Code Civ. Proc.*, §§ 254, 258; *California Code Civ. Proc.*, § 274.

Under the *New York Code Civ. Proc.*, §§ 86, 289, court stenographers are only entitled to charge counsel for furnishing an official copy of the stenographic minutes of a trial, ten cents per folio of one hundred words by actual count, and, on application of the attorney he will be ordered to write out his minutes and make out his bill at such rate. *Wright v. Nostrand*, 58 How. Pr. (N. Y.) 184; *Guth v. Dalton*, 58 How. Pr. (N. Y.) 289.

By the proper construction of *New Jersey Acts* of 1871 and 1874, relating to stenographic reporters, the circuit judge in his discretion may fix the compensation of such officer for attendance and transcript of proceedings furnished by the order of the court. *Knight v. Ocean County*, 49 N. J. L. 485.

In *California*, prior to 1885, it was held that neither section 869 of the Penal Code, nor any provision of law, fixed the fees of stenographers generally; and that a magistrate had no power to fix them according to the standard fixed for official reporters. *Fox v. Lindley*, 57 Cal. 650. But since that time, by an amendment passed in 1885, a magistrate is allowed to fix such fees, not to exceed those allowed reporters in the superior courts of the state, as provided for in the *California Code of Civil Procedure*, § 274, which declares that the official reporter shall receive as compensation a sum to be fixed by the court not exceeding \$10.00 per day. *McAllister v. Hamlin*, 83.

ment.<sup>1</sup> Where the rate of compensation at which an official stenographer is bound to furnish, with reasonable diligence, copies of his stenographic notes of testimony or other proceedings, is fixed by statute, an agreement to pay a greater rate for furnishing copies more expeditiously than would otherwise be done, cannot be enforced.<sup>2</sup> But it seems that when the statute prescribing his duties does not contemplate that he shall devote his entire time to the public service, he may recover for work done under special contract not falling within his official duties.<sup>3</sup>

Cal. 361. This case overrules *Smith v. Strother*, 68 Cal. 194, in which it was said that this mode of fixing the stenographer's salary was in conflict with the constitution of the state, as it lays legislative functions upon the judiciary.

A county board has no discretion as to the amount due the official stenographer of the state's circuit court of *New Jersey* for services rendered, but must pay what the certificate of the judge of such court calls for. *Knight v. Ocean County*, 48 N. J. L. 70. See *McAllister v. Hamlin*, 83 Cal. 361.

#### Translation of Stenographer's Notes.

—Under *Iowa Code*, § 3777, the stenographer is not bound to furnish a translation of his notes, unless provision is made by the party desiring it for payment of same. *Godfrey v. McKean*, 54 Iowa 127.

1. A *Michigan* act relating to stenographers provides that the appointment may be made for an entire circuit, but that the stenographer cannot receive from the entire circuit more than the statutory salary of \$2,000; this should be apportioned by the judge amongst the several counties composing the circuit, and he cannot require each individual county to pay him specific sums by way of compensation unless the respective proportions of such counties towards the salaries shall amount to these sums. *Goodale v. Marquette County*, 45 Mich. 47.

The supreme court of *Indiana* has no authority to order a stenographer's notes to be copied and paid for out of the state or county treasury. *Merrick v. State*, 63 Ind. 327.

A stenographer in the surrogate's court of *New York*, appointed under *New York Act* of 1865, is not limited in the collection of his salary to the fees which have been paid by that court into the county treasury; if these

fees are inadequate, the excess becomes a county charge. *Munson v. New York*, 57 How. Pr. (N. Y.) 497.

A county is not liable to an official stenographer, appointed by virtue of the provisions of the *Pennsylvania Act* of May 8, 1876 (P. L. 140), for transcripts of his notes furnished by him, unless said transcripts are made by order of court or to be filed in performance of the stenographer's general duty. A county is not liable to such stenographer for a transcript furnished by him at the request of counsel, although the same be filed in the cause and constitute part of the record thereof. *Briggs v. Erie County*, 98 Pa. St. 570; *Lehigh County v. Meyer*, 102 Pa. St. 479.

The proviso of the third section of the *Pennsylvania Act* of May 8, 1876 (P. L. 140), that in counties having less than two hundred thousand inhabitants the compensation of the official court stenographer, payable by said county, shall not exceed \$1,200 per annum, applies only to his compensation for the services referred to in the enacting clause of said third section; viz., the *per diem* compensation for the taking of notes in court. It does not apply to the additional duties imposed by the fourth section of said act, to-wit, the writing out of notes in longhand when ordered by the court. Where, therefore, the *per diem* compensation of the stenographer for taking notes in court amounts to less than \$1,200 for any year, but compensation for writing out notes in longhand when ordered by the court increases his total compensation for the year to a sum in excess of \$1,200, he is entitled to recover his total compensation from the county. *Lehigh County v. Meyer*, 102 Pa. St. 479.

2. *McCarthy v. Bonyng*, 12 Daly (N. Y.) 356.

3. *Langley v. Hill*, 63 Mich. 271.

A client is alone responsible for the fees of a stenographer employed by the client's attorney to render services necessary to the proper and convenient conduct of the case,<sup>1</sup> and the rule is not altered by the fact that the attorney simply requested the performance of the services for his client.<sup>2</sup>

In the absence of a special agreement all the parties to an action are jointly liable to an unofficial stenographer employed to take the official report of the proceedings before a referee and furnish the parties with copies of the testimony.<sup>3</sup>

By statute in several states a stenographer is entitled to demand payment of his fees, or satisfactory security therefor, in advance.<sup>4</sup> If an attorney wrongfully refuses to pay the legal

1. **Who Liable.**—*Harry v. Hilton*, 11 Abb. N. Cas. (N. Y.) 448; 64 How. Pr. (N. Y.) 199. See generally ATTORNEY AND CLIENT, vol. 1, p. 942.

2. *Bonyng v. Field*, 44 N. Y. Super. Ct. 581; 81 N. Y. 459; *Bonyng v. Waterbury*, 12 Hun (N. Y.) 534; *Sheridan v. Genet*, 12 Hun (N. Y.) 660. These cases hold that in order to impose liability on the attorney, there must be a special agreement on his part to be responsible.

3. *Adams v. New York, etc., R. Co.*, 20 Abb. N. Cas. (N. Y.) 180. In this case it was further held that under an agreement by the parties to a trial before a referee that the "successful party" shall pay the fees of the stenographer, the party who prevails before the referee and takes up his report and enters judgment thereon with costs, including the stenographer's bill as an item therein, is the "successful party," and alone liable, notwithstanding the judgment be modified on appeal so that no costs can be taxed by either party.

At a hearing before a referee the parties failed to agree on a stenographer, and the referee offered to take down the testimony in longhand. The defendant's counsel objecting to this, the referee requested a stenographer who was present to take testimony, and the defendant's counsel said: "Go ahead, I am satisfied." The defendant's counsel took the report and afterwards wrote to the referee to send the bill of the stenographer, which had been lost, to him. It was held that this evidence justified a finding that the stenographer was employed by defendant and entitled to payment by him. *Macvey v. Metropolitan El. R. Co.* (Supreme Ct.), 19 N. Y. Supp. 133.

4. **Payment in Advance.**—*Merrick v. State*, 63 Ind. 327. But in this case it was also adjudged that the court might, in its discretion, admit the defendant to defend as a poor person and direct that a copy of the reporter's notes of the evidence be furnished him to enable him to prepare a bill of exceptions.

But this may not be demanded by the defendant as a matter of right. *Ex parte Morgan*, 122 Ind. 428. *New York Court of Common Pleas* has held that under § 86, Code of Civ. Proc. of that state, the stenographer may require payment of his fees in advance. *Guth v. Dalton*, 58 How. Pr. (N. Y.) 289. But in *Wright v. Nostrand*, 58 How. Pr. (N. Y.) 184, the supreme court held that the stenographer could not require payment in advance upon speculation or conjecture as to what his bill might ultimately be.

**One Convicted of Felony not Entitled to Copy of Testimony at Public Expense**—*Nebraska*.—*State v. Moore*, 8 Neb. 22, was an application for mandamus brought by the relators to compel the defendant, the official stenographer, to furnish from his shorthand report a copy of the testimony taken on trial, in which the relators were convicted of murder in the second degree and sentenced to the state penitentiary for a term of years, to the end that they might be enabled to prepare a bill of exceptions and prosecute proceedings in the supreme court. A statute of the state (*Nebraska* act of Feb. 19, 1877) made it the duty of the reporter to furnish, on application of any party to a suit in which a stenographic record of the proceedings had been made, a copy of the same for which he was entitled to receive a specified compensation. The relators sought to avoid the force of this last clause

charges of a court stenographer, it has been held that the court would protect the latter by a summary order against the attorney.<sup>1</sup>

It has been held that the custom among stenographers of estimating the number of folios to the page of copy furnished, will not prevail as against an actual count reducing the number charged for.<sup>2</sup>

**IV. WHEN FEES TAXABLE AS COSTS OR DISBURSEMENTS.**—A direction made in open court that the testimony given in court be taken down by a stenographer is sufficient to entitle the stenographer's charges to be taxed by the prevailing party.<sup>3</sup>

It has been held that where a stenographer is employed by the parties to an accounting before a master in chancery, by his procurement, he has no authority to make the fees of the stenographer taxable costs, but the court will leave them to be borne by the parties according to their contract.<sup>4</sup>

on the ground that being without the means of making payment they were practically deprived of the benefit to be secured to them by § 23, art. 1, of the state constitution, which declares that "the writ of error shall be a writ of right in all cases of felony." Wherefore, it was contended that a transcript of the testimony should be furnished them at the public expense. But the court held that there was no conflict between the statute and the constitution in this particular, for, while, by the latter, one convicted of felony was entitled to a writ of error as a matter of right, there was nothing in that instrument by which the duty of aiding him, either with money or counsel, in making an application for it, was imposed upon the public; and that such a party could obtain the transcript from the reporter only at his own expense; and that the reporter could require payment in advance.

**Refusal to Pay Stenographer's Fees—Excluding Defense.**—After the commencement of a trial, it is illegal to exclude the defense on account of the refusal of the defendant to pay his proportion of the stenographer's fees. *Wheaton v. Atlantic Giant Powder Co.*, 41 Mich. 718.

**Delivering Notes to Referee—Effect of—Duty of Referee.**—In *Pope v. Perault*, 22 Hun (N. Y.) 468, it was held, that although a stenographer is not obliged to part with his notes until his bill has been paid, yet if he delivers them to the referee to be examined by him and used as the basis of his report, he may not limit the effect of such delivery; and it is the duty of the referee to file

them with his report, even though the fees of the stenographer remain unpaid.

1. *Wright v. Nostrand*, 58 How. Pr. (N. Y.) 184.

2. *Maltby v. Plummer*, 73 Mich. 539. See also *Wright v. Nostrand*, 58 How. Pr. (N. Y.) 184.

3. *The E. Luckenback*, 19 Fed. Rep. 847. In this case the judge's notes of the trial of the cause contained the memorandum, "Stenographer takes notes." This memorandum indicated a direction given at the time that the testimony given in court be taken down by a stenographer. It was held that such a direction was sufficient and the entry of a formal order was unnecessary.

In *Kansas*, it is provided by statute that a stenographer's fees shall be taxed in each case in the district court in any county in which a stenographer may be appointed. Under this statute such fee must be taxed as costs in every case, although the stenographer is not called upon to render any services in that particular case. But when the fee is taxed as a part of the costs, in an action in which no services are rendered, such an item is not a tax within the meaning of § 1, art. 11 of the constitution of the state. It is a fee to the public imposed for the purpose of adjusting, on an equitable basis, the expense of the administration of justice as between the suitor and the public. *Beebe v. Wells*, 37 Kan. 472.

4. *Bridges v. Sheldon*, 7 Fed. Rep. 42.

Where the parties for their convenience agree upon the employment of a stenographer to take down testi-



Where, upon the commencement of a trial before a referee, the parties stipulate for the employment of a stenographer whose fees are to be paid by them in equal proportion, the expense of an extra copy of the minutes ordered by the referee for his own use is included in the agreement, and consequently not taxable against the unsuccessful party.<sup>1</sup>

A stipulation by the parties to the suit that the compensation of a stenographer employed in taking testimony may be taxed as costs has the effect of submitting to the court the question as to the amount to be allowed, and waives the right to have the question determined by a jury, and the finding of a referee to whom the question has been referred is merely advisory, and the court may disregard it and enter its order upon the evidence returned by the referee.<sup>2</sup>

Where a stenographer's notes, used by the defendant in preparing a bill of exceptions, had been obtained and paid for on a previous trial, the plaintiff should not be taxed with such expense as costs in the suit.<sup>3</sup>

money before a referee, and that each shall pay one-half the expense of his services in taking notes of the evidence, the expense, or any part thereof, cannot be taxed as a disbursement on the successful party within the meaning of the law regulating the adjustment of costs. *Colton v. Simmons*, 14 Hun (N. Y.) 75; *Nugent v. Keenan*, 53 N. Y. Super. Ct. 530.

Where upon a stipulation that each party has paid a specified sum as stenographer's fees in proceedings before a referee, an order is entered by consent appointing a new referee and providing that "the amount heretofore paid by the respective parties for . . . stenographer's fees shall be taxed by the successful party as disbursements in the case," the finally defeated party may not question the amount named, but the successful party is entitled to tax it in his bill of costs. When such stipulation also provides that each party shall pay one-half of the fees of a stenographer to be employed on the new reference, and that the successful party may tax the amount so paid as a disbursement, and the plaintiff fails to recover against one of the defendants, though successful as to the others, the successful defendant is entitled to tax the amount paid by him in his bill of costs. *Clegg v. Aikens*, 17 Abb. N. Cas. (N. Y.) 89.

1. *Mark v. Buffalo*, 87 N. Y. 184.

2. *In re Barnes* (Mo. App. 1886), 4 West. Rep. 302. And it was further

held, that under such circumstances, the appellate court may set aside the finding of the trial court, and remand the cause to that tribunal with direction to enter an order in accordance with the finding of the referee.

3. *George W. Roby Lumber Co. v. Gray* (Mich. 1889), 42 N. W. Rep. 839.

In *New York*, where it is necessary for a party to provide himself with a copy of the stenographer's minutes of the evidence and proceedings upon a trial to enable him to make a case or bill of exceptions, the legal expense incurred in procuring the same properly forms an item in the bill of costs, and is taxable as a necessary disbursement incurred in the prosecution or defense of the action as the case may be. *Varnum v. Wheeler*, 9 N. Y. Civ. Pro. Rep. 421.

And the fees of a stenographer for a copy of his minutes are a taxable item of disbursement when procured for the purpose of enabling a party to propose amendments to a case on appeal. *Sebley v. Nichols*, 32 How. Pr. (N. Y.) 182; *Stevens v. New York El. R. Co.*, 58 N. Y. Super. Ct. 569. Compare *Pfandler & Co. v. Sargeant*, 43 Hun (N. Y.) 154.

In *Cutter v. Morris*, 7 N. Y. St. Rep. 426, the item objected to in a bill of costs was described as the "stenographer's minutes used in preparing amendments to case." The disbursement was sworn to as being necessary and actually incurred in the action by

Under a statute providing that the court may direct the employment of a stenographer, if thought necessary, and may order the expense occasioned thereby to be paid by the parties, the stenographer's fees, or the part thereof paid by the successful party as directed by the court, cannot be taxed by him as a necessary disbursement.<sup>1</sup>

the attorney. It was held that without any evidence being stated tending to disprove the affidavit of disbursement contained in the bill of costs, the item could not be stricken out.

Howell's *Michigan* Statutes, § 6590, provides that, "It shall be the duty of the stenographer, appointed by the order of the court, to write in legible English a full copy of the notes taken by him on the trial of any cause without fee or charge, and to file the same with the clerk of the court, for the use of the court and parties to the cause." Where the defendant, in the making and settlement of a bill of exceptions, was not obliged to procure a copy, but obtained it upon his own motion, without any effort to take advantage of this statute, his payment of the copy must be considered as voluntary, and cannot be taxed as cost; only the copy furnished for the printer could be so taxed. *Thurstin v. Luce*, 61 Mich. 486; *Detroit, etc., R. Co. v. Hayt*, 55 Mich. 347; *Bell v. Pate*, 48 Mich. 640; *Hayes v. Livingston*, 35 Mich. 371. But where the judge refuses to make the order necessary to obtain the copy, and yet refuses to settle the bill of exceptions without such copy, then the party appealing, who is obliged to obtain and pay for it, if he prevails in the higher court, may have the amount so paid taxed as costs. *Bradford v. Vinton* (Mich. 1886), 27 N. W. Rep. 2.

**Notes on Former Trial.**—The cost of copies of the stenographer's notes of the first trial for the use of a party on a second trial is not taxable as a disbursement under *New York* Code Civ. Proc., § 311. *Hamilton v. Butler*, 19 Abb. Pr. (N. Y.) 446; *Spring v. Day*, 44 How. Pr. (N. Y.) 390. The contrary was held by the *New York* supreme court at special term in *Flood v. Moore*, 2 Abb. N. Cas. (N. Y.) 91.

1. *Gleiman v. Oliver*, 14 Abb. Pr. (N. Y.) 174; *Arnoux v. Phelan*, 21 How. Pr. (N. Y.) 88. But see *Reynolds v. New York*, 14 Abb. Pr. (N. Y.) 176, note.

Where the plaintiff procured from the stenographic reporter a copy of the

evidence, and the fees of the reporter were allowed as an item of disbursement in the bill of costs as taxed, and an affidavit as to the disbursement, which was made by the plaintiff's attorney, stated that the items of disbursement set forth in the bill were "actually made and incurred," the trial judge made his certificate that on the trial he directed the stenographer's minutes to be furnished the court and that his fees be taxed as a disbursement; it was held, that as it did not appear that the court used the copy procured by the plaintiff, or that it was obtained by him for that purpose, the item should have been disallowed under *New York* Code Civ. Proc., § 84. *Pfandler Barin Extracting, etc., Co. v. Pfandler*, 3 How. Pr. N. S. (N. Y.) 253.

The *New York* Code Civ. Proc., § 289, which provides that if a "judge requires a copy of any proceedings written out at length from the stenographer's notes, he may make an order directing one-half of the stenographer's fees therefor to be paid by each of the parties to the action or special proceeding," etc., does not limit the time for making the order. Accordingly, where the stenographer's minutes were required for a proper decision of the case, it was held that the order could be made after the costs had been taxed and the taxation would be reopened and the costs sent back to be retaxed after the order was made. *Abendroth v. Manhattan R. Co.*, 9 N. Y. Civ. Pro. Rep. 406.

**Additional Allowances—Disbursements and Not Costs.**—In ascertaining whether the additional allowances granted by the surrogate of *New York* exceed the limit of \$2,000, fixed by *New York* Code, § 309, an amount awarded to the stenographer of the court is not to be considered—that amount is a disbursement in the case, and not in the nature of costs. *Dow v. McGourkey*, 15 Hun (N. Y.) 444.

**Stenographer's Fees—Repayment of.**—There is no provision of law in *New York* authorizing the repayment or return to one paying them, of the

**V. STENOGRAPHER'S NOTES AS EVIDENCE.**—The decisions involving the admissibility and value of stenographer's reports as evidence have arisen under varying local statutes, and no general principles can be gathered from them. The instances where such reports as evidence are brought into question, are confined principally to those cases where reports are taken upon preliminary examinations and sought to be introduced in evidence on the trial;<sup>1</sup> cases where a new trial has been granted and stenographic reports of evidence given on a former trial are offered as evidence on the new trial;<sup>2</sup> and cases of appeal

stenographer's fees paid in the first judicial department upon the filing of a note of issue, and as the clerk of the court is required to pay them to the comptroller of the city of New York, and they are in the constructive possession of the latter official so soon as they reach the hands of the clerk, their repayment cannot be required. *Kerwin v. Valentine*, 13 N. Y. Civ. Pro. Rep. 334.

**1. On Preliminary Examinations.**—Under *California* Pen. Code, § 869, a reporter's transcribed notes, taken by him at an examination of a prosecuting witness before the committing magistrate, must be certified to be a correct statement of the testimony and proceedings, and not merely that it is a full, true, and correct transcription of the shorthand notes. The certificate must be correctly written, and its absence cannot be supplied by parol evidence so as to make the transcription admissible, although it would be a proper course to have the reporter refresh his memory and testify orally at the examination. *People v. Carty*, 77 Cal. 213.

A transcript of the shorthand reporter's notes taken on preliminary examination in a criminal case certified as provided by § 369, Penal Code of *California*, is placed upon the same footing as a deposition, and is admissible in like cases. *People v. Grundell*, 75 Cal. 301; *People v. Qurise*, 59 Cal. 343; *People v. Cunningham*, 66 Cal. 668.

The requirement of *California* Penal Code, § 869, that a stenographer's transcript of testimony taken at a preliminary examination, shall be filed within ten days, is merely directory, and a filing within a reasonable time is sufficient. *People v. Grundell*, 75 Cal. 301.

By statute in *California*, in case of a preliminary examination of a person charged with a felony, the stenog-

rapher employed to take testimony need not be sworn. *People v. Riley*, 75 Cal. 98.

**2. On Former Trial.**—The reporter's transcript of the testimony of a witness taken on a former trial between the same parties, relating to the same matter, may be given in evidence when such witness is dead, out of the state, or unable to testify; this is so even when the testimony is not signed by the witness. *Hicks v. Lovell*, 64 Cal. 14; 49 Am. Rep. 679; *Stewart v. First Nat. Bank*, 43 Mich. 257; *Rex v. Wylde*, 6 C. & P. 380; 25 E. C. L. 447.

Under subd. 8, § 1870, *California* Code of Civ. Proc., which provides that evidence may be given upon a trial, of the testimony of a witness in a former action between the same parties, when the witness is "out of the jurisdiction," the reporter's notes of evidence given at a former trial should not be admitted when the witness is resident in the state, though in an adjoining county. *Meyer v. Roth*, 51 Cal. 582.

The notes of a stenographer containing the testimony of a party in a civil case cannot, unless by consent, be introduced to contradict him on a subsequent trial of the same case, particularly if they are not authenticated. *Edwards v. Heuer*, 46 Mich. 95. In this case, the court said: "The legislature in providing for the assistance of shorthand writers did not intend that their notes should have more force than the judge's minutes, and no one has ever supposed that the latter possessed the inherent character of written evidence." See also *Misner v. Darling*, 44 Mich. 438.

When a stenographer takes down in writing what a witness has said on a former trial, it is not the best evidence in such a sense as to exclude the testimony of an intelligent bystander, who has heard and paid particular attention to the testimony of the witness.

Brice v. Miller (S. Car. 1892), 15 S. E. Rep. 272.

When it is sought to impeach the testimony of a witness by showing that he has testified differently on a former trial, the stenographer who took the notes of the testimony is not the only competent witness. *State v. McDonald*, 65 Me. 466.

A transcript report of a stenographer containing the evidence given on a former trial cannot be used to contradict the witness on a subsequent trial, the legislature not having declared such reports evidence for any purpose. *Phares v. Barber*, 61 Ill. 272.

Where one party offers parts of the evidence of a witness given on a former trial in order to contradict such a witness, the other party may put in so much as is relevant, and may cause the stenographer to read his original minutes. *Noyes v. Gilman*, 78 Me. 394.

The stenographer's transcript of evidence given by a deceased witness at a former trial of the same case has been held admissible, although the witness being dumb gave his testimony by signs which the stenographer in his notes described and translated. *Quinn v. Halbert*, 57 Vt. 178.

In *Brown v. Luehrs*, 79 Ill. 575, it was held that the transcript of evidence taken on a trial of a suit at law is properly admitted in evidence on the hearing of a bill in equity for a new trial, when the stenographer who took the evidence testified that he wrote up the same; that the transcript is correct, and that the witnesses had sworn and testified as therein stated.

In *California*, a stenographer's notes of testimony given on a former trial, are not admissible in evidence if he has not testified to their accuracy, or if they are not in some way authenticated, or if the examination of the witness was incomplete. *Misner v. Darling*, 44 Mich. 438.

Where depositions of a witness before a register in bankruptcy have been taken by a stenographer and afterwards reduced to longhand, such depositions will be suppressed if not read to, and signed by the witness, although his subsequent attendance for that purpose could not be procured. *In re Cary*, 9 Fed. Rep. 754.

A witness examined at a former trial having declared his intention of being absent on the occasion of the second, plaintiff entered a notice three or four days before such trial that the transcript

of the stenographer's notes would be offered as evidence. Section 3777, *Iowa* Civ. Code, provides, that such notes, or any transcript thereof duly certified by the reporter of the court, shall be admissible, in any case in which the same are material to the issue therein, with the same force and effect of depositions, and subject to the same objections so far as applicable. Under these circumstances an objection to the admission of evidence, on the ground that there was no sufficient showing that the plaintiff could not have secured the attendance of the witness, and that the notice was insufficient, could not be sustained. *Fleming v. Shenandoah Tp.*, 71 *Iowa* 456.

The testimony of a stenographer in regard to evidence introduced upon a former trial is competent if based upon his recollection of the evidence itself and not of his notes. *Moore v. Moore*, 39 *Iowa* 461.

Stenographer's notes are not depositions and detached portions are not to be used to impeach a witness on a subsequent trial without first interrogating him as to them. *Seligman v. Ten Eyck*, 53 Mich. 285.

*California* Code Civ. Proc., § 273, provides as follows: "The report of an official reporter of any court, duly appointed and sworn, when written out in longhand and certified as being a correct transcript of the testimony, and of the proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings." Under this section the plaintiff was allowed to introduce the stenographer's transcript of evidence given in another suit, but the supreme court held that this section did not make the transcript itself admissible in evidence. An unfiled transcript is not a public record, but must be put upon the footing of a private memorandum, and having been written up at an uncertain time, is not admissible as part of the *res gestæ*. *Reid v. Reid*, 73 Cal. 206.

The notes of the shorthand reporter of a district court of *Nebraska*, of the testimony of a witness examined in that court, is not admissible in a future action between the same parties as documentary or independent evidence. *Lipscomb v. Lyon*, 19 Neb. 511.

A certified copy of a stenographer's report of proceedings is admissible whenever the original would be. *Spielman v. Flynn*, 19 Neb. 342.

where the stenographer's reports are sought to be made a part of the record.<sup>1</sup>

1. **In Cases of Appeal.**—In *Pennsylvania* and *West Virginia*, the acts relating to a stenographer declare that their "notes shall be deemed and held official, and the best authority in any matter of dispute." Such notes must be made up under the eye and direction and with the approval of the court, and subject to its direction. These notes of testimony, including exceptions to the rulings of the court during the examination, become part of the cause and need not be embodied in any other bill of exceptions, nor require other verification than identification by the clerk of the court and by the reporter himself. *Taylor v. Preston*, 79 Pa. St. 436; *Chase v. Vandergrift*, 88 Pa. St. 217; *Cummings v. Armstrong*, 34 W. Va. 1.

In *Louisiana*, under Act No. 94, 1876, p. 150, it was held, in *Nichols v. Harrison*, 32 La. Ann. 646, that the notes of a stenographer, although illegible or unintelligible to any one else, constitute a "taking in writing under the eye and within the hearing of the court by a sworn officer, and although they had never been transcribed or translated, owing to some accident, the insufficiency of the record under such circumstances was no ground for dismissing the bill."

**Iowa.**—Evidence taken by a stenographer does not become a part of the record, until the shorthand notes, together with a translation thereof, are deposited in the clerk's office and duly certified by the judge. And this must be done within the time prescribed by law else it constitutes no part of the record and will be stricken from it. *Chicago Lumber Co. v. Davis*, 82 Iowa 731; *Kavalier v. Machula*, 77 Iowa 121; *Thomas v. McDonald*, 77 Iowa 126; *Lowe v. Lowe*, 40 Iowa 220; *Harris v. Snair*, 76 Iowa 558; *McCarthy v. Watrous*, 69 Iowa 260; *Gibbs v. Buckingham*, 48 Iowa 96; *Lynch v. Kennedy*, 42 Iowa 220; *Wise v. Usry*, 72 Iowa 74; *Arts v. Culbertson*, 73 Iowa 13; *Wadsworth v. First Nat. Bank*, 73 Iowa 425; *Merrill v. Bowe*, 69 Iowa 653; *Hammond v. Wolf*, 78 Iowa 227. The certificate of the judge indorsed upon the transcript, that it is all the evidence given in the trial, is sufficient to make it a bill of exceptions. *McCarthy v. Watrous*, 69 Iowa 260; *Gibbs v. Buckingham*, 48 Iowa 96;

*McFarland v. Folsom*, 61 Iowa 117; *Hahn v. Miller*, 60 Iowa 96.

In *Richards v. Lounesbury*, 65 Iowa 587, the court, citing *Ross v. Loomis*, 64 Iowa 432, held that evidence taken in shorthand can only become written evidence when translated and certified by the reporter, and that the certificate of the judge alone, who cannot read such notes, is not sufficient.

Although the original shorthand notes of the testimony were certified by the judge and the stenographer who took them, the transcript does not become a part of the record, if the type-written copy used by the judge, and the longhand copy made by the attorney for the appellants were not so certified. *Citizens' Sav. Bank v. Stewart*, 82 Iowa 719.

Where a translation of the report of testimony taken on a trial, certified by the stenographer and inserted in the bill of exceptions in a blank left for that purpose, was not designated as the testimony in any cause, although on the outside of the document the title of the case was indorsed, such evidence was not sufficiently identified to be considered on appeal. *Joy v. Bitzer*, 77 Iowa 73.

The transcript of reporter's notes showed that the documents offered were identified by exhibit marks, and that two depositions were read in evidence; to this transcript two documents were attached bearing exhibit marks identical with those called for in the transcript, and two depositions indorsed as in this case; the transcript also contained a copy of the judge's certificate to the original report in shorthand, certifying that the same, together with the documentary evidence therein referred to, contained all the evidence given on the trial. This was held by the court to be sufficient identification of the transcript on appeal. *Johnston v. McPherran*, 81 Iowa 230; *Way v. Counsel*, 76 Iowa 741.

Although evidence is not preserved by bill of exceptions it may be preserved by the stenographer's report, and upon being duly certified, may become a part of the record on appeal. *DeLong v. Lee*, 73 Iowa 53.

It was stated in a bill of exceptions that the "evidence was taken down by the official stenographer in the form of

depositions, and the notes were filed in the clerk's office and made a part of the record therein, and a true transcript of said notes and evidence made and exhibited by the report is as follows: (here the court will insert a true and complete transcript of all evidence offered and introduced in the trial);" such statement in the bill did not identify the evidence by any unmistakable reference thereto as required by the Code of *Iowa*, § 2834. *Nelson v. Peterson*, 82 *Iowa* 739.

*Indiana*.—In order to constitute the longhand manuscript of evidence taken by a stenographer a part of the record on appeal, it must be incorporated into the bill of exceptions. *Marshall v. State*, 107 *Ind.* 173; *Weir Plow Co. v. Walmsley*, 110 *Ind.* 242; *Shirk v. Coyle*, 2 *Ind. App.* 354.

A paper in the record purporting to be the stenographer's report of evidence, not signed or attested by the judge, is entirely without force. *Louisville, etc., R. Co. v. Kane*, 120 *Ind.* 140; *Lyon v. Davis*, 111 *Ind.* 384.

But it has been held in *McCormick, etc., Mach. Co. v. Gray*, 114 *Ind.* 340, that where the original longhand manuscript of the evidence was followed by the certificate of the official reporter to the effect that it contained all the evidence given in the cause, the trial judge, when he signed a statement to the effect that the plaintiff tenders the document as his bill of exceptions, and prays that the same may be signed and made a part of the record, sufficiently certified that all the evidence given in the cause was contained in such manuscript.

If there be an omission in the record on appeal to note the appointment and swearing of the stenographer, such defect may be cured by the stenographer certifying that he was the duly appointed reporter, together with the certificate of the clerk, that the report is the original longhand manuscript of the evidence, and was made a part of the bill of exceptions. *Tobin v. Young* (*Ind.* 1888), 17 *N. E. Rep.* 625.

A bill of exceptions which ended with a statement to the effect that it contained all the evidence given in the cause, and duly signed by the presiding judge, will not be disregarded because the reporter was not sworn. *Williams v. Pendleton, etc., Turnpike Co.*, 76 *Ind.* 87.

A stenographer's report of oral testimony is not a "written instrument."

within the meaning of *Indiana Rev. Stat.*, § 626, which allows written instruments to be brought into a bill of exceptions, by the words, "here insert, etc." *Wagoner v. Wilson*, 108 *Ind.* 210; *Fahlor v. State*, 108 *Ind.* 387; *Lowery v. Carver*, 104 *Ind.* 447; but the report in order to be brought into a record must be set out in the bill before the latter has been signed by the judge; merely attaching it to the bill after it has been signed will not effect this. *Patterson v. Churchman*, 122 *Ind.* 379; *Dick v. Mullins*, 128 *Ind.* 365.

Under *Indiana Rev. Stat.*, § 1410, the longhand manuscript of a report of evidence taken by a stenographer, appearing in a bill of exceptions, is an original document incorporated therein; the original papers attached to and properly identified in such longhand report are considered a part thereof, and are properly in the record, notwithstanding the general rule, that original papers read in evidence must be copied in the bill of exceptions at the proper place and cannot be transmitted to the court with the record. *Indiana, etc., R. Co. v. Quick*, 109 *Ind.* 295; *Tobin v. Young* (*Ind.* 1888), 17 *N. E. Rep.* 625.

In *Indiana*, it is held that a bill of exceptions may not contain any matter in the characters used by shorthand writers, upon the principle that all pleadings must be in the English language. *Merrick v. State*, 63 *Ind.* 327.

*Michigan*.—By *Michigan Act*, 1879, § 8, the minutes of the official stenographer are authorized to be used in settling a bill of exceptions, but it does not give them the character of depositions, or record evidence generally. *Edwards v. Heuer*, 46 *Mich.* 95.

The entire evidence as taken by the stenographer was sent up as a bill of exceptions, but there was no index to the record or to the parts thereof to which the assignments of error applied. In such case the court will not examine the record critically for error. *Pease v. Munro*, 83 *Mich.* 475.

In case of an appeal in a divorce suit, the settlement of facts, preparatory to taking the appeal, may properly be made on the stenographer's notes, where the judge goes out of office before the time for such settlement expires. *Johnson v. Johnson*, 49 *Mich.* 630.

The preparation of a bill of exceptions by merely taking a heading

**STEP-CHILDREN.**—See CHILD, vol. 3, p. 232; GRANDCHILD, vol. 8, p. 1412; ISSUE, vol. 11, p. 870.

**STIPULATED DAMAGES.**—See LIQUIDATED DAMAGES, vol. 13, p. 847.

**STIPULATION (IN ADMIRALTY).**—As to stipulations relating to the preparation for or conduct of a trial, see TRIAL.

- I. In General, 567.
- II. Stipulations for Costs, 571.
- III. Stipulations for Costs and Damages, 573.

- IV. To Appear and Abide or Pay Decree, 573.
- V. To Abide or Pay Decree, 574.
- VI. For Value, 574.
- VII. On Appeal, 581.

**I. IN GENERAL.**—The term "stipulation" in admiralty practice is the analogue of "bond" or "undertaking" in the practice of

and conclusion to the usually voluminous notes of a stenographer, is oppressive in its expense to the parties, and imposes unnecessary labor on the court. Therefore, the plaintiff was allowed only one-third of the expense in taxing the costs. *Rice v. Rice*, 50 Mich. 448.

*North Carolina.*—In case of appeal, the bill of exceptions should not contain the entire amount of evidence embraced in the stenographer's report, but only so much of such evidence, and other matters occurring on the trial, as may be necessary to present and illustrate the matters excepted to. *Durham Tp. v. Richmond, etc., R. Co.*, 108 N. Car. 399.

*Montana.*—The evidence contained in the record on appeal was a mere transcript of the shorthand reporter's notes, by question and answer, and no reason was given why it should be in that condition. Such record could not be considered, and therefore the findings were presumed to be sustained by the evidence. *Barger v. Halford*, 10 Mont. 57, citing *Newell v. Myndorff*, 9 Mont. 254.

*Oregon.*—The *Oregon* statute authorizing the appointment, etc., of official stenographers, provides in § 5, that the notes of such stenographer when transcribed and certified as correct and filed with the clerk, as provided, may thereafter be read in evidence under the same circumstances as depositions, but nothing in the act gives such notes the effect, or makes them perform the office, of a bill of exceptions. *McQuade v. Portland, etc., R. Co.*, 19 Oregon 535.

*Wyoming.*—The Act of December, 1877, provides that the transcription of

a stenographer's notes into longhand, shall be deemed to be a correct statement of the testimony given on a trial, but such transcription cannot take the place of a bill of exceptions, for the *Wyoming* Civil Code, § 303, requires a certified and absolutely true statement of the evidence to be taken up in all proceedings in error. *Johns v. Adams*, 2 Wyoming 194.

*Massachusetts.*—The purpose of the *Massachusetts* statute of 1870, ch. 312, providing for the appointment by the superior court of the county of Suffolk of stenographers, is to afford assistance to the court and the counsel in conducting the trial and in drawing up reports and bills of exceptions, not that a complete report of all that took place in the court below whether material or immaterial to the questions of law reserved should be transmitted to the supreme judicial court.

Where a report from the superior court stated none of the rulings upon the admission and rejection of the evidence, and upon the question reserved, whether there was any evidence to be submitted to the jury, referred to the stenographer's report annexed; and this report, as printed, covered about two hundred pages and consisted in large part of irrelevant and unimportant details of testimony, long cross-examinations, affecting only the bias and credibility of witnesses, and interlocutory discussions between the judge and counsel, through which the rulings of the judge and the portions of the evidence bearing upon the questions of law to be determined were scattered, it was held that the report was so irregular that it must be dismissed. *Churchill v. Palmer*, 115 Mass. 310.

the common law courts. The subject is therefore considered here in its restricted technical sense, and not in its more enlarged significance as a synonym of the terms "contract" or "agreement," of which there is nothing peculiar to be observed in admiralty.

Stipulations are required in the civil law practice for a variety of purposes, all of which have been reduced in the American admiralty practice to five, namely: for costs; for costs and damages; for value; to appear and abide and pay the decree of the court; and lastly to abide and pay the decree.<sup>1</sup>

They follow the civil law in respect to formalities of execution, and consequently need not be under seal.<sup>2</sup> But if executed under seal,<sup>3</sup> or if insufficiently executed as specialties, they are none the less valid as admiralty stipulations.<sup>4</sup> In the construction of a stipulation, in case of ambiguity as to its meaning, the intention of the court under the order of which it was taken, rather than the intention of the parties, is to be considered.<sup>5</sup>

Stipulations should be acknowledged before the court or a commissioner.<sup>6</sup> Personal sureties are required to swear that their estate is worth twice the amount of the obligation assumed, after

1. Adm. Rules, Sup. Ct. (U. S.), 3, 4, 10, 11, 25, 35; 1 Ben. Adm., § 493.

2. *The Alligator*, 1 Gall. (U. S.) 145; *The Wanata*, 95 U. S. 600; *Lane v. Townsend, Ware* (U. S.) 292; *The Sydney*, 47 Fed. Rep. 260; *Nelson v. U. S., Pet. (C. C.)* 235; *Dunlap Prac.* 164. The security may be by bond, recognizance, or stipulation. *The Octavia*, 1 Mason (U. S.) 150; 2 Conkl. Adm. (2d ed.) 105; *Holmes v. Dodge, Abb. Adm.* 60; *Gaines v. Travis, Abb. Adm.* 422.

3. *Lane v. Townsend, Ware* (U. S.) 292.

4. *The Alligator*, 1 Gall. (U. S.) 145.

5. *Lane v. Townsend, Ware* (U. S.) 292; *Cure v. Bullus*, 7 N. Y. Leg. Obs. 345. In the first case, Ware, J., said on the question of the construction of a stipulation in admiralty: "In contracts, it is the intention of the party which governs, in giving a construction to the terms of the agreement, and when that intention is ascertained, if it is not in collision with any rule of law, the court is bound to carry it into effect. But the security, which is taken in the progress of a suit in court, for the purpose of sustaining and enforcing its jurisdiction and authority, is taken under the order of the court or of the law. Its terms are dictated by the law or the court, and as the will of the party is not consulted as to the tenor of the obligation, so his will or intention is not regarded in its interpretation.

Such is the language of the civil law, which it is well known has had great influence over the jurisprudence, and more especially the practice of the admiralty. . . . If, therefore, there is an ambiguity in the terms of the stipulation, or the construction of them is doubtful, it is not the intention of the party, for which we are to inquire, for the will of the party had nothing to do in determining its conditions; the doubt must be removed by consulting the intention of the court, or the law which required the stipulation and dictated its terms."

6. Adm. Rules 5, 35. Neither of these rules provides for the execution of a stipulation before a clerk in vacation. In *The Jeanie Landles*, 17 Fed. Rep. 91, it was held that the clerk could not take a stipulation for the discharge of a vessel, there being in that case no method of giving formal notice of the fact to the marshal, and advising him that the process for the arrest of the vessel had been superseded. A doubt to the same effect is expressed in *Conkling's Treatise* (2d ed.) 366. Mr. Benedict adopts the contrary view, relying upon the principle that the court of admiralty is always open, and that proceedings in a cause therein, in vacation, are entered as having taken place in open court, and upon U. S. Act, April 5, 1832, providing that such proceedings may take place as well in vacation as in term, and that bail may be taken by the



payment of all debts.<sup>1</sup> Any person dissatisfied with the sureties offered may, on exception and notice, have their solvency determined by the court or a commissioner.<sup>2</sup> Further security may be compelled in case of the subsequent insolvency, insufficiency, death,<sup>3</sup> or removal of the surety beyond the jurisdiction of the court.<sup>4</sup> As a general rule, money may be deposited with the clerk or brought into court as a substitute for a stipulation.<sup>5</sup>

A stipulator in admiralty is regarded as a surety for the claimant, and his liability is strictly measured by the terms of the stipulation.<sup>6</sup> He will be released by the substitution of a new party as sole libellant,<sup>7</sup> but not by an amendment of the pleadings, which neither increases nor diminishes his liability,<sup>8</sup> nor by a reinstatement of a libel *in rem* which had been dismissed and the stipulation cancelled, if such reinstatement merely revives his liability, and does not otherwise affect him injuriously.<sup>9</sup> The stipulation

clerk on production of a certificate of the collector of the sufficiency of the sureties. Ben. Adm. (2d. ed.), § 446.

The commissioner appointed by the circuit court of a circuit other than that in which a libel is pending, cannot authenticate a stipulation in that proceeding by his mere certificate that the proposed stipulators appeared before him and acknowledged themselves bound, etc. *Sawyer v. Oakman*, 11 Blatchf. (U. S.) 65.

1. Ben. Adm. (2d ed.), § 489.

2. Bett's Prac. 41; Ben. Adm., § 491.

3. *The City of Hartford*, 11 Fed. Rep. 89.

4. Adm. Rule 6.

5. Adm. Rule 11; Ben. Adm. (2d ed.), § 491.

Other matters of minor importance touching the practice in respect to stipulations will be found in the admiralty rules of the supreme court, and in those of the various district courts. Those of the supreme court may be found in Ben. Adm. (2d ed.), p. 367, and Henry's Adm. Jur. & Prac., p. 419.

6. *The Ann Caroline*, 2 Wall. (U. S.) 538; *The Wanata*, 95 U. S. 600; *Brown v. Burrows*, 2 Blatchf. (U. S.) 341; Adm. Rule 11. In the case first cited, the libellant sought to recover from the stipulators the full value of the vessel, which exceeded the amount of the stipulation, and the claim was denied upon the ground stated in the text. In *Brown v. Burrows*, 2 Blatchf. (U. S.) 341, the stipulation was in the sum of \$900, and was conditioned to pay such sum as should be awarded to the libellant by final decree. It was held that

the surety's liability was limited to \$900, though the decree was for a greater sum. In *The Wanata*, 95 U. S. 600, it was said that seasonable payment of the sum expressed in the instrument was all that was to be required at the hands of the stipulators, but that if they neglected to fulfill the terms of the instrument, and the suffering party was driven by their neglect to resort to legal measures to recover the amount to satisfy his loss, they were then, like the delinquent shipowner, liable for costs and interest occasioned by their neglect and contumacy.

7. *The Detroit*, 1 Brown Adm. 141. But in this case it was held that the illegality of such action will be waived by proceeding in the trial without objection.

8. *Newell v. Norton*, 3 Wall. (U. S.) 257. In this case the amendment of the libel consisted of a dismissal thereof as to a pilot and retaining it as against the vessel and the master or owner. The court, by Grier, J., said: "It has been objected here that the allowance of the amendment was injurious to the surety in the bond given for the property, but this objection was without foundation as their liability was neither increased nor diminished. Every person bailing such property is considered as holding it subject to all legal dispositions of the court. *The Harmony*, 1 Gall. (U. S.) 123, citing *King v. Holland*, 4 T. R. 459."

9. *The Brig Antelope*, 1 Ben. (U. S.) 343. In this case the libel was dismissed by default, and the claimant, without notice to the libellant, entered.

cannot be increased in the appellate court.<sup>1</sup> In the absence of evidence to the contrary, it will be presumed that the sureties in a stipulation are solvent and sufficient.<sup>2</sup> In a libel *in personam* a decree against the debtor will be a lien upon his real estate, in all cases where the judgment of a state court would be given that effect. In this respect decrees in admiralty for the payment of money stand upon the same footing as decrees in equity.<sup>3</sup> Notwithstanding the death of the claimant, a decree may be entered against a surviving stipulator,<sup>4</sup> without calling in the per-

an order cancelling the stipulation for costs and the bond given on the discharge of the vessel, but thereafter agreed to open the default. The cause was subsequently noticed for hearing by both parties, but when it was called for hearing the claimant's proctor stated that it had been dismissed, on which the libellant's proctor moved to set aside the decree and the order of cancellation. On the hearing of this motion, Blatchford, J., said that the claimant by his conduct, followed by his noticing the cause for trial, waived the decree dismissing the libel and the order of cancellation, and continued: "The only question as to which I have had any hesitation has been, whether the claimant could thus practically assent to a reinstatement of the cause, so as to affect the sureties in the stipulation, and hold them to their liability after the dismissal of the libel, and whether the court could now vacate the decree and the order so as to hold the sureties still liable on their stipulation." The question was resolved by the judge in the affirmative, upon the ground that to all intents and purposes the property affected by the stipulation was still in court, and that the stipulation was to be deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in its custody; and that it was not shown that the sureties would be affected any more injuriously than sureties in any case who were compelled to pay the debt of the principal.

An amendment of a libel by adding a co-libellant will not discharge a surety from a stipulation. *The Maggie Jones*, 1 Flip. (U. S.) 635.

1. *Houseman v. The North Carolina*, 15 Pet. (U. S.) 40.

2. *The Snap*, 24 Fed. Rep. 510.

3. *Ward v. Chamberlain*, 2 Black (U. S.) 430. In this case the question

whether a decree *in personam* in admiralty was a lien on the real estate of the debtor, was examined at considerable length by Mr. Justice Clifford, who arrived at the conclusion that the lien of judgments in the courts of the United States, in general, did not result from any direct general legislation of Congress on the subject, and that under the Judiciary Act of 1789, ordaining that the laws of the several states shall be rules of decision at common law in the courts of the United States, such courts had uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments so far as the same were applicable, treating them as rules affecting real property and its transmission, whether by descent or purchase; and that a decree in admiralty *in personam* for the payment of money stood upon the same footing as a summary decree in a federal court of equity, and consequently became a lien on the debtor's real estate. *Grier and Catron, JJ.*, dissented from this opinion, holding that "the lien of judgments was a rule of property which it was beyond the power of the court to establish." In *Cropsey v. Crandall*, 2 Blatchf. (U. S.) 41, the existence of the lien was recognized. See also *The Belgenland*, 108 U. S. 153.

Execution on a stipulation may issue as well against the land of the stipulator as against his personal effects. *Rules Supreme Court of the United States*, 1862; *Cropsey v. Crandall*, 2 Blatchf. (U. S.) 341; *The Kentucky*, 2 Blatchf. (U. S.) 450. See also *Ward v. Chamberlain*, 2 Black (U. S.) 430.

4. *The James A. Wright*, 10 Blatchf. (U. S.) 160. In this case the claimant, who was also a party to the stipulation, died before final decree in the cause. The court, by Woodruff, J., said: "The point first to be considered now on this appeal, urged as ground for reversing the decree of the district court, is

sonal representatives of the decedent. No appeal lies from any proceedings upon the stipulation after final decree in the cause.<sup>1</sup> Married women<sup>2</sup> and partners<sup>3</sup> have been rejected as sureties in a stipulation.

**II. STIPULATIONS FOR COSTS.**—A stipulation for costs may be required of the defendant in libels *in personam* at the discretion of the court in cases where no bail has been taken and no attachment of property sued out.<sup>4</sup>

The libellant, *in personam* or *in rem*, may be required to enter into a stipulation to pay all costs and expenses which may be awarded against him by final decree of the court, or on appeal.<sup>5</sup>

that by the death of the claimant the suit abated, and that it was error to proceed therein to a final decree, without calling in the representatives of the deceased. On that subject, I must follow the declaration of the supreme court in *Penhallow v. Doane*, 3 Dall. (U. S.) 53, that, in proceedings *in rem*, in admiralty, the death of a claimant does not abate the suit, nor render a subsequent decree therein erroneous. I deem it unnecessary, after that declaration, to discuss the question at length, but numerous cases relating to the nature of such proceedings and their conclusiveness as to all persons who do not intervene for the protection of their interest in the *rem* proceeded against, and relating to the substituted security which, when a discharge of the attached vessel is obtained, stands in court in lieu thereof tend to the same conclusion. The vessel is the defendant. All the world must take notice, at their peril, that condemnation is sought. All having an interest may intervene, and if, by death, or otherwise, an interest is transmitted or devolved upon persons not previously entitled to intervene, it is for them to protect their own interest, by applying to the court for that purpose. The libellant should not be affected by their neglect. There is no more reason why he should take notice of a change of interest than that he should originally have made the owner of the vessel a party to the suit."

The death of a co-stipulator will not defeat the libellant's right to summary judgment against the survivor, though the libellant has not exhausted his remedy against the claimant. *The C. F. Ackerman*, 14 Blatchf. (U. S.) 360.

1. *The Hollen*, 1 Mason (U. S.) 431. In this case the *res* had been seized for an alleged violation of the revenue

laws, and a final decree was rendered directing the appraised value of the vessel to be paid into court. No appeal was taken from this decision. Afterwards the parties to the stipulation given for the appraised value filed a petition in the cause, praying that execution on the stipulation be superseded, in order to allow them an opportunity to comply with the terms of an alleged remission of the forfeiture by the secretary of the treasury. Defensive allegations were filed by revenue officers, and the petition was dismissed. In dismissing an appeal from this decision, Story, J., said: "The final decree of condemnation, in this case, was rendered at the May term of the district court of 1817, and for want of a claim, and no appeal was made, or indeed could under such circumstances be made to the next circuit court. That decree, then, is not subject to our revision. The subsequent proceedings upon the bond for the appraised value, and the issuing of the execution, were but incidents of the original cause to enforce the decree of condemnation. And it has been long since settled that this court has no jurisdiction over the proceedings on the bond, which is but an admiralty stipulation, unless it has possession of the cause to which it belongs."

2. In the case of *The Antelope*, 1 Ben. (U. S.) 521, the libellants objected to a married woman as a surety in a stipulation, and the court ordered another surety to be furnished.

3. In *England* partners will not be received as sureties in a stipulation. *The Corner*, B. & L. Adm. 161.

4. Adm. Rule 25.

5. This statement is made on the authority of Benedict's Adm. Prac., § 494. The author cites "Adm. Rules 3, 4, 10, 11, 25, 35," as his authority,

This is the equivalent of the plaintiff's "security for costs," in the common law practice.

Seamen and poor suitors are exempt from this requirement, the latter being permitted to give a "juratory caution,"<sup>1</sup> or personal undertaking for the costs.

A stipulation to pay all costs and expenses may also be required of the claimant in a proceeding *in rem*.<sup>2</sup>

but investigation shows that neither in these, nor in the remainder of the admiralty rules, is any provision made for a stipulation for costs on the part of a libellant *in personam*. The authority to require such a stipulation may perhaps be derived from Rule 46, which declares that in cases not provided for by the rules, the courts may regulate the practice "in such manner as they shall deem most expedient for the due administration of justice." The admiralty rules of the district court for the southern district of New York provide that the libellant shall give security for costs. Ben. Adm., § 413.

According to the ancient practice of the admiralty the plaintiff was required to find surety or *fide jussores* for the prosecution of the suit or payment of defendant's costs. Clerke's Praxis, tit. 14; but this is not now required except in a case of non-residents, and not then if the defendant has arrested sufficient property of the plaintiff in another suit. The Sophie, 1 W. Rob. 326; The Volant, 1 W. Rob. 383; The Franzet Elize, Lush. Adm. 377; The Wild Ranger, Lush. Adm. 553.

A foreign plaintiff suing *in rem* will not be required to give security for damages in case of the wrongful arrest of the vessel. The D. H. Peri, Lush. Adm. 543; The Mary, L. R., 1 Adm. 335.

1. The Phoenix, 36 Fed. Rep. 272; Bradford v. Bradford, 2 Flip. (U. S.) 281; Polydore v. Prince, Ware (U. S.) 402; Thomas v. Thorwegan, 27 Fed. Rep. 400. The same privilege is sometimes extended to the defendant when he is unable to give bail. Ben. Adm. (2d ed.), § 502. The "juratory caution" or security by oath, appears to be the equivalent of "personal recognizance" in other jurisdictions.

As a general rule seamen will not be required to give security for costs as libellants. 2 Parsons Adm. 417. Otherwise, if it appear that they are able to give security. Wheatley v. Hotchkiss, 1 Sprague (U. S.) 225.

A seaman will not be entitled to his exemption from the rule requiring security for costs from the libellant, where his agreement with the master for wages was made outside of the shipping articles. The Great Britain, Olc. Adm. 1.

A poor libellant will not be required to give the juratory caution, unless demanded by the defendant. Polydore v. Prince, Ware (U. S.) 402.

2. Adm. Rule 26. The term "claimant" as used in an admiralty proceeding *in rem*, designates the person asserting title to the subject of the suit, and is analogous to "intervenor" and "interpleading party" in other systems of procedure.

If the stipulation for costs given by a claimant be worthless, the obligors in release bonds taken by the marshal may be made liable for costs, if the decree against the claimant does not exceed the penalty of the release bond. The Madgie, 31 Fed. Rep. 926.

Where the owners of a vessel appear and contest a suit *in rem* Mr. Parsons considers that they are personally liable for the costs, when the damages and costs are greater than the stipulation, on the ground that by appearing they submit to the jurisdiction of the court. 2 Parsons Adm. 413. Compare The Temiscouata, 2 Spinks 208; The Nostra Signora del Carmine, 1 Spinks 303; The Mellona, 6 Notes of Cas. 62.

A claimant is liable for costs as *magister litis*, whether he execute a stipulation or not. *In re Stover*, 1 Curt. (U. S.) 201.

If a delay of an action is caused or procured by the libellant, an increased stipulation for costs should not be required from the claimant. The Laurens, Abb. Adm. 302.

A representative of the owner, by taking part in the suit as an intervenor, makes himself liable for the payment of costs though he is not a party to the stipulation. *In re Stover*, 1 Curt. (U. S.) 201.

The rule requiring a party to give security for costs may be waived by the other party at pleasure.<sup>1</sup>

**III. STIPULATIONS FOR COSTS AND DAMAGES.**—The only instance in which a stipulation to pay damages, in addition to costs and expenses, is required, is that of an intervenor. He must file a stipulation "to pay all such costs and expenses and damages as shall be awarded by the court" on final decree or on appeal.<sup>2</sup>

**IV. TO APPEAR AND ABIDE OR PAY DECREE.**—This is a stipulation required in the first instance of the defendant in a suit *in personam* in which a simple warrant of arrest issues.<sup>3</sup> It is the equivalent of bail taken in a suit at common law begun by the writ of *capias ad respondendum*. Summary process of execution may be issued on this stipulation to enforce the final decree of the court, or the decree on appeal.<sup>4</sup>

1. *Polydore v. Prince, Ware* (U. S.) 402.

2. Adm. Rule 34.

3. Adm. Rule 3.

Occasions for applying this provision are limited by Adm. Rule 48, which provides that bail shall be required of the defendants only in cases where it might be required by the laws of the state where the arrest is made, upon similar or analogous process, and abolishes imprisonment for debt in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been abolished.

A court of admiralty will be governed by equitable considerations in holding a respondent to bail; so held in a case where the respondent was arrested in a foreign suit for a small amount already in litigation in the state where they dwelt; and the respondent was accordingly discharged. *Martin v. Walker, Abb. Adm.* 579.

By process of imprisonment, the defendant cannot be compelled to enter stipulations in a suit wherein he is not liable to rearrest. *Louisiana Ins. Co. v. Nickerson, 2 Low.* (U. S.) 310.

In suits commenced by warrant of arrest, the stipulators cannot, like ordinary bail, surrender their principal; they are liable to any sum which may be awarded against them by final decree. *Holmes v. Dodge, Abb. Adm.* 60; *Gaines v. Travis, Abb. Adm.* 422; *In re Snow, 2 Curt.* (U. S.) 485.

While a court of admiralty cannot take a recognizance, it may take a stipulation in the nature of a recognizance, conditioned to appear, or to perform a decree. *Respublica v. Lacaze, 2 Dall.* (U. S.) 118.

4. Adm. Rule 3. It is not under-

stood by this, that a stipulation is the equivalent of a confession of judgment, or a "judgment note" upon which execution may issue against the obligor without a preliminary proceeding of some kind affording him an opportunity of defense. It appears from the case of *The Baltic, B. & H. Adm.* 149, that in the case of a stipulation for costs (and, presumably, in the case of other stipulations) payment may be enforced by motion in open court, after demand, without further notice; or upon petition filed and notice served upon the stipulator, with this qualification that in the proceeding by motion without notice a conditional decree only can be rendered against the stipulator.

A court of admiralty has jurisdiction over the sureties in a stipulation, they being *quasi* parties to the proceeding in which it is given, and may enforce the same by monition, attachment, or execution. *The Alligator, 1 Gall.* (U. S.) 145; *The Hollen, 1 Mason* (U. S.) 431; *The Flora, 1 Hag. Adm.* 298. *Ex parte Warden, 13 W. N. C.* (Pa.) 195.

It is not the practice in admiralty to obtain a monition, that is, bring an action against the principal in a stipulation, but to issue execution at once against him and his sureties. *Gardner v. Isaacson, Abb. Adm.* 141; *In re Snow, 2 Curt.* (U. S.) 485; *Gaines v. Travis, Abb. Adm.* 422; *Holmes v. Dodge, Abb. Adm.* 60.

Bail, or stipulators, in admiralty are treated as principals, and it is not necessary to proceed against them by suit independent of that in which the stipulation is given. *The Alligator, 1 Gall.* (U. S.) 145; *Betts v. Hancock, 1 Salk.*

The fact that a party takes out a

**V. TO ABIDE OR PAY DECREE.**—This stipulation is required in all suits *in personam* where the personal effects of the defendant have been attached, and the defendant moves for a dissolution of the attachment.<sup>1</sup> Summary process of execution may be issued upon this stipulation, also to enforce the decree of the court.<sup>2</sup>

**VI. FOR VALUE.**—This is a stipulation entered into by the claimant of the ship or goods which have been taken into custody pending a proceeding *in rem*, in order to regain possession of them before the suit is determined.<sup>3</sup> An appraisement of the

*fi. fa.* on a stipulation in the first instance without success, will not affect his right to resort to a *ca. sa.* or to an attachment. The Delaware, Olc. Adm. 240.

1. Adm. Rule 4.

Payment of a decree by stipulators cannot be enforced by process of imprisonment in a state where imprisonment for debt has been abolished; nor by sequestration of property, nor by process of contempt. The Blanche Page, 16 Blatchf. (U. S.) 1; The Kentucky, 4 Blatchf. (U. S.) 448; 5 U. S. Stat. at Large 321.

2. Adm. Rule 4.

3. Adm. Rules 10, 11; The G. G. King, 16 Fed. Rep. 921. One of the distinctive features of admiralty procedure is that by which the vessel, or *res* in respect of which a liability is asserted, is subjected to the demands of the libellant, without process of any kind against the owners. The J. W. French, 13 Fed. Rep. 916. These, or their representatives (*In re Stover*, 1 Curt. (U. S.) 201), may, if they choose, make themselves parties to the proceeding by petition, being then designated as "claimants," or persons asserting title to the vessel in custody, and upon executing a stipulation for her appraised value are allowed to enter again into possession. Maritime law gives a lien on the vessel for all claims against her growing out of contracts or torts, whence arises the proceeding *in rem*, which is the appropriate mode of enforcing a lien, or *ius in re*. Henry Adm. Prac., § 41 *et seq.*

In a proceeding *in rem*, a personal judgment or execution against the property of claimants who defended, but were not parties to the stipulation, cannot be had; the only remedy against them is by a separate suit *in personam*. The Zodiac, 5 Fed. Rep. 220; Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. Rep. 279; U. S. v. Ames, 99 U. S. 35; The Gran Para, 10 Wheat. (U. S.) 497.

In *Stratton v. Jarvis*, 8 Pet. (U. S.) 4, it was held that if there be several owners of the subject of the libel, *e. g.*, a cargo of merchandise consigned to different persons, there must be separate claims and answers, and from this an author deduces the rule that in such case there must be separate stipulations. Parsons Shipping and Adm., p. 407.

A stipulation taken in pursuance of the U. S. Rev. Stat., § 941, providing that in a case of libel *in rem* the marshal may discharge the property on receiving from the claimant a stipulation in double the amount claimed by libellant, is the equivalent of a stipulation executed by the claimant under Admiralty Rule 34. The Oregon, 45 Fed. Rep. 62.

The owner or claimant need give security to pay only what the libellant may recover, leaving other persons to assert their demands by a new proceeding *in rem*, after the discharge. The owner retakes her liable to all the liens attaching on her. The Langdon Cheves, 2 Mason (U. S.) 59.

In a libel *in rem* for damages resulting from a collision, if the losses exceed the value of the vessel and freight, the claimants (owners) will be permitted to file a stipulation in the appraised value of the vessel and freight, for the benefit of all persons entitled to liens upon her for losses resulting from the collision; and on the filing of such stipulation the owners will be discharged from all liability arising out of the collision. The City of Norwich, 1 Ben. (U. S.) 89.

Where the owner contests the liability of the ship for losses, his stipulation for costs must include the fees of the clerk, marshal, proctors, and others, but not the clerk's commission, which is payable whether he contests or not. The Vernon, 36 Fed. Rep. 113.

If claimants incur an unnecessary expense in finding stipulators for

property is provided for, and the stipulation is usually conditioned to pay such appraised value,—whence its technical name “for value;” but it must be in such sum as the court shall direct.<sup>1</sup> This procedure is closely analogous to that by which, in other jurisdictions, the defendant regains possession of his property in replevin or detinue. Such a stipulation is deemed a substitute for the thing itself.<sup>2</sup>

the full amount of an exorbitant demand contained in the libel, without an effort to obtain a discharge of the vessel on a proper stipulation, they will not be entitled to set off the compensation paid the stipulators against the libellant's damages. *The Stelvio*, 30 Fed. Rep. 509; *The Indiana*, 22 Fed. Rep. 925.

The respondent in a cross-libel *in rem* may be required to give security, though the vessel has not been bonded in the original libel, but is still in custody, and though the original libellant has not given security in his action. *The Empresa Maritima a Vapor v. North, etc., Steam Nav. Co.*, 16 Fed. Rep. 502.

The United States government cannot have the *res* discharged from arrest by giving a stipulation for value in a proceeding in a district court in admiralty to enforce a lien on a vessel given by a state law; such a case is not within Rev. St. U. S., § 3753, which provides for replevying government property taken “in a judicial proceeding under the laws of any state.” *The Revenue Cutter, 4 Sawy. (U. S.)* 136.

Where several libels are filed against a vessel to recover amounts exceeding her value, the amount of the freight cannot be included in the stipulation for value required of the owners. *The Vivid*, 3 Ben. (U. S.) 397.

The court may permit a stipulation to be given to satisfy a decree, reserving at the same time for the stipulator the right to deny the legality of the marshal's custody and to ask for relief from the stipulation. *The Roslyn*, 9 Ben. (U. S.) 119.

A stipulation given upon simple notice of the filing of a libel is valid, though the vessel sought to be proceeded against is not and never was in custody. *The Roslyn*, 9 Ben. (U. S.) 119.

Owners who are too poor to give a stipulation, who make affidavit of that fact, and that they have a good defense, will be excused from the requirement

of this rule. *Adm. 34. U. S. v. The Lion*, 1 Sprague (U. S.) 399.

1. *Adm. Rules 10, 11*; *The Cargo ex Venus, L. R.*, 1 *Adm. 50*, an English case, in which the court held that an appraisal of the property was conclusive, and that the owner could not be discharged by payment of what he realized from the sale of the property. See also *The Wanata*, 105 U. S. 600; *The Hope*, 1 W. Rob. 155.

The stipulation is to be considered a security not for the amount of the claim of the libellant, but simply for the value of the property arrested, to the extent of the claim and costs of suit, if any, beyond the preliminary stipulation. *Clifford, J., in U. S. v. Ames*, 99 U. S. 35, *citing Williams & Bruce Prac.* 270. In a recent work this case is cited as authority for the proposition that a stipulation given to discharge a vessel from arrest must be in an amount sufficient to secure the claim for which the vessel was arrested. *Henry's Adm. Jur. & Proc.*, § 124.

2. *The Palmyra*, 12 Wheat. (U. S.) 1. Here it was objected that the court could not reinstate an appeal in a libel suit in which the *res* had been delivered to the claimant on stipulation in the court below, without prejudicing the rights of the sureties in the stipulation. *Story, J.*, after observing that the court could not concur in the objection, continued: “Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in its custody. This is the known course of the admiralty. It is quite a different question, whether the court will, in particular cases, exercise its authority, where sureties on the stipulation may be affected injuriously. That is a subject addressed to its sound discretion. In the present case, there

A vessel will not be released on stipulation by the claimant, when the object of the libel is to determine the right of possession to the vessel;<sup>1</sup> nor where such discharge would defeat the very object of the suit; for example, to enforce a seizure under the neutrality laws;<sup>2</sup> nor, in a salvage proceeding *in rem*, will ship or cargo be delivered on stipulation to the claimants, where it is apparent that a proportion, not a specific or gross sum, should be allowed as salvage; nor, as matter of right, is the cargo deliverable in case of its liability to deteriorate or perish, or the ship, if liable to be injured by delay incident to the suit, the proper course in such case being to apply to the court for a sale.<sup>3</sup>

was no ground for surprise or injury to the stipulators, or, indeed, to any party in interest. If there had been no final award of damages, the cause would not have been properly before this court, and the appeal itself, being a nullity, would have left the cause still in the circuit court. But as such an award was made, the appeal was rightfully made; and the dismissal, being solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constituted no bar to a new appeal, even if a general dismissal might."

In *U. S. v. Ames*, 99 U. S. 35, it was held that where property is seized in admiralty, as forfeited, and a bond is given by its claimant for its return to him, such bond becomes the substitute for the property; and in case the property is condemned, the remedy is transferred from the property to the bond. The question, whether a case is made for the recall of property released under bond in such a case, must be determined by the courts empowered to hear and determine the matter in controversy in the pending suit.

1. *Henry's Adm. Proc.*, § 124, citing *Muir v. The Brisk*, 4 Ben. (U. S.) 252; *The John*, 2 Hag. Adm. 305.

2. *The Mary N. Hogan*, 17 Fed. Rep. 813. The following extract from the opinion of Brown, J., in this case, is pertinent and instructive: "The appointment of appraisers and the bonding of the vessel are claimed under Rule 11 of the Supreme Court Rules in Admiralty, which provides that 'where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon due appraisalment to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving stipulation with sureties,' etc. In

the great majority of cases suits are brought, and the arrest of the vessel is made, for the purpose only of securing payment of some pecuniary demand. In such cases the object of the suit will be fully secured by permitting a good bond, with sureties, to be substituted as security in place of the vessel during the pendency of the litigation; and thereby not only is the great expense of keeping the vessel in custody for a considerable period avoided, but the vessel is also allowed in the meantime to be engaged in the pursuit of commerce. Rule 11 is clearly designed for this purpose. It is not in form imperative in all cases of the arrest of vessels, but provides only that the vessel 'may' be delivered, etc., thus leaving to the court a discretion which may be rightly exercised under peculiar circumstances; and, as it seems to me, the rule clearly should not be applied in those cases where the object of the suit is not the enforcement of any money demand, nor to secure any payment of damages, but to take possession of and forfeit the vessel herself, in order to prevent her departure upon an unlawful expedition, in violation of the neutrality laws of the United States. Such, by the statements of the libel, appears to be the sole object of this suit; and to permit the vessel, as soon as arrested, to be bonded by the very persons alleged to be engaged in this unlawful expedition, and bonded presumably for the purpose of immediately prosecuting it, would be to facilitate in the most direct manner the unlawful expedition, and would practically defeat the whole object of the suit, and render the government powerless by legal proceedings to prevent the violation of its international obligations."

3. *The Nathaniel Hooper*, 3 Sumn. (U. S.) 542.



As a general rule a vessel which has been discharged on stipulation for value, cannot be rearrested for the same cause of action.<sup>1</sup>

Stipulators are liable for interest upon the stipulated sum, only in case of default in complying with the terms of the stipulation.<sup>2</sup> The amount of the stipulation being fixed, the surety cannot be

1. If a vessel has once been discharged on stipulation, and the libel discontinued and costs paid, it cannot be rearrested for the same cause of action. *The Wm. Murtagh*, 17 Fed. Rep. 259; *The Nahor*, 9 Fed. Rep. 213; *The Union*, 4 Blatchf. (U. S.) 90; *The White Squall*, 4 Blatch. (U. S.) 103; *The Thales*, 3 Ben. (U. S.) 327; *Home Ins. Co. v. The Keokuk*, Chic. Leg. N. 249. See also *The Kalamazoo*, 9 Eng. L. & Eq. 557; *The Hope*, 1 W. Rob. 154; *The Volant*, 1 W. Rob. 383; 15 Law Reporter 563.

No right of subrogation exists on behalf of a stipulator when he discharges a decree against the claimant; he cannot rearrest a vessel as security for the liability of the claimant to him as surety. *The Robertson*, 8 Biss. (U. S.) 180; *Roberts v. The Huntsville*, 3 Wood (U. S.) 386.

If a vessel has been discharged by mistake, or through fraud or improvidence, the court may, on application, within a reasonable time, order a rearrest. *The Union*, 4 Blatchf. (U. S.) 90; *The Virgo*, 13 Blatchf. (U. S.) 255; *The Hero*, B. & L. Adm. 447; *The Duchess de Brabant*, Swabey Adm. 264; *The Flora*, L. R., 1 Adm. 45.

If the rights of third parties have intervened, the rearrest will not be ordered. *Henry's Adm. Jur. & Proc.* 349, citing *The Virgo*, 13 Blatchf. (U. S.) 255; *The White Squall*, 4 Blatchf. (U. S.) 103; *The Thales*, 10 Blatchf. (U. S.) 204; *The City of Hartford*, 11 Fed. Rep. 89.

In *England*, it has been held that if a vessel be arrested and delivered up on bail, and judgment be given in a greater sum than the bail, the court will not direct a rearrest of the vessel. *The Kalamazoo*, 9 Eng. L. & Eq. 557; *The Wild Ranger*, 1 B. & L. Adm. 84. Compare *La Tourette v. Burton*, 1 Wall. (U. S.) 43. But the court may at any time before judgment allow an amendment of the libel, and rearrest of the vessel. *The Hero*, B. & L. Adm. 447.

In Ben. Adm., p. 265, § 407, it is said: "That a vessel which has been delivered to the claimant on stipulation, may

be rearrested to answer other claims if necessary for the purposes of justice." Citing *The Gran Para*, 10 Wheat. (U. S.) 497. The proposition of the text is doubtless true, but the case cited supports the text only by way of remote inference. A quantity of bullion had been taken into custody on a libel and afterwards released to a claimant on a stipulation executed for his benefit, to which he was not a party. A decree of restitution was passed by the supreme court on appeal from the court below, and it was held that it being necessary to retake the property into the custody of the court, the proper process against the claimant was a monition and not an execution on the stipulation; he not being a party to the stipulation. No question appears to have been made as to the right to retake the property.

Upon the death or insolvency of the sureties in the stipulation for value, the court may order a new stipulation to be executed. *The Virgo*, 13 Blatchf. (U. S.) 255; *The City of Hartford*, 11 Fed. Rep. 89.

2. *The Sidney*, 47 Fed. Rep. 260; citing *Brown v. Burrows*, 2 Blatchf. (U. S.) 340; *The Ann Caroline*, 2 Wall. (U. S.) 538; *The Webb*, 14 Wall. (U. S.) 406. *Contra*, *The Belle*, 5 Ben. (U. S.) 57. In *The Wanata*, 95 U. S. 600, Clifford, J., said: "Stipulators, like sureties, where the stipulation is for a definite sum, are bound to make good the liability or default of the principal to the amount of the stipulation, but they cannot be held to any greater sum unless they themselves have been guilty of default, in which case they may be held liable for costs and interest, by the way of damages, to the extent that the same have arisen from the breach of their duty to comply with the terms of their stipulation. Where the stipulation or bond is given for the value of the ship, the obligation of the stipulator is that he pay into court the sum ascertained as the value. *Benedict Adm.* (2d ed.) 294; *Dunlap Adm.* 174; *Lane v. Townsend*, 1 Ware. (U. S.) 289."

An agent who executes a stipulation

compelled to pay more than that amount, though the stipulation be conditioned to pay such sum as shall be awarded by the final decree.<sup>1</sup> Nor can the stipulation be reduced in amount if it was

for value, and who appears and defends a suit, is liable for interest on the stipulation from the time it was filed. Brown, J., in *The Maggie M.*, 33 Fed. Rep. 591; *citing* *The Stover*, 1 Curt. (U. S.) 201; *The Wanata*, 95 U. S. 612; *The Maggie J. Smith*, 123 U. S. 356.

Where a stipulation for value recites that it was "entered into pursuant to the rules and practices of the court," the rules of the court will be held a part of the stipulation so that a libellant, being entitled to interest under the rules of the court, may be allowed interest on the value recovered from the date of the stipulation. *The Belle*, 5 Ben. (U. S.) 57, *distinguishing* *The Ann Caroline*, 2 Wall. (U. S.) 538. See *The Sydney*, 47 Fed. Rep. 262, where the court adverts to this case in language from which disapproval may be inferred.

1. *Brown v. Burrows*, 2 Blatchf. (U. S.) 340; *The William H. Webb*, 14 Wall. (U. S.) 406.

The following observations by Clifford, J., in *The Ann Caroline*, 2 Wall. (U. S.) 538, elucidating this point, are also valuable as a resume of the procedure on the part of the claimant desiring to obtain possession of the ship: "Libellant insists that he is entitled to recover the value of his vessel, together with the interest on that amount from the time of the collision to the date of the decree. On the other side, the claimants insist that the stipulation for value under the general rules of the admiralty, stands in the place of the vessel, and that the decree as against the stipulators cannot exceed the amount of the stipulation. Separate stipulations are usually filed for costs, and the same rule, it is admitted, applies to such a stipulation as to the one given for the value of the vessel. Stipulation for costs in the sum of \$250 was regularly filed by the claimants in this case at the time they entered their appearance. Such a stipulation is properly required as a condition of the right to appear, unless the claimant, under the Act of the 3d of March, 1847, had given the bond to the marshal therein mentioned for the discharge of the property arrested at the time of the service of the monition. Ch. 55; 9

Stat. at L. 181; 2 Conk. Adm. 94, 97; Adm. Rules 26, 34. Suit in this case was *in rem*, and consequently the vessel, when arrested, was in contemplation of law in the possession of the court. But the practice is, where the claimant desires to gain the possession, to allow the value of the same to be ascertained; and when that is done according to law, the claimant may file a stipulation for that amount in the place of the vessel. When the claimant desires to secure the possession of the vessel, he may apply to the court for an appraisement, or if the parties agree upon a sum as the value, the court may adopt that sum, and accept a stipulation for that amount. Parties in this case agreed that the value of the vessel was \$5,000, and thereupon the court accepted a stipulation for that amount, and the vessel was delivered to the claimants. Adm. Rule 11; 2 Conk. Adm. 96; *Lane v. Townsend*, 1 Ware (U. S.) 300. Obligation of a stipulator is the same as that of a surety, and consequently his liability is limited by the terms of his contract. Whenever the obligation of the stipulator is for a definite sum named in the stipulation, the surety stipulating to pay that sum cannot be compelled to pay more than that amount. *Brown v. Burrows*, 2 Blatchf. (U. S.) 341; Adm. Rule 11. Same rule prevails whether the instrument is in form a bond or stipulation. Where a claimant in a suit *in rem* made application for a delivery of the property, and obtained it by an order of the court, upon giving a bond to suspend the appraised value, Judge Story held that the bond was good as a stipulation, and having affirmed the decree condemning the vessel, ordered that judgment should be entered against the signers of the bond as stipulators for the appraised value of the vessel with costs. *The Alligator*, 1 Gall. (C. C.) 149. Mr. Benedict says, that where a party is entitled to have the property delivered on bail, he is bound to stipulate with sureties to pay the full value of the property. Such value, says the same author, may usually be fixed by consent and agreement of the parties, but if not, then it is ascertained by an appraisement; and on final decree the stipulators are bound to pay into court

executed out of court between the parties; otherwise, if it was taken in pursuance of an order of court.<sup>1</sup>

A stipulation given by the claimant reverts title to the vessel in him, discharged of the libellant's demands.<sup>2</sup> The court has no authority over a vessel after it has once been discharged on stipulation, and cannot order its restoration to a person from whom

the sum ascertained as the value. Ben. Adm., § 498, p. 272; Dunl. Pr. 181; The Octavia, 1 Mason (C. C.) 150. Bail is taken, says Mr. Dunlap, for the value of the ship upon the delivery of the property, and it will not be reduced upon the ground that the property brought less upon a sale than the appraised value. Dunl. Pr. 174; The Peggy, 4 C. Rob. 304. Settled rule is, that where the value of the vessel condemned in a cause of damage is insufficient to pay the loss, it is not competent for the court to award damages against the owner beyond the value or proceeds of the ship. The Hope, 1 W. Rob. 155. But it has been held that costs might be awarded against the owner where there was an appearance and hearing, although no stipulation to that effect had been given. The John Dunn, 1 W. Rob. 160. Rule in admiralty, however, is the same as at law, that sureties are only bound to the extent of the obligation expressed in their bond, but not beyond its plain and obvious meaning. The Harriet, 1 W. Rob. 192. The true measure of damages in this case was the loss which the libellant sustained by the sinking of his vessel, which, as the commissioner reported, was \$5,000. He lost that amount, and there is no proof in the case that he lost anything more, for which any claim is made in the libel. Stipulation for value filed by the claimants was for that sum and, consequently, the libellant is entitled to a decree against the stipulators for that sum, as the value of the vessel, and no more, because they never agreed to be bound for any greater sum. Argument of the libellant is, that he is entitled to interest on that sum as against the stipulators for value; but it is a sufficient answer to the proposition to say that this court has expressly decided otherwise, and we adhere to that decision. Hemmenway v. Fisher, 20 How. (U. S.) 258. Separate stipulation was filed for costs, and, of course, the libellant is entitled to full costs in the district and circuit courts, unless the amount exceeds the sum specified in the stipulation."

In *England* it has been held that if the owners of a vessel are liable only for the value of the ship and freight, the stipulator will be liable only to the same extent, though the action may have been entered and stipulation given in a larger sum. The Duchess de Brabant, Swabey Adm. 264. Mr. Parsons assumes that the same rule exists in the American Admiralty, 2 Parsons Adm. 411; the stipulation being regarded as a mere substitute for the thing itself, and the stipulator liable for no more and no less than the thing itself if it had remained in the custody of the court. The Ann Caroline, 2 Wall. (U. S.) 538; The Palmyra, 12 Wheat. (U. S.) 1.

1. The Monarch, 30 Fed. Rep. 263. In this case, Simonton, J., said: "The motion is now made to reduce the amount of this bond. Had the stipulation been executed under an order emanating from this court, binding on the parties, libellant and respondent, or under the section of the Revised Statutes (941), I would feel no hesitation in looking into the amount demanded, and in reducing it if the facts justified me in so doing. The City of Hartford, 11 Fed. Rep. 89. But in the present case the bond is the result of the act of the parties, and was insisted upon by the libellant as the sole condition of the immediate release of the steamship and of her cargo. Without such consent she could not have left the port. Reluctantly and under protest the claimant finally yielded and gave the bond. This was done to gain a present advantage,—the speedy departure of the vessel, and time and money saved. Upon this, and this alone, the libellant released his lien on the cargo and the ship. He accepted this bond in lieu of both. This being the act of the parties, accompanied by the release of present advantage on the one part, and the gain of present advantage on the other, I cannot interfere with it."

2. The Thales, 3 Ben. (U. S.) 327; 10 Blatchf. (U. S.) 103; The White Squall, 4 Blatchf. (U. S.) 203.

it has been forcibly taken.<sup>1</sup> If a vessel in the hands of stipulators be arrested on other suits brought against her, the stipulators may, on petition, be released from their stipulation, in which case the marshal will hold the vessel on the former, as well as the latter warrant of arrest.<sup>2</sup>

No personal judgment can be rendered against claimants in a proceeding *in rem* who have not signed a stipulation for a release of the vessel. The only remedy of the libellant against them is by a proceeding *in personam*.<sup>3</sup> A personal representative or agent of the owner will be permitted to intervene on stipulation.<sup>4</sup>

The claimant will not be entitled to a deduction from the stipulation on account of liens lessening the value of the ship in his hands.<sup>5</sup> The original liability of a vessel is not waived by a stipulation filed for her release.<sup>6</sup>

1. U. S. v. Towns, 7 Ben. (U. S.) 444.

2. The Jewess, 1 Ben. (U. S.) 21, note. But such petition will not be entertained until the process in the second case be returned to court. The Empire, 1 Ben. (U. S.) 19.

3. The Steamship Zodiac, 5 Fed. Rep. 220. Admiralty Rule 21 of the supreme court provides that in all cases of a final decision for the payment of money the libellant shall have the right of execution against the property "of the defendants or stipulators." In the construction of this rule in the case of Atlantic, etc., Ins. Co. v. Alexandre, 16 Fed. Rep. 279, the court, by Brown, J., said: "I am satisfied that it was not the intention of this rule in collision cases to afford a personal judgment against the claimants who have not executed the stipulation, and that the phrase 'defendants or stipulators,' in rule 21, refers to a judgment against one or the other according to the nature of the action, and not to a judgment against both conjointly. Betts Adm. 99."

4. *In re Stover*, 1 Curt. (U. S.) 201; The Adeline, 9 Cranch (U. S.) 244; The Sally, 1 Gall. (U. S.) 401; The Lively, 1 Gall. (U. S.) 315.

Personal representatives of deceased claimants in a proceeding *in rem* will be admitted as parties to the cause. The James A. Wright, 10 Blatchf. (U. S.) 160; Penhallow v. Deane, 3 Dall. (U. S.) 54.

Foreign administrators may intervene without taking out letters of administration in the state in which the court of admiralty sits. The Boston B. & H. Adm. 309.

If it appears that the claimant has no title to the property seized, the

court will retain the *res* for delivery to the true owner upon appearance and claim made by him. U. S. v. Four Hundred and Twenty-two Casks of Wine, 1 Pet. (U. S.) 547.

If charterers in possession fail to appear and defend a libel *in rem*, in which the owners are not personally liable, the latter will be permitted to intervene, on stipulation, as claimants. The Prometheus, 1 Low. (U. S.) 491.

The fact that stipulators to whom a vessel has been delivered, fail to file a formal claim, or name the owners in the stipulation, will not affect their liability. Todd v. The Bark Tulchen, 2 Fed. Rep. 600.

5. The Virgin, 8 Pet. (U. S.) 538, Story, J., saying: "One of the owners has had the ship delivered up to him upon an appraisal. . . . and he has given a stipulation according to the course of admiralty proceedings to refund that value, together with damages, interest, and costs, to the court. He is not at liberty now to insist that the ship is of less than that value in his hands; or that he has discharged other liens diminishing the value for which the owners were personally liable *in solido*, in the first instance."

The owners of a vessel and the stipulators are not estopped by the appraisal and stipulation in a sum certain, from showing that her surrender value, for which the owners would be accountable under the statutes in limitation of liability, is less than the amount of their stipulation given in the cause. The Doris Eckhoff, 30 Fed. Rep. 140.

6. The Fidelity, 16 Blatchf. (U. S.) 569, per Waite, Ch. J., who stated the reason of this rule to be that "the

**VII. ON APPEAL.**—The court below, upon entering a decree in accordance with the mandate of the appellate court, may give summary judgment against the stipulators on appeal;<sup>1</sup> so also where the appeal has been dismissed.<sup>2</sup> But the stipulators are not in default until the adjudication of the appellate court vacating the appeal becomes, by the mandate of that court, the decree of the court below.<sup>3</sup>

A decree cannot be entered on a stipulation within the time within which an appeal operating as a *supersedeas* may be taken; if no appeal lies, the decree may be entered at once.<sup>4</sup>

A stipulation, in case of an appeal from the district court to the circuit court, where a stipulation for value has been given, need be in an amount sufficient to cover damages for delay and costs and interest only, and it is not necessary that it should be conditioned to pay the whole amount of the decree and costs.<sup>5</sup>

**STIRPES.**—See PER, vol. 18, p. 297; SUCCESSION; TITLE.

stipulation takes the place of the vessel, and for all the purposes of the trial, the case goes on as if the vessel were itself in court."

1. The Sidney, 47 Fed. Rep. 260; Sawyer v. Oakman, 11 Blatchf. (U. S.) 65; The Blanche Page, 16 Blatchf. (U. S.) 1; 17 Blatchf. (U. S.) 221; The New Orleans, 17 Blatchf. (U. S.) 216; *Ex parte* Sawyer, 21 Wall. (U. S.) 235; The Belgenland, 108 U. S. 153. Obligors in an appeal bond in admiralty—sureties as well as principals—are deemed to be stipulators who have consented to submit to summary judgment on their obligations. The Sidney, 47 Fed. Rep. 260. In that case, the court, by Wallace, J., said: "The power of the court to award summary judgment against the obligors in an appeal-bond, given upon an appeal in an admiralty cause from the district court to the circuit court, was treated as unquestionable by the supreme court in the case of The Wanata, 95 U. S. 600; and it has long been the practice in this court, upon entering a decree in an admiralty cause which has been taken by appeal to the supreme court, when the mandate has been received from that court, to give summary judgment against the obligors in the *supersedeas* bond. Sawyer v. Oakman, 11 Blatchf. (U. S.) 65; The Belgenland, 108 U. S. 152; 2 Sup. Ct. Rep. 864. The practice has been so uniform, and has become so well established that it is too late for this court to question its propriety. The obligors in such bonds, sureties as

well as the principal, are deemed to be stipulators who have consented to submit to summary judgment requiring them to make good their engagements. Under the stipulation for costs and the bond for additional costs, the stipulators are liable for the sum of \$550, that being the aggregate amount which they have undertaken to pay by the terms of the two instruments. Under the stipulation for the value of the Worden, which is a substitute for the vessel itself, they are liable for the sum of \$1,000 and no more. Stipulators are liable for interest upon the stipulated sum only in case of default in complying with the terms of the stipulation. Brown v. Burrows, 2 Blatchf. (U. S.) 240; The Ann Caroline, 2 Wall. (U. S.) 538; The Webb, 14 Wall. (U. S.) 406; The Wanata, 95 U. S. 600. The contrary was decided in the case of The Belle, 5 Ben. (U. S.) 57, in view of the special recital in the stipulation, and the rule of court, which in effect required stipulators to pay interest. But the recital and rule of court in the cases of The Ann Caroline, The Steamer Webb, and The Wanata were the same, as appears from an examination of the records, as in the case of The Belle."

2. The Sidney, 47 Fed. Rep. 260.

3. The Sidney, 47 Fed. Rep. 260; *Ex parte* Sawyer, 21 Wall. (U. S.) 235.

4. The New Orleans, 17 Blatchf. (U. S.) 216; The Blanche Page, 17 Blatchf. (U. S.) 221.

5. The Brantford City, 32 Fed. Rep. 324.

**STOCK.**—(See also ASSOCIATION, vol. 1, p. 881; BENEFICIAL ASSOCIATIONS, vol. 2, p. 171; BUILDING ASSOCIATIONS, vol. 2, p. 604; COMPANY, vol. 3, p. 366; CORPORATION, vol. 4, p. 184; COUPONS, vol. 4, p. 430; DIVIDEND, vol. 5, p. 725; FOREIGN CORPORATIONS, vol. 8, p. 329; JOINT STOCK COMPANIES, vol. 11, p. 1036; MANUFACTURING CORPORATIONS, vol. 14, p. 269; MINING COMPANIES, vol. 15, p. 614; MUNICIPAL SECURITIES, vol. 15, p. 1204; NATIONAL BANKS, vol. 16, p. 143; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39; PARTNERSHIP, vol. 17, p. 824; RAILROADS, vol. 19, p. 775; RAILROAD SECURITIES, vol. 19, p. 694; RELIGIOUS SOCIETIES, vol. 20, p. 773; SOCIETIES AND CLUBS, vol. 22, p. 803; STOCK EXCHANGE, vol. 23, p. 748; STOCKHOLDERS, vol. 23, p. 776; ULTRA VIRES; WATERED STOCK.)

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**I. DEFINITION AND NATURE—1. In General.**—Stock has been succinctly designated as “the sum of all the rights and duties” of the shareholders.<sup>1</sup> This phrase, while technically correct and admirably concise, is rather too pregnant in meaning, and too insufficiently specific, to serve as an elementary definition. Moreover, it will appear from what follows<sup>2</sup> that the term “stock” is employed in different senses by juridical writers, being used now to denote capital stock, and now shares of stock, and again being applied so as apparently to include both. It is evident, therefore, that these various meanings must be understood and these different elements examined separately before a satisfactory definition can be reached. The term stock is sometimes used in the plural to denote bonds or other corporate and government securities, but its use in this sense is of doubtful accuracy,<sup>3</sup> and is

1. Lowell, *Transfer of Stock*, § 4; Compare Morawetz, *Corp.* (2d ed.) 226.

2. See *infra*, this title, *Capital Stock*; *Shares of Stock*.

3. Lowell, *Transfer of Stock*, § 6.



at least obsolescent.<sup>1</sup> When used in a charter before subscriptions have been taken, stock means no more than power in the directors to receive subscriptions for shares.<sup>2</sup> While stock is commonly associated with corporate enterprise, the connection is not a necessary one. Partnerships and unincorporated joint stock companies,<sup>3</sup> and even voluntary associations,<sup>4</sup> sometimes issue stock; indeed, it is only within a comparatively recent period of the history of corporations that the issue of stock has become a feature of their life and organization.<sup>5</sup>

**2. Capital Stock.**—Capital stock is the fund of money or other property fixed as the basis for conducting the business of the corporation.<sup>6</sup> Unless expressly required, it need not actually

1. Cook, *Stock and Stockholders*, § 569, n. 1.

2. *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

3. The capital stock of a corporation is like that of a copartnership or joint-stock company—the amount which the partners or associates put in as their stake in the concern. *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307; *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412.

In *England* many of the most important trading companies (which correspond to business corporations in the United States) are unincorporated. See an interesting diagram in Lindley on Partnership, vol. 1, p. 14.\* It will be noted, moreover, that this author uses the term "partnership" as a comprehensive designation of all forms of associated enterprise, whether corporate or not.

4. *Crawford v. Gross* (Pa. Com. Pl. 1839), 7 Ry. & Corp. L. J. 123; *Compare Bryant v. Ohio Dental College*, 7 Cin. Super. Ct. (Ohio) 307. In the former case a concern calling itself the "Beef Butchers' Hide Association" is thus described by the court in its opinion: "The association originally formed was so loose as hardly to deserve the name. Every man following the trade of a butcher might become a member on depositing a few pounds of hide or fat, and withdraw at the end of the year or sooner as freely as he came. There was no capital and nothing to which the members could lay claim, except the proceeds of the stuff which they had brought to be cured or melted. The purchase of the hide-house worked no change, except that the subscribers took the place of the landlord while remaining, like the other members, tenants. So long as they

had hides or fat to be prepared for market, and the rent was paid out of the proceeds, it was their interest not to eject the depositors or take any step that would hinder the prosecution of the business which was carried on for the common good. Such was the relation of the parties for more than thirty years, and the long continued occupancy of the buildings tended to beget the idea that the depositors were the owners, whether they had or had not paid any of the purchase money." Yet this concern had taken subscriptions and issued certificates for "Shares in the stock of the Beef Butchers' Hide Association."

5. In *McKim v. Odom*, 3 Bland Ch. (Md.) 418, Chancellor Bland says that the history of colonial America affords no instance of a business corporation with capital stock. See also Cook, *Stock and Stockholders*, § 1; and an interesting sketch of the history of company law in Lindley on Partnership, vol. 1, p. 5 *et seq.* The "corporations" treated of by Blackstone and Kent were mostly counterparts of the non-trading and stockless, though incorporated, companies of the present day.

6. *Bailey v. Clark*, 21 Walh. (U. S.) 286; *Farrington v. Tennessee*, 95 U. S. 686. There have been many judicial decisions of the phrase "capital stock," but they correspond in substance with that given in the text.

The capital stock is that money or property which is put into a single corporate fund by those who, by subscriptions therefor, become members of the corporate body. That fund becomes the property of the aggregate body only. *Burrall v. Bushwick R. Co.*, 75 N. Y. 216.

The term "capital stock" in 1 *New*

exist as an entirety at any one time,<sup>1</sup> but those who deal with a company have a right to assume that the full capital stock is available; hence it has come to be known in legal phraseology as "a trust fund for creditors."<sup>2</sup> Capital stock does not usually include accumulated profits,<sup>3</sup> or surplus,<sup>4</sup> though it has been held to cover profits not segregated.<sup>5</sup> The value of the capital stock is measured by that of the corporate property,<sup>6</sup> but for purposes of taxation the value of the charter is not to be included.<sup>7</sup>

A distinction has been drawn between capital stock and capital,<sup>8</sup> the latter being used in its strict, economic sense, in which

*York Rev. St. 601, § 2*, prohibiting the directors of a corporation from making dividends, except from the surplus profits of a corporation, etc., does not mean share stock, but it means the property of the corporation contributed by its stockholders or otherwise obtained by it to the extent required by its charter. *Williams v. Western Union Tel. Co.*, 93 N. Y. 187; 3 Am. & Eng. Corp. Cas. 139.

The phrase "capital stock" is very generally, if not universally, used to designate the amount of capital to be contributed for the purposes of the corporation. The amount thus contributed constitutes the "capital stock" of the company. *State v. Morristown Fire Assoc.*, 23 N. J. L. 195.

It must be distinguished from stock and stock certificates, which are the individual interest of the stockholder and the evidence of such interest in the dividends as they are declared, and the effects of the corporation on hand at its dissolution. *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

The "capital stock" of a bank upon which, under the banking law of *Wisconsin*, a certain per cent. is to be paid annually in lieu of all other taxation, is the amount of funds paid in by the stockholders to be used and managed by the association for banking purposes. *State Bank v. Milwaukee*, 18 Wis. 284.

The interest in stock is nothing but a right to receive a perpetual annuity, subject to redemption. *Grant, M. R.*, in *Wildman v. Wildman*, 9 Ves. 174.

In *State Bank v. Charlestown*, 3 Rich. (S. Car.) 346, stock is described as the original sum upon which a corporation commences business.

See also for other definitions: *St. Louis, etc., R. Co. v. Loftin*, 30 Ark. 693; *Martin v. Zellerbach*, 38 Cal. 300; 99 Am. Dec. 189; *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Field*

*v. Pierce*, 102 Mass. 261; *Bent v. Hart*, 10 Mo. App. 146; *People v. Com'rs of Taxes*, 40 Barb. (N. Y.) 353; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307; *Mutual Ins. Co. v. Erie Co.*, 4 N. Y. 442; *State v. Cheraw, etc., R. Co.*, 16 S. Car. 524; *Sanger v. Upton*, 91 U. S. 60.

1. It need only be "authorized or required to be paid in." *Farrington v. Tennessee*, 95 U. S. 686. Hence the difference between "subscribed" and "paid up" capital stock. Compare *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *State v. Morristown Fire Assoc.*, 23 N. J. L. 195; *Philadelphia v. Philadelphia, etc., Ferry Pass. Co.*, 52 Pa. St. 177.

Under the *New York* statute a stockholder of any railroad or plank-road company may acquire, after sale of road by foreclosure, the same relative interest as he had before, upon paying the purchasers a sum equal to such proportion of the price paid at the sale as such shares bear to the whole capital stock. "The whole capital stock" here means stock actually subscribed and paid for. *Pratt v. Munson*, 17 Hun (N. Y.) 475.

2. See STOCKHOLDERS, vol. 23, p. 776.

3. *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *State Bank v. Milwaukee*, 18 Wis. 281.

4. *Williams v. Western Union Tel. Co.*, 93 N. Y. 188; 3 Am. & Eng. Corp. Cas. 139; *Farrington v. Tennessee*, 95 U. S. 686; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241.

5. *Phelps v. Farmers', etc., Bank*, 26 Conn. 272.

6. *Raleigh, etc., R. Co. v. Wake*, 87 N. Car. 414; 17 Am. & Eng. R. Cas. 466. Compare *People v. Howell*, 69 N. Y. 91.

7. *Coit v. North Carolina Gold, etc., Co.*, 14 Fed. Rep. 12.

8. See a paper read before the American Bar Association in 1884; "Stock Dividends and their Restraint," by M.

it has been most tersely defined as "wealth in use."<sup>1</sup> Thus it is said that capital stock "exists only nominally" and is the mere representative of the capital.<sup>2</sup> The funds of the company may fluctuate, but its capital stock remains invariable save in the prescribed mode.<sup>3</sup> So, the corporation is not limited in its ownership of property to the amount fixed as its capital stock.<sup>4</sup> Still the term is not infrequently used as synonymous with capital.<sup>5</sup> Guaranty capital of the stock department of a mutual insurance company is neither a debt owed by, nor a loan to, the corporation.<sup>6</sup>

Again, capital stock is distinguished from shares of stock;<sup>7</sup> and it is held that if each is separately taxed, the result is not

Dwight Collier, 1 Am. Bar Asso. Rep. 257. Beach, Priv. Corp. 426, says: "The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed although the actual property of the corporation varies in value and is constantly increasing or diminishing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the laws governing it." See also *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307.

Ownership of stock in a corporation should not be confounded with ownership of its property. *Humphreys v. McKissock*, 140 U. S. 304; 46 Am. & Eng. R. Cas. 261.

1. **Capital—Economic Definitions.**—That in the text is by John S. Walters, in *Belford's Magazine* for October, 1890, vol. 5, p. 777. Other definitions by eminent economists are given below and will be seen to be mainly amplifications of the one quoted:

John Stuart Mill: "Whatever of the produce of the country is devoted to production, is capital." *Principles of Political Economy*, ch. 4, § 2.

Prof. A. L. Perry: "Capital is the aggregate of all products reserved as a means for further production." *Int. to Political Economy*, p. 110.

Francis A. Walker: "The capital of a community is that part of its wealth which is devoted to the production of wealth." *Political Economy*, § 58.

2. In *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550, the court, by Napton, J., said: "Confining ourselves entirely to the railroad corporation whose property has in this case been subjected to taxation, without undertaking to give

any construction to the law with reference to corporations of a different character, the question is, upon this provision of the general revenue law, whether the roadbed, machinery, depots, and other property used by the company in operating the road, are to be considered as a part of the capital stock of the company. It is undoubtedly not literally the capital stock, taking these words in their usual acceptation. Capital stock, in its strict signification, exists only nominally; the money or property which it represents is the tangible reality. The one is the representative of the other; and if the stock and the property it represents are both taxed, the taxation is double."

3. *State v. Morristown Fire Assoc.*, 23 N. J. L. 196.

4. *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 307.

5. *State v. Norwich, etc., R. Co.*, 30 Conn. 290; *People v. Com'rs of Taxes*, 23 N. Y. 222; *Traders', etc., Ins. Co. v. Brown*, 142 Mass. 403; 14 Am. & Eng. Corp. Cas. 615; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443.

6. *Traders', etc., Ins. Co. v. Brown*, 142 Mass. 403; 14 Am. & Eng. Corp. Cas. 615.

7. *Farrington v. Tennessee*, 95 U. S. 686; *State Bank v. Richmond*, 79 Va. 113; 11 Am. & Eng. Corp. Cas. 640; *Union Bank v. State*, 9 Yerg. (Tenn.) 490. *Compare State Railroad Tax Cases*, 92 U. S. 575; *Indianapolis, etc., R. Co. v. Vance*, 96 U. S. 450.

In *People v. Coleman* (N. Y.), 34 Am. & Eng. Corp. Cas. 223, Finch, J., said: "The capital stock of a company is one thing; that of the stockholders is another and a different thing. That of the company is simply its capital, existing in money, or property or both;

double taxation.<sup>1</sup> However, this distinction between the capital stock and its shares seems to amount to no more than a difference between the whole and its parts.

**3. Shares of Stock—*a*. GENERAL NATURE.**—Shares of stock are a species of incorporeal property consisting of rights in the profits, management, and assets of the company.<sup>2</sup> Participation in the profits and management is a right which may be realized

while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise, and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation, the other to the corporators. The franchise of the company which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form a part, and a very essential part of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock is the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition, a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both; but that surplus is no part of the company's capital stock, and therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter and form a part of the share stock, for that represents and absorbs into its own value surplus as well as capital; and the franchise in addition; so that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, and its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share of stock covers, embraces, and represents all three in their totality; for it is a business photograph of all the corporate possessions and possibilities. A company may also have no surplus, but, on the contrary, a deficiency which

works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things, the company's capital stock, and the shareholder's capital stock, are essentially and in every material respect, different. They differ in their character, in their elements, in their ownership, and in their values."

1. *Farrington v. Tennessee*, 95 U. S. 687.

**2. Shares of Stock—Judicial Definitions.**—*Parker v. Sun Ins. Co.*, 42 La. Ann. 1172; 32 Am. & Eng. Corp. Cas. 334; *Williams' Pers. Prop.* 155; *Allen v. Pegram*, 16 Iowa 173.

In *Fisher v. Essex Bank*, 5 Gray (Mass.) 377, Shaw, C. J., said: "Shares in incorporated companies, such as banks, insurance companies, bridges, turnpikes and railroads, have long been considered in this commonwealth as property of a definite and important character, with many of the qualities of visible, tangible, personal property, and having a value, and as capable of appreciation as vessels, or merchandise, or other personal chattels. But it is not visible or tangible, and therefore not like merchandise, capable of passing by manual delivery. . . . The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends and profits, and to receive an aliquot part of the proceeds of the capital on winding up and terminating the active existence and operations of the corporation."

In *Plimpton v. Bigelow*, 93 N. Y. 599; 3 Am. & Eng. Corp. Cas. 131, Andrews, J., said: "The right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus

at any time, but the right to share in the corporate assets accrues only at dissolution.<sup>1</sup> Shares of stock are in no sense debts due

profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts."

In *Neiler v. Kelley*, 69 Pa. St. 407, Sharswood, J., said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive in the meantime such profits as may be made and declared in the shape of dividends."

Shares of stock empower the owners thereof "to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property shall not be diverted from the original purpose." *Forbes v. Memphis, etc., R. Co.*, 2 Woods (U. S.) 323.

"A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature, that is, the shareholder cannot by any act of his, nor ordinarily by any act of the law, reduce it to possession. He can take, and is entitled to take, the surplus profits when a dividend has been declared by the proper officers of the corporation, and upon dissolution of the corporation he can take his share of the assets thereof left for distribution *pro rata* among the shareholders." *Earl, J.*, in *Jermain v. Lake Shore, etc., R. Co.*, 91 N. Y. 492; 1 Am. & Eng. Corp. Cas. 111.

"The expression 'shares of stock,' when qualified by words indicating number and ownership, expresses the extent of the owner's interest in the corporation property. The interest is equitable, and does not give him the right of ownership to specific property of the corporation. But he does own the specific stock held in his name, and under the rules of law, the property of the corporation is held by the corporation in trust for the stockholders." *Beck, J.*, in *Bridgman v. Keokuk*, 72 Iowa 42.

See further for definitions: *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80; *Bridgman v. Keokuk*, 72 Iowa 42; *Field v. Pierce*, 102 Mass. 261; *Spalding v. Paine*, 81 Ky. 416; 3 Am. & Eng. Corp.

Cas. 187; *Bent v. Hart*, 10 Mo. App. 143; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Jones v. Davis*, 35 Ohio St. 477; *Bradley v. Bauder*, 36 Ohio St. 35; 38 Am. Rep. 547; *Arnold v. Ruggles*, 1 R. I. 165; *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196; *Harrison v. Vines*, 46 Tex. 21; *Barksdale v. Finney*, 14 Gratt. (Va.) 357; *Van Allen v. Assessors*, 3 Wall. (U. S.) 585; *Morrice v. Aylmer*, L. R., 7 H. L. 717; *Oak Bank Oil Co. v. Crum*, L. R., 8 App. Cas. 65.

**Definitions by Text Writers.**—"Ashare in one of these companies may be defined to be a right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted." *Ang. & A., Corporations* (11th ed.) 557.

"The term 'stock' when not employed to denote the same thing as capital, has reference to the interests of the shareholders or individuals. The interest of each individual shareholder is a share of the net produce of the capital stock of the corporation when brought into one fund." *Boone, Corporations*, Par. 205.

"Shares in a corporation represent fractional interests in the entire corporate concern, and their value necessarily depends upon the real capital which the company owns. The whole and the sum of its parts must be equal." *Morawetz, Corporations* (2d ed.) 228.

"A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation." *Cook, Stock and Stockholders* (2d ed.), § 5.

The term "stock," as used in the charter before it is taken by subscription, means nothing more than the power in the directors to receive subscriptions for stock. *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

1. "The ownership of a share of stock involves a right to participate in the dividends declared from the profits of the business, and, upon the dissolution of the corporation, to a proportionate share of the fund remaining after payment of the corporate debts. This interest or right, however, does not enable the shareholder to withdraw

to the owner;<sup>1</sup> hence they are not credits.<sup>2</sup> Nor are they securities for money,<sup>3</sup> nor representatives thereof,<sup>4</sup> and they will not pass under a bequest of money,<sup>5</sup> even if they are shares in a financial institution like the Bank of England.<sup>6</sup> The term stock, which in the *United States* is used synonymously with "shares," in *England* means a number of shares *en bloc*, but capable of separation.<sup>7</sup> For the individual portions the term "shares" is there used exclusively.

*b. SHARES PERSONAL PROPERTY.*—It has been said that shares of stock are property.<sup>8</sup> Their *status* as such has finally been fixed as personalty,<sup>9</sup> but this result has not been reached without some conflict of judicial opinion, and in several jurisdictions the present

any portion of the capital stock of the corporation from its control, nor to exercise any authority over it, further than to participate, to the extent of his stock, in the election of a board of managers, charged with the conduct of the business for which the corporation was created." *Jones v. Davis*, 35 Ohio St. 477. See also *Field v. Pierce*, 102 Mass. 261; *Bridgman v. Keokuk*, 72 Iowa 42. And see generally cases in preceding note.

1. *Bridgman v. Keokuk*, 72 Iowa 42.

2. *Bridgman v. Keokuk*, 72 Iowa 42; *New Orleans Nat. Banking Assoc. v. Wiltz*, 4 Woods (U. S.) 43; *Smith v. Crescent City Live-Stock, etc., Co.*, 30 La. Ann. 378.

3. *Mechanics' Bank v. New York, etc.*, R. Co., 13 N. Y. 626.

4. *Mechanics' Bank v. New York, etc.*, R. Co., 13 N. Y. 626.

5. *Lowe v. Thomas*, 6 De G. M. & G. 315; 54 Eng. Ch. 315; *Gosden v. Dotterill*, 1 M. & K. 50; 7 Eng. Ch. 56; *Jones v. Brinley*, 1 East 1. *Compare* *Nightingal v. Devesme*, 5 Burr. 2589; *Douglas v. Congreve*, 1 Keen 410.

6. "It appears to me to be utterly impossible to hold that bank stock, which is, after all, nothing but a share in the capital stock of a company incorporated by act of parliament, for the purpose of carrying on a banking business, is any more a security for money than a share in any other partnership whatever. It is merely a share in an incorporated partnership, which has certain statutory privileges, and does the banking business of the state. That cannot alter the character of it. It is really as much a share in a company as any partner's share in a brewery is." *Sir W. M. James, V. C.*, in *Ogle v. Knipe*, L. R., 8 Eq. 434.

7. *Rapalje & L. Law Dict.* 1224;

*Cook, Stock and Stockholders*, § 5. "Shares are not necessarily converted into stock as soon as they are paid up; they may exist either as paid up shares or as not paid up shares. But, as regards stock, that can only exist in the paid up state. . . . There is a certain extent of change as well as consolidation in these paid up shares. They are changed from ordinary shares in this respect, that they are no longer capable of being subdivided." *Norrice v. Aylmer*, L. R., 7 H. L. 717. See also *Trinder v. Trinder*, L. R., 1 Eq. 695.

8. See *supra*, this title, *Shares of Stock—General Nature*. Stock is "property" within the meaning of the *Kentucky Civil Code*, § 180, authorizing the suing out of an order of arrest for a debtor about to leave the state, without leaving "property" sufficient to satisfy the claims against him. *Field v. Montmollin*, 5 Bush. (Ky.) 455.

9. *Stock is Personal Property.*—*Berney Nat. Bank v. Pinckard*, 87 Ala. 577; 30 Am. & Eng. Corp. Cas. 52; *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80; *San Francisco v. Flood*, 64 Cal. 504; 3 Am. & Eng. Corp. Cas. 404; *Tregear v. Etiwanda Water Co.*, 76 Cal. 537; 9 Am. St. Rep. 245; *South Western R. Co. v. Thomson*, 40 Ga. 408; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Seward v. Rising Sun*, 79 Ind. 351; 13 Am. & Eng. R. Cas. 315; *Allen v. Pegrarn*, 16 Iowa 173; *Baltimore, etc., R. Co. v. Sewall*, 35 Md. 238; *Tippets v. Walker*, 4 Mass. 596; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Johns v. Johns*, 1 Ohio St. 350; *Weaver v. Barden*, 49 N. Y. 286; *Arnold v. Ruggles*, 1 R. I. 165; *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460; *Bligh v. Brent*, 2 Y. & C. 268;

state of the law is the result of legislative interference in direct opposition to the courts.<sup>1</sup> Some of the older authorities hold that shares are realty or personalty according to the nature of the corporate capacity and enterprise.<sup>2</sup> Accordingly, shares in a turnpike company,<sup>3</sup> a waterworks company,<sup>4</sup> a canal company,<sup>5</sup> a navigation improvement company authorized to col-

*Ex parte* Lancaster Canal Co., 1 D. & C. 411; *Bradley v. Holdsworth*, 3 M. & W. 422; *Watson v. Spratley*, 20 Eng. L. & Eq. 507; 10 Ex. 222; *Edwards v. Hall*, 6 De G. M. & G. 74.

In *Cooper v. Corbin*, 105 Ill. 224; 13 Am. & Eng. R. Cas. 394, the court, by Craig, J., said: "Capital stock has never, so far as we know, been treated as real property. It is in its very nature changeable, transitory, and has no element whatever which likens it to real property."

In *Seward v. Rising Sun*, 79 Ind. 351; 13 Am. & Eng. R. Cas. 315, the court, by Bicknell, C. C., said: "Shares of stock in incorporated companies, whether the property of such companies be tangible or intangible, are personal property."

See also an interesting monograph by Henry Budd, Jr., on the "Nature and Transfer of Stock," 7 South. L. Rev. 430.

1. In *Connecticut*, after the decision in *Welles v. Cowles*, 2 Conn. 567, and in *Kentucky*, after that of *Copeland v. Copeland*, 7 Bush (Ky.) 349, statutes were enacted providing that shares of stock should thereafter be regarded as personalty.

2. Thus, Prof. Greenleaf, in his edition of *Cruise on Real Property* 39, 40, says: "Shares in the property of a corporation are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, etc., to make a canal, erect waterworks, and the like, as was the case in the New river water, the navigation of the river Avon, and some others, and the property or interest in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll bridge, canal and turn-

pike companies by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate."

3. *Welles v. Cowles*, 2 Conn. 567; *Knapp v. Williams*, 4 Ves. Jr. 430. In the former case, Swift, C. J., said: "When the legislature incorporated the turnpike company in question, they authorized and empowered them to make and maintain the road, to erect gates thereon, and collect a certain toll, till the expense of making and repairing the road should be reimbursed to the stockholders, with twelve per cent. interest. This is a right issuing out of real property, annexed to, and exercisable within it; and comes within the description of an incorporeal hereditament of a real nature, on the same principle as a share in the New river, in canal navigations, and tolls of fairs and markets. (*Drybutter v. Bartholomew*, 2 P. Wms. 127; *Habergham v. Vincent*, 2 Ves. Jr. 204; *King v. Chipping-Norton*, 5 East 239.) This is not a mere right of action in favor of the company to collect a toll from individuals passing the road; but they can, by erecting the gates, compel passengers to pay for the privilege of passing the road. This is a power annexed to, and exercisable upon, the turnpike road; and the toll is paid for passing the road, and, consequently, issues out of it. It has been urged that the individual stockholders have only a claim on the company, and not upon the realty, and this must be of a personal nature. But the stockholders, as members of the company, are owners of the turnpike road; and it is in virtue of this interest that they have their claims for the dividends, or their respective shares of the toll. It is not a mere claim on the corporation."

4. *Townshend v. Ashe*, 3 Atk. 336; *Drybutter v. Bartholomew*, 2 P. Wms. 127. See the review of these cases by Thurman, J., in *Johns v. Johns*, 1 Ohio St. 351.

5. *Tomlinson v. Tomlinson*, 9 Beav. 459.

lect tolls,<sup>1</sup> and even a railroad company,<sup>2</sup> have been held in some instances to be real estate.

But these decisions are practically obsolete and possess chiefly an historical interest. It is now settled that stock is personal property,<sup>3</sup> and it is said moreover to be in the nature of a chose in action.<sup>4</sup> But shares have been held not to be goods and chattels within the meaning of the statute of 13 Elizabeth, ch. 5, relating to conveyances in fraud of creditors, being incapable of seizure.<sup>5</sup> Generally throughout the *United States* trover lies to recover shares of stock,<sup>6</sup> though a different doctrine obtains in

1. *Buckeridge v. Ingram*, 2 Ves. Jr. 652. Compare *Meason's Estate*, 4 Watts (Pa.) 346, where the respective interests of two individuals authorized to build a bridge across a river between their lands were held to be real estate.

2. *Price v. Price*, 6 Dana (Ky.) 107. Compare *Copeland v. Copeland*, 7 Bush. (Ky.) 349.

3. See cases cited above.

4. *Allen v. Pegram*, 16 Iowa 173; *Howe v. Starkweather*, 17 Mass. 243; *Hutchins v. State Bank*, 12 Met. (Mass.) 426; *Fisher v. Essex Bank*, 5 Gray (Mass.) 377; *James v. Woodruff*, 10 Paige (N. Y.) 541; *aff'd* 2 Den (N. Y.) 574; *Denton v. Livingston*, 9 Johns. (N. Y.) 96; 6 Am. Dec. 264; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 150; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; *People's Bank v. Kurtz*, 99 Pa. St. 349; 44 Am. Rep. 112; *Arnold v. Ruggles*, 1 R. I. 165; *Union Bank v. State*, 9 Yerg. (Tenn.) 500; *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. (Va.) 506; *Humble v. Mitchell*, 11 A. & E. 203; 39 E. C. L. 46; *In re Jackson*, L. R., 12 Eq. 354; *Société Générale v. Tramways Co.*, 14 Q. B. Div. 424.

In *Colonial Bank v. Whinney*, 30 Ch. Div. 261, the question arose whether shares of stock were governed by that clause of the English Bankruptcy Act of 1883, which excepted choses in action from passing to the trustee in bankruptcy. A majority of the court held that shares were not so included, and Lord Justice Lindley, after a learned discussion of the phrase "choses in action," follows the earlier case of *Ex parte Union Bank of Manchester*, L. R., 12 Eq. 354, and says: "I confess that I feel a difficulty in seeing what the registered owner of a share can recover by action. He has the ownership of the share, and he cannot get anything

more than he has got already. If he is kept out of his dividends he can bring his action for those dividends. They may be choses in action, that I can understand, but he cannot sue for the share, as he has it already. This appears to me to show that it cannot be a chose in action in the ordinary sense, although I do not say that it may not be so in the extended and loose sense of that expression." But when this case came before the house of lords, the judgment of the chancery division was reversed, and the English doctrine still conforms to that stated in the text. Lord Blackburn, on appeal, says: "I think it was hardly disputed that, in modern times, lawyers have accurately and inaccurately used the phrase 'choses in action' as including all personal chattels that are not in possession. In what sense, then, is it used in the 15th section of the act of 1869 from which the present is taken? It is not disputed that these words show that the legislature intended to take policies of insurance out of the order and disposition clause. Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind."

5. *Dundas v. Dutens*, 1 Ves. 196; *Grogan v. Cooke*, 2 B. & B. 230; *Colonial Bank v. Whinney*, 30 Ch. Div. 261. Compare *Rex v. Capper*, 5 Price 217.

6. *Trover Lies for Shares of Stock.*— "The fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become, in the progress of law, an unmeaning thing, which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property." McKee, J., in *Payne v. Elliot*, 54 Cal. 341; 35 Am. Rep. 80.

In *Ayres v. French*, 41 Conn. 151,



*Pennsylvania.*<sup>1</sup> Attachment and execution may, by statute, be levied upon stock in most of the states, whereas the common law did not warrant this procedure.<sup>2</sup>

c. STATUTE OF FRAUDS AS PERTAINING TO SHARES—(1) *Seventeenth Section*—(a) *American Doctrine*.—The seventeenth section of the original act of Parliament of 29 Car. 2, ch. 3, known as the Statute of Frauds, required every "contract for the sale of goods, wares and merchandise" of specified value, to be, in most cases, in writing.<sup>3</sup> This provision has been substantially adopted in the states of the Union,<sup>4</sup> and shares of stock have been there held to be subject to the requirements of the section.<sup>5</sup>

Park, C. J., said: "If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted—that the conversion of the paper constitutes the entire wrong. The real act done in such cases is precisely the same as that done here, no more, no less, and to say that trover will lie in one case and not in the other is to make a distinction where in reality there is no difference. Conversion is the gist of the action of trover. Everywhere it is so held. 1 *Swift's Digest* 533. The stock in both cases was converted; and we think that, in these days, when the tendency of the courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained." See also *Nabring v. Bank of Mobile*, 58 Ala. 204; *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Jarvis v. Rogers*, 15 Mass. 389; *Morton v. Preston*, 18 Mich. 60; 100 Am. Dec. 146; *Freeman v. Harwood*, 49 Me. 195; *Boylan v. Huguet*, 8 Nev. 345; *Anderson v. Nicholas*, 28 N. Y. 600; *Barry v. Calder*, 48 Hun (N. Y.) 449; *Godfrey v. Pell*, 49 N. Y. Super. Ct. 226; *Budd v. Multnomah St. R. Co.*, 12 Oregon 271; 22 Am. & Eng. R. Cas. 27; 53 Am. Rep. 355; *Kuhn v. McAllister*, 1 Utah 273; 96 U. S. 87. Compare *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 286.

1. "Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm." *Sharswood, J., in Neiler v.*

*Kelley*, 69 Pa. St. 407. See also *Se-wall v. Lancaster Bank*, 17 S. & R. (Pa.) 285.

2. See *infra*, this title, *Attachment and Execution*.

3. The full text of the section was as follows: "That no contract for the sale of any goods, wares, and merchandise for the price of £10 sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized."

4. *Parsons on Contracts*, vol. 3, p. 3.\*

5. *Statute of Frauds—American Doctrine*.—The leading American case is *Tisdale v. Harris*, 20 Pick. (Mass.) 9, in which Shaw, C. J., says: "Supposing this a new question, now for the first time calling for a construction of the statute, the court are of opinion, that as well by its terms, as its general policy, stocks are fairly within its operation. . . . There is nothing in the nature of stocks, or shares in companies, which, in reason or sound policy, should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term goods, as they are within the

Part payment will, of course, take the contract out of the statute,<sup>1</sup> and this payment may consist of services rendered, such as furnishing information.<sup>2</sup> So, part performance will render a parol contract valid,<sup>3</sup> but the performance of a merely collateral agreement will not suffice.<sup>4</sup> A stockbroker may, as the agent of both parties, make the entire memorandum required by the statute,<sup>5</sup> and the latter does not, *inter partes*, govern agreements by partners to purchase stock from an outsider,<sup>6</sup> or by one party to buy in his own name for the benefit of himself and another.<sup>7</sup> Nor does the statute apply to contracts for the purchase of stock in a company not yet formed,<sup>8</sup> nor to parol promises to sub-

reason and policy of the act, the court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action." Other decisions are *North v. Forest*, 15 Conn. 400; *Southern L. Ins., etc., Co. v. Cole*, 4 Fla. 378; *Mayer v. Child*, 47 Cal. 142; *Pray v. Mitchell*, 60 Me. 430; *Colvin v. Williams*, 3 Har. & J. (Md.) 38; 5 Am. Dec. 417; *Baldwin v. Williams*, 3 Met. (Mass.) 365; *Eastern R. Co. v. Benedict*, 10 Gray (Mass.) 212; *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *Boardman v. Cutter*, 128 Mass. 388; *Fine v. Hornsby*, 2 Mo. App. 61; *Baltzen v. Nicolay*, 53 N. Y. 467; *Mason v. Decker*, 72 N. Y. 595; 28 Am. Rep. 190.

1. *Thompson v. Alger*, 12 Met. (Mass.) 428.

2. *White v. Drew*, 56 How. Pr. (N. Y.) 53.

3. *Eastern R. Co. v. Benedict*, 10 Gray (Mass.) 212. Compare *Hinchman v. Lincoln*, 124 U. S. 38, where the question of delivery was submitted to the jury.

4. In *North v. Forest*, 15 Conn. 400, defendant, in consideration of plaintiff's releasing him from a parol contract to sell shares, agreed to pay plaintiff one-half of the excess which should be realized from a sale to a third party over the original purchase price. In an action upon the promise, the court said: "It is further claimed that there has been a part performance of the contract by the sale of the stock. But we see no foundation for this claim. The defendant had indeed sold the stock; but this he could have done as well without any contract with the

plaintiff, as with it. The contract made with the plaintiff was invalid, and did not prevent the defendant from treating the stock as his own, and selling it as such."

5. *Colvin v. Williams*, 3 Har. & J. (Md.) 38; 5 Am. Dec. 417.

6. *Tomlinson v. Miller*, 7 Abb. Pr. N. S. (N. Y.) 364.

7. *Stover v. Flack*, 41 Barb. (N. Y.) 162.

8. *Gadsden v. Lance*, 1 McMull. Eq. (S. Car.) 87; 37 Am. Dec. 548. In *Green v. Brookins*, 23 Mich. 54; 9 Am. Rep. 74, it was said: "We think the agreement thus set forth in the declaration, by which Green was to find a man to take stock to be thereafter created in a company thereafter to be organized through the means contemplated, and which stock as it originated should stand in the name of Brookins, was not an agreement on the part of Green to buy goods, wares, and merchandise, within the meaning of the statute in question. This arrangement did not in strictness provide for a sale of the anticipated stock. In substance it was an arrangement by which, if Brookins would embark in the enterprise, Green undertook to procure someone to be substituted in Brookins's place as a shareholder and member of the company, if Brookins so desired."

But in *Boardman v. Cutter*, 128 Mass. 388, the court, in construing a contingent agreement to purchase in a corporation about to be formed, said: "It has been decided by this court that shares in a corporation are 'goods, wares, and merchandise,' within the Statute of Frauds. *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Baldwin v. Williams*, 3 Met. (Mass.) 365. There is some conflict in the decisions of other courts upon this point (see *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep.

scribe,<sup>1</sup> nor to an agreement by the seller to repurchase.<sup>2</sup> Releasing a party from a parol contract to sell shares, will not afford consideration for a collateral agreement by him,<sup>3</sup> nor will the assignment of such a contract support a promise on the part of the assignee.<sup>4</sup>

(b) *English Doctrine.*—The rule in *England* regarding the operation of the seventeenth section of the Statute of Frauds upon sales of shares, is exactly the reverse of the American. While the decisions prior to the middle of the eighteenth century hold that such sales are within the statute,<sup>5</sup> the modern English authorities have established the rule that its provisions do not apply.<sup>6</sup>

(2) *Fourth Section.*<sup>7</sup>—A parol agreement by the projector of a company to find a purchaser for the shares which a party might subscribe for, is not a "promise to answer for the debt, default, or miscarriage of another."<sup>8</sup> Neither does an assurance of certain dividends by the president of a corporation to a prospective subscriber,<sup>9</sup> nor the guaranty by the owner, of par value within

459), but we do not feel called upon to overrule the two decisions above cited. As the defendant's contract in this case was not in writing, we see no ground upon which any action can be maintained upon it, without violating the Statute of Frauds. *Massachusetts Gen. Stats.*, ch. 105, § 5. The fact that the plaintiff was induced to become one of the stockholders by the defendant's promise that he would at some future time buy the stock of the plaintiff at a specific price, does not change the essential character of the transaction."

1. *Bullock v. Falmouth, etc., Turnpike Road Co.*, 85 Ky. 184; *Coleman v. Eyre*, 45 N. Y. 38; *Miles v. Bough*, 3 Q. B. 845; 43 E. C. L. 1001; 3 *Railway Cas.* 668.

2. *Thorndike v. Locke*, 98 Mass. 340; *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Meyer v. Blair*, 109 N. Y. 600; 21 *Am. & Eng. Corp. Cas.* 307; 4 *Am. St. Rep.* 500; *Bank of Lyons v. Demmon*, Hill & D. Supp. (N. Y.) 398; *Morgan v. Struthers*, 131 U. S. 246; *Fay v. Wheeler*, 44 Vt. 292.

3. *North v. Forest*, 15 Conn. 400.

4. *Mayer v. Child*, 47 Cal. 142; *Sherman v. Barnard*, 19 Barb. (N. Y.) 291.

5. *Mussall v. Cooke*, Pre. Ch. 533; *Pickering v. Appleby*, 1 Com. 354; *Croll v. Dobson*, Sel. Cas. in Ch. Temp. King (fol. 41, 1724).

6. *Modern English Doctrine.*—*Humble v. Mitchell*, 11 A. & E. 205; 39 E. C. L. 46; *Duncuft v. Albrecht*, 12 Sim. 189; *Hibblewhite v. M'Morine*, 6 M. &

W. 200; *Knight v. Barber*, 16 M. & W. 66 (construing the stamp act); *Bradley v. Holdsworth*, 3 M. & W. 422; *Tempest v. Kilner*, 3 C. B. 249; 54 E. C. L. 248; *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 844; *Haseltine v. Sigers*, 1 Exch. 856; *Bowlby v. Bell*, 3 C. B. 284; 54 E. C. L. 284; *Watson v. Spratley*, 10 Exch. 222; *Pickering v. Appleby*, 1 Com. 354; *Colonial Bank v. Whinney*, 30 Ch. Div. 261.

7. This section of the original statute reads: "That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

8. *Green v. Brookins*, 23 Mich. 48; 9 *Am. Rep.* 74.

9. *Moorehouse v. Crangle*, 36 Ohio St. 130; 38 *Am. Rep.* 564.

a certain time, for stock offered in exchange for lands,<sup>1</sup> constitute such a promise. The provision regarding contracts for the "sale of lands" does not apply even to agreements to buy and sell shares in cost book mining companies,<sup>2</sup> for all stock is personal estate.<sup>3</sup> The words "Not to be performed within a year" refer to performance on "either side;" hence a contract to sell stock at the end of three years, with an option by the purchaser to close the agreement at any time, is not included.<sup>4</sup> As in other cases, the defense of the Statute of Frauds in contracts for the sale of stock must be specially pleaded.<sup>5</sup>

*d. IDENTIFICATION.*—One of the peculiar features of this species of property is its entire want of legal identity. Shares of stock are without "earmarks" and one cannot be distinguished from others of the same company and issue.<sup>6</sup> Hence, a transfer in which, by mistake, the shares are incorrectly numbered, has been held to pass title to those actually owned by the transferor.<sup>7</sup> So where a pledgee of shares has caused them to be transferred to himself,<sup>8</sup> or has sold them,<sup>9</sup> he need not, in order to place himself aright with the pledgor, make restoration of the original shares. Nor is the pledgee liable to account for them at the highest price for which he has sold stock during the continuance of his relation with the pledgor.<sup>10</sup> It is sufficient in all such cases

1. *Hill v. Smith*, 21 How. (U. S.) 283.

2. *Watson v. Spratley*, 10 Exch. 222; *Powell v. Jessopp*, 18 C. B. 335; 86 E. C. L. 335; *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 844; *Ashworth v. Munn*, 15 Ch. Div. 363.

3. See cases cited *supra*, this title, *Shares of Stock—Personal Property*.

4. *Seddon v. Rosenbaum*, 85 Va. 928, containing an extensive review of the authorities bearing on this phase of the Statute of Frauds.

5. *Porter v. Wormser*, 94 N. Y. 450.

6. *Hubbell v. Drexel*, 11 Fed. Rep. 115.

In *Skowhegan Bank v. Cutler*, 52 Me. 517, the court, by Davis, J., said: "A share in the capital stock of a corporation is merely some aliquot part of it, and not any particular part. Any designation, therefore, except by stating the owner or owners, would seem to be impossible. Even if the shares were consecutively numbered, of which there is no evidence, this would be the same. For, as a share is not any particular part, but merely an intangible, undivided proportion of the whole, the number would but designate the successive owners."

7. *Inds Case*, L. R., 7 Ch. 485, where Mellish, J., says: "I think the numbers of the shares are simply directory, for

the purpose of enabling the title of particular persons to be traced; but that one share, an incorporeal right to a certain portion of the profits of the company, is the same as another, and that share No. 1 is not distinguishable from share No. 2, in the same way that a gray horse is distinguishable from a black horse. If, therefore, a holder of shares has the same number of shares which he professes to transfer, or a larger number, and by mistake the wrong distinguishing numbers are put in the transfer, that will not prevent the fifty shares which belonged to him passing to the transferee."

8. *Hubbell v. Drexel*, 11 Fed. Rep. 115.

9. *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 286, where the court says: "The defendant was at all times able, and ready and willing to transfer to the plaintiff the same number of shares of similar stock of the same company, and which had precisely the same value; and it is evident that if the defendant, in these transactions, committed a technical breach of his trust, it presents a case of *damnum absque injuria*."

10. *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490; 7 Johns. Ch. (N. Y.) 87; 8 Am. Dec. 606; 11 Am. Dec. 403. In this case the defendants were stock-

if the pledgee has retained shares enough of equal value to meet the pledgor's demand, when made.<sup>1</sup>

**4. Certificates of Stock**—*a. GENERAL NATURE.*—Certificates of stock are distinct from the shares themselves,<sup>2</sup> and, therefore, deserving of separate treatment. The former are not the *res*, but rather the evidence of its ownership.<sup>3</sup> They are assurances to the commercial world that the stock is the property of the person designated,<sup>4</sup> and the corporation is estopped to deny their validity when issued to *bona fide* purchasers.<sup>5</sup> Still they are no more than

brokers, and the shares left with them were not distinguishable from other shares in the same company which had passed through defendants' hands. Chancellor Kent says in the opinion: "It is sufficient, under this contract, that the defendants always had the requisite quantity of shares on hand, and the law will presume that the shares so on hand, from time to time, were the shares deposited, because the parties have not reduced the shares to any more certainty. We must take the contract as we find it, and are not bound to enter into a labyrinth of inquiry and accounts to see if we cannot mend it. The plaintiff has no right to call for an account of the profits made on a like number of shares, when the defendants always had a sufficient quantity to comply with the contract, and when the plaintiff is not able to point out which were his shares. . . . If a person will suffer his property to go into a common mass in this way, without having put a mark upon it, by which it can be identified, he clearly has no right to ask anything more than that the quantity he put in should always be there and ready for him. By just fiction of law that residuum shall be presumed to be the portion he put in." See also *Horton v. Morgan*, 6 Duer. (N. Y.) 56; 19 N. Y. 172; 75 Am. Dec. 311; *Allen v. Dykers*, 3 Hill (N. Y.) 593; *Gilpin v. Howell*, 5 Pa. St. 42; 45 Am. Dec. 720; *Le Croy v. Eastman*, 10 Mod. 499.

1. *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 286; *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490; 7 Johns. Ch. (N. Y.) 87; 8 Am. Dec. 606; 11 Am. Dec. 403; *Hubbell v. Drexel*, 11 Fed. Rep. 115.

2. *Burr v. Wilcox*, 22 N. Y. 551; *McAllister v. Kuhn*, 96 U. S. 89; and see generally cases in following notes:

3. Says Sanderson, J., in *Hawley v. Brumagim*, 33 Cal. 399: "Stock is one thing and certificates another. The

former is the substance and the latter is the evidence of it."

"A certificate of title to a share is not a share. It is evidence of the shareholder's interest. His interest may be transferred by the transfer of the certificate; but it is not the certificate that is valued, when the worth of the share is estimated either by the speculator in the market, or by the tax assessor. It is the property which it represents that is valued by the speculator, often with reference to speculation only, but by the public officer, always, if he does his duty, by the real worth of the property, all things considered." *Van Allen v. Assessor*, 3 Wall. (U. S.) 598.

"The certificate does not constitute the title to the stock. . . . In legal contemplation the certificate is merely an additional and convenient evidence of the ownership of the stock." *Cincinnati, etc., R. Co. v. Pearce*, 28 Ind. 502.

See also *Payne v. Elliot*, 54 Pa. St. 339; 35 Am. Rep. 80; *Mitchel v. Beckman*, 64 Cal. 117; 1 Am. & Eng. Corp. Cas. 40; *Campbell v. Morgan*, 4 Ill. App. 100; *Johnson v. Albany, etc., R. Co.*, 40 How. Pr. (N. Y.) 193; *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *McAllister v. Kuhn*, 96 U. S. 89; *Hubbell v. Drexel*, 11 Fed. Rep. 115.

4. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183.

5. *Twin Creek, etc., Turnpike Road Co. v. Lancaster*, 79 Ky. 552; 3 Am. & Eng. Corp. Cas. 58; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110; 25 Am. Rep. 37; *Boston, etc., R. Co. v. Richardson*, 135 Mass. 473; *Allen v. South Boston R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 185; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Cole v. Ryan*, 52 Barb. (N. Y.) 168;

*prima facie* evidence either of the validity of the issue,<sup>1</sup> or of the stockholder's title.<sup>2</sup> It has been said that "the certificate has no intrinsic value disconnected from the stock it represents,"<sup>3</sup> but on the other hand, certificates issued by a corporation without capital stock have been recognized as conferring substantial rights.<sup>4</sup>

*b. NEGOTIABILITY.*—See also, *infra*, this title, *Sales*.

(1) *Certificates Not Negotiable.*—In the present state of the law it is settled that certificates of stock are not negotiable instruments.<sup>5</sup> Thus, a purchaser of stock receives it subject to the lien of the company for debts, though the corporate capacity is

*Spear v. Crawford*, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 64; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Mechanics' Sav. Inst. v. Potthoff*, 9 Mo. App. 574; *Lee v. Citizens' Nat. Bank*, 2 Cin. Super. Ct. (Ohio) 298; *Kisterbock's Appeal*, 127 Pa. St. 601; *Shaw v. Port Philip Gold Min. Co.*, 13 Q. B. Div. 103.

1. *Hall v. Rose Hill, etc., R. Co.*, 70 Ill. 673.

2. *Courtright v. Deeds*, 37 Iowa 503; *Walker v. Detroit Transit R. Co.*, 47 Mich. 338; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

3. *Ayres v. French*, 41 Conn. 151. *Compare Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 30.

4. A certificate issued by a college corporation, not empowered to issue stock, declaring the holder entitled to one share in the real property of the corporation, and drawing six per cent. interest, though not a certificate of stock, will be sustained as a contract to pay annual interest during the existence of the corporation; but it creates no lien on the realty. *Bryant v. Ohio Dental College*, 1 Cin. Super. Ct. (Ohio) 307.

5. *Certificates Not Negotiable.*—*East Birmingham Land Co. v. Debbis*, 85 Ala. 565; 26 Am. & Eng. Corp. Cas. 135; 7 Am. St. Rep. 73; *Atkins v. Gamble*, 42 Cal. 99; 10 Am. Rep. 282; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412; *Barstow v. Savage Min. Co.*, 64 Cal. 391; 3 Am. & Eng. Corp. Cas. 194; 49 Am. Rep. 705; *Tiedeman v. Knox*, 53 Md. 612; *Anderson v. Nicholas*, 28 N. Y. 600; *Weaver v. Barden*, 49 N. Y. 286; *Hammond v. Hastings*, 134 U. S. 401; 31 Am. & Eng. Corp. Cas. 421; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752; *Société Générale v. Tramways*

*Union Co.*, 14 Q. B. Div. 424; *London, etc., Banking Co. v. London, etc., Bank*, 20 Q. Div. 232; 19 Am. & Eng. Corp. Cas. 469; *Taylor v. Great Indian, etc., R. Co.*, 4 De G. & J. 559.

In *Mechanic's Bank v. New York, etc., R. Co.*, 13 N. Y. 627, *Comstock, J.*, said: "Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member."

In *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 282; 81 Am. Dec. 701, the court, by *Chapman, J.*, said: "The authorities cited show that a certificate of stock is not a negotiable instrument; and, without any authorities, it is apparent that it has not a negotiable character."

In *Weaver v. Barden*, 3 Lans. (N. Y.) 338, the court, by *Mullen, P. J.*, said: "Stock has none of the qualities of negotiable paper, hence it cannot be treated as other personal property, title to which can only be divested by the owner's consent or by operation of law."

In *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172; 32 Am. & Eng. Corp. Cas. 334, the court, by *Watkins, J.*, said: "Shares of stock possess inherently only a restricted negotiability, and transfers of them can be effected only by assignment of them, as of other credits or incorporeal rights."

A certificate of stock expressing on its face that it is "transferable only on the books of the company by the holder thereof in person, or by a conveyance in writing recorded on said books and surrender of this certificate," and indorsed in blank, is not a negotiable instrument. *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; 97 Am. Dec. 102.

not indicated on the certificate and the purchaser is ignorant of the lien.<sup>1</sup> So even a *bona fide* purchaser of a lost certificate acquires no title.<sup>2</sup> Again, where certificates indorsed in blank are stolen, purchasers from the thief are not protected,<sup>3</sup> and it is held in *Nevada* that such purchasers become liable in damages to the real owner.<sup>4</sup> But the transferee, after intervening registry, of a stolen certificate, has been held to acquire a good title.<sup>5</sup> In *England*, while certificates are not generally negotiable,<sup>6</sup> they may become so by the usages of trade and will be treated by the courts accordingly.<sup>7</sup>

1. *Hammond v. Hastings*, 134 U. S. 401; 31 Am. & Eng. Corp. Cas. 421; *Conant v. Reed*, 1 Ohio St. 298.

2. *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412.

In *Winter v. Belmont Min. Co.*, 53 Cal. 428, plaintiff transferred his stock to "M., Trustee," who subsequently indorsed the certificates in blank and delivered them back to plaintiff. Afterward M. stole the certificates from plaintiff and sold them, and it was held that as the purchaser was a *bona fide* one, he acquired a good title to the stock. The court here relied upon a peculiar statute of *California*, and upon the cases of *Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, 48 Cal. 112, and *Weston v. Bear River, etc.*, Min. Co., 6 Cal. 425; 63 Am. Dec. 117. It seems to recognize, however, that its holding is a departure from the authority first above cited, for it says: "In the case of *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412, our attention was not called to the foregoing decisions, nor to the statute regulating the transfer of stocks in private corporations. Without referring to these decisions or to the statute on which they were founded, counsel in the *Sherwood* case discussed the sole proposition whether a certificate of this character, on general principles of commercial law, was negotiable in the sense in which bills of exchange and other similar instruments are negotiable, and we held they were not, which was the only point decided in that case."

3. *Barstow v. Savage Min. Co.*, 64 Cal. 388; 3 Am. & Eng. Corp. Cas. 194; 49 Am. Rep. 705; *Anderson v. Nicholas*, 28 N. Y. 600; *Aull v. Colkett*, 33 Leg. Int. (Pa.) 44; *Given's Appeal* (Pa. 1886), 16 Atl. Rep. 75; *East, etc., Co. v. Dennis*, 5 Ry. & Corp. Law J. (Ala.) 296.

The mere fact of loss is not proof of negligence. *Biddle v. Bayard*, 13 Pa.

St. 150. The purchaser of a stolen certificate cannot compel registration. *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412. But the company is not entitled to an injunction against a possible suit by one who has been refused registration. *Buffalo Grape Sugar Co. v. Alberger*, 22 Hun (N. Y.) 349.

4. *Berlich v. Marye*, 9 Nev. 312.

5. *Mandlebaum v. North American Min. Co.*, 4 Mich. 464, the court saying: "When the company permitted this transfer to *Ingersoll* to be intimated upon their books, and issued this certificate to him, they well knew that it might, and probably would, pass from hand to hand, upon his indorsement, through numberless *bona fide* holders, before it would be returned for a like intimation of transfer and new certificate thereon. . . . Once indorsed, the certificate passes from hand to hand, like commercial paper, and an ordinary purchaser would, and under our statute well might, regard the usual indorsement, if genuine, as sufficient; and suspicion would naturally be lulled, and inquiry would be silenced beyond such as would, by mercantile law and usage, be required upon the purchase of commercial paper. And if inquiry were further pressed, and the party desirous of purchasing should seek further evidence of the genuineness of the title of his vendor, the entry upon the company's books corresponding with the issuing of such certificate would, almost of necessity, impel him to the conclusion that, up to that point, the title was unquestionable, and that behind it he need not pursue his investigations. It would be regarded, and properly too, as the recognition by the company of a title upon which every subsequent purchaser could rely."

6. *Shropshire Union R., etc., Co. v. Reg., L. R.*, 7 H. L. 496.

7. *Rumball v. Metropolitan Bank*, 2

(2) *Quasi-Negotiability*.—But while certificates of stock do not possess the incidents of negotiability, they are said by some of the authorities to be "*quasi-negotiable*."<sup>1</sup> Thus, where the real owner has conferred upon another the apparent power to dispose of stock, a *bona fide* purchaser from such transferrer will be protected, though the latter exceeded his authority in the sale.<sup>2</sup> This, however, is hardly more than the statement of a principle which applies equally as well to non-negotiable choses in action,<sup>3</sup> and the use of the term *quasi-negotiable* in reference to certificates of stock has been criticised by the text writers.<sup>4</sup> Still, this branch of the law

Q. B. Div. 194; *Goodwin v. Robarts*, L. R., 1 App. Cas. 476; *Compare* *Pickard v. Sears*, 6 A. & E. 469; 33 E. C. L. 115.

See generally NEGOTIABLE INSTRUMENTS, vol. 16, p. 479.

1. *Bridgeport Bank v. New York*, etc., R. Co., 30 Conn. 275.

In *Litchfield v. Wells*, 48 N. Y. 613, it was said: "Since the decision of the case of *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, above cited, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper."

And in *Mandlebaum v. North Am. Mining Co.*, 14 Mich. 473, the court, by Martin, J., observed: "It is true that this is not commercial paper in the strict sense of the term; but by our statute, as has been stated, it is transferable by indorsement and delivery, so as to confer a valid title as between the parties thereto, and is, we think, by this provision of the statute, so far assimilated to such paper that the holder is entitled to every right respecting it, as against third parties, which the law confers upon the holder of commercial paper."

*Compare* also the following: *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472; *East Birmingham Land Co. v. Dennis*, 85 Ala. 567; 26 Am. & Eng. Corp. Cas. 135; 7 Am. St. Rep. 73; *Supply Ditch Co. v. Elliott*, 10 Colo. 333; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Campbell v. Morgan*, 4 Ill. App. 100; *Smith v. Crescent City Live Stock, etc., Co.*, 30 La. Ann. 1378; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 282; 81 Am. Dec. 701; *Shaw v. Spencer*, 100 Mass. 388; 1 Am. Rep. 115; 97 Am. Dec. 107; *Sargent v. Essex, etc., R. Co.*, 9 Pick. (Mass.) 205; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454;

*First Nat. Bank v. Northern R. Co.*, 58 N. H. 203; *Broadway Bank v. McIlrath*, 13 N. J. Eq. 24; *Prall v. Tilt*, 28 N. J. Eq. 483; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91; 22 Wend. (N. Y.) 348; *Finney's Appeal*, 59 Pa. St. 398; *Woods' Appeal*, 92 Pa. St. 379; 37 Am. Rep. 694; *Fraser v. Charleston*, 11 S. Car. 486; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Black v. Zacharie*, 3 How. (U. S.) 483; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (U. S.) 396; *Johnson v. Laffin*, 5 Dill. (U. S.) 65; *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369; *McAllister v. Kuhn*, 96 U. S. 89; *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557; *Johnston v. Laffin*, 103 U. S. 800; *Famous Shoe Co. v. Crosswhite*, St. Louis Ct. of App. Dec. 1892. See also an exhaustive note, 19 Am. & Eng. Corp. Cas. 478.

2. *Nutting v. Thomason*, 46 Ga. 34; *Stinson v. Thornton*, 56 Ga. 377; *Cohen v. Gwynn*, 4 Md. Ch. 357; *Salisbury Mills v. Townsend*, 109 Mass. 115; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232; *Caulkins v. Memphis Gas Light Co.*, 85 Tenn. 683; 19 Am. & Eng. Corp. Cas. 400; 4 Am. St. Rep. 786; *Briggs v. Massey*, 42 L. T. Rep., N. S. 49.

3. *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41.

4. "It is little satisfaction to the court, the practitioner, the student, or the owner of stocks, to be told that certificates of stock have a *quasi-negotiability*. The term itself has been coined to describe the character of certain things which can be understood only by a study and knowledge of the characteristics of the thing described. Especially is this true of certificates of stock. The information sought is not whether the certificate is *quasi-negotiable*, but whether the holder of it is



has the appearance of being in a transitional stage, and the trend of decisions seems to be in the direction of endowing certificates of stock with greater transferable potentiality.<sup>1</sup>

c. ISSUE.—A certificate is issued when it is executed and mailed to the party entitled to receive it;<sup>2</sup> and the stub of the stock book is evidence of such issue.<sup>3</sup> The execution need not be under seal,<sup>4</sup> nor in the state where the corporation has its domicile.<sup>5</sup> The issue must be authorized by the directors<sup>6</sup> and

protected under different states of facts and circumstances. He who intends to purchase such certificates wishes to know what dangers or risks he incurs by the purchase. The practitioner is interested, not in the general character of the instrument, but in the law as applicable to his particular case. Many of the cases concede to the certificates of stock a *quasi*-negotiability; but it is extremely doubtful whether such discussions do not confuse the understanding of the character of such an instrument more than they explain it." Cook, Stock and Stockholders, § 413.

"The phrase '*quasi*-negotiability' has been termed an unhappy one, and certainly it is far from satisfactory, as it conveys no accurate, well defined meaning. But still it describes better than any other short-hand expression, the nature of those instruments which, while not negotiable in the sense of the law-merchant, are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable." Daniel, Neg. Inst., § 1708.

1. In *Scott v. Pequonnock Nat. Bank*, 15 Fed. Rep. 501; 1 Am. & Eng. Corp. Cas. 32; Shipman, J., says: "The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment, and power to transfer, as approximating to negotiable securities, though neither in form nor character negotiable," citing *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369; *Bank of Bridgeport v. New York, etc., R. Co.*, 30 Conn. 270.

It must be remembered also that the negotiability of all the instruments which possess that feature is the product of a long period of judicial evolution. The first reported case involving the negotiability of bills of exchange was about 1603, while promissory notes did not become fully negotiable until the act of Parliament of 1704. In recent years, moreover, the field covered by these instruments has been greatly

enlarged until it now includes also in many states, bonds, warrants, certificates of deposit, bills of lading, warehouse receipts, etc. But little further advance is needed, it seems, to include certificates of stock.

2. *Jones v. Terre Haute, etc., R. Co.*, 17 How. Pr. (N. Y.) 529.

3. *Weber v. Fickey*, 47 Md. 196.

4. *Halstead v. Dodge*, 51 N. Y. Super. Ct. 169.

5. *Courtright v. Deeds*, 37 Iowa 503.

6. *Ryder v. Bushwick R. Co.* (N. Y. 1892), 31 N. E. Rep. 251, was an action by the purchaser of certain certificates issued by the executive committee of a corporation, to enforce recognition of his rights as a stockholder. The court thus states and disposes of the case: "It appears that the directors of the defendant consisted of thirteen stockholders; that they had appointed of their number five to act as an executive committee, who were to have the general direction and superintendence of the affairs of the company, and were vested with full authority for constructing, repairing, equipping and operating the road, etc. But no power was given to them to issue stock. The certificates in question, however, were issued by the president upon the authority of the executive committee. The trial court has found as facts that such certificates were not issued by the authority of the board of directors; that they had not ratified such issue, and had not authorized the executive committee, nor the president, to issue the same; and that the plaintiff was not a purchaser in good faith for full value. Our examination of the case leads us to conclude that the findings are supported by the evidence. We regard these findings as disposing of the case, for if the certificates were not legally issued, and the plaintiff is not a *bona fide* holder, he is not entitled to the relief demanded. *Barnes v. Brown*, 80 N. Y. 534; *Burrall v. Bushwick R. Co.*,

signed by the full number of officers required by law.<sup>1</sup> Where a corporate officer has authority to issue certificates, he may issue them to himself as well as to others, and the corporation is liable to one who has been damaged as the result of such issue.<sup>2</sup> While the possession of certificates is not essential to membership in a corporation,<sup>3</sup> every stockholder is entitled to them and may enforce his right by action.<sup>4</sup>

**II. PARTICULAR KINDS—1. Preferred or Guaranteed—*a*. DEFINITION.**—See also DIVIDENDS, vol. 5, p. 743.

The most important classes into which shares of stock may be divided are common and preferred.<sup>5</sup> Holders of the common

75 N. Y. 211; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30."

1. Holbrook v. Farquier, etc., Turnpike Co., 3 Cranch. (C. C.) 425.

2. Titus v. Great Western Turnpike Co., 61 N. Y. 237.

3. Corwith v. Culver, 69 Ill. 502; Dows v. Naper, 91 Ill. 44; Helm v. Swiggett, 12 Ind. 194; Beckett v. Houston, 32 Ind. 394; First Nat. Bank v. Gifford, 47 Iowa 575; Agricultural Bank v. Burr, 24 Me. 256; Agricultural Bank v. Wilson, 24 Me. 273; Chaffin v. Cummings, 37 Me. 76; Chester Glass Co. v. Dewey, 16 Mass. 94; 8 Am. Dec. 128; Ellis v. Essex Merrimack Bridge, 2 Pick. (Mass.) 243; Boston, etc., R. Co. v. Pearson, 128 Mass. 445; Minneapolis Harvester Works v. Libby, 24 Minn. 327; Choteau Spring Co. v. Harris, 20 Mo. 382; Shaeffer v. Missouri Home Ins. Co., 46 Mo. 248; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390; 64 Am. Dec. 300; Wheeler v. Walker, 45 N. H. 355; *In re* Election of Directors, 44 N. J. L. 529; Dennis v. Kennedy, 19 Barb. (N. Y.) 517; Strong v. Smith, 15 Hun (N. Y.) 222; Buffalo, etc., R. Co. v. Dudley, 14 N. Y. 336; Johnson v. Albany, etc., R. Co., 40 How. Pr. (N. Y.) 193; Thorp v. Woodhull, 1 Sandf. Ch. (N. Y.) 411; Downer v. Zanesville Bank, Wright (Ohio) 477; Com. v. Woodward, 4 Phila. (Pa.) 124; Galveston City Co. v. Sibley, 56 Tex. 269; Turnbull v. Payson, 95 U. S. 418; Hawley v. Upton, 102 U. S. 314; Cecil Nat. Bank v. Watontown Bank, 105 U. S. 217; Ferrar v. Walker, 3 Dill. (U. S.) 506; Upton v. Burnham, 3 Biss. (U. S.) 431; Becher v. Wells Flouring Mill Co., 1 McCrary (U. S.) 62. Certificates are only secondary evidence of membership. Bank of Commerce's Appeal, 73 Pa. St. 59. Compare Mitchell v. Beckman, 64 Cal.

117; 1 Am. & Eng. Corp. Cas. 40; Baker v. Woolston, 27 Kan. 185.

4. Fletcher v. McGill, 110 Ind. 395; Chester Glass Co. v. Dewey, 16 Mass. 94; 8 Am. Dec. 128; Wyman v. American Powder Co., 8 Cush. (Mass.) 168; Buffalo, etc., R. Co. v. Dudley, 18 N. Y. 336; Haldeman v. Hillsborough, etc., R. Co., 2 Handy (Ohio) 101; Rowley's Appeal, 115 Pa. St. 110; Cecil Nat. Bank v. Watontown Bank, 105 U. S. 217; Ferguson v. Wilson, L. R., 2 Ch. 77.

Readiness and willingness to issue certificates at the time payment is to be made, is all that can be required where payment is to be in installments. James v. Cincinnati, etc., R. Co., 2 Disney (Ohio) 261. But the corporation must be in a position to issue them. McCord v. Ohio, etc., R. Co., 13 Ind. 220.

Where there are two claimants to stock, and the certificate is issued to the wrongful claimant, the other has an adequate remedy by *mandamus* to compel the issue of certificates to him. Baker v. Marshall, 15 Minn. 177. But delivery cannot be compelled where the corporation has already issued the full amount of its stock. Williams v. Savage Mfg. Co., 3 Md. Ch. 418; Smith v. North American Min. Co., 1 Nev. 423; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Baker v. Wasson, 53 Tex. 150; 59 Tex. 140.

In *Massachusetts*, however, the corporation may, in a proper case, be compelled to purchase stock in the market and issue it to the complainant. Pratt v. Machinists' Nat. Bank, 123 Mass. 110; Machinists' Nat. Bank v. Field, 126 Mass. 345.

5. Called also indifferently preference or preferential. Henry v. Great Northern, etc., R. Co., 4 K. & J. 1.

stock stand on an equal footing and share *pro rata* in the corporate profits.<sup>1</sup> Preferred stock, on the other hand, entitles its owners to dividends before other shareholders may receive them.<sup>2</sup> In the *United States* the term "preferred stock" and "guaranteed stock" are used interchangeably,<sup>3</sup> but in *England* the latter variety alone is entitled to arrears of dividends.<sup>4</sup>

b. POWER TO ISSUE.—While the issue of preferred stock is undoubtedly valid when authorized,<sup>5</sup> it is generally true that such

1. Cook, Stock and Stockholders, § 9.

2. *Totten v. Tison*, 54 Ga. 139; *Bel-fast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736; *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310; 5 Am. Rep. 575; *Crawford v. North-eastern, etc., R. Co.*, 3 Jur. N. S. 1093; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; 16 Am. & Eng. R. Cas. 408; "Preferred Stock," 20 Am. Law Reg. 633, article by John D. Lawson; see also *DIVIDENDS*, vol. 5, p. 743. "The holder of preferred shares may say, 'Nobody shall have any portion of the profits of the company until I have been paid my dividend.'" *Henry v. Great Northern, etc., R. Co.*, 4 K. & J. 1; 1 De G. & J. 606.

In *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 236; 9 Am. & Eng. R. Cas. 639, *Van Fleet, V. C.*, said: "There are certain legal principles pertinent to this discussion which I think are so firmly established that they may be taken for granted, without argument or the citation of authorities: First, stockholders are not creditors, and until the winding up of the corporation are entitled to nothing from it but a distribution of its net earnings; second, dividends can only be paid out of profits; third, calling stock preferred stock does not, *per se*, define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary stock, resort must be had to the statute or contract under which it is issued; and, fourth, where the statute or contract under which preferred stock is issued declares or promises that the holder of such stock shall receive a dividend of a fixed and certain rate *per annum*, without limiting the annual sum to be paid as dividend to profits earned or made within a designated period—as, for example, that he shall receive a dividend of seven per cent. *per annum* before any dividend shall be paid on the ordinary stock—there the preferred stockholder

is entitled to seven per cent. *per annum* from the date of the issuing of the stock held by him, whether profits sufficient to pay him each year are made or not; and if, at the first division of profits, sufficient shall not have been made to pay him the whole sum due, he may carry the arrears due him over to the next dividend, and continue to do so until he has received the whole sum due him, calculated at seven per cent. *per annum* from the date of the issue of the stock held by him. The principle last stated rests mainly on English adjudications, and has in that country received the approval of such judges as Lord Cranworth, Lord Hath-erly, Lord Justice Knight Bruce and Lord Justice Turner. The cases in which it has been enunciated are: *Henry v. Great Northern R. Co.*, 3 Jur. N. S. 1133; 1 De G. & J. 606; *Crauford v. North Eastern R. Co.*, 3 Jur. N. S. 1093; *Sturge v. Eastern Union R. Co.*, 7 De G. M. & G. 158; *Matthews v. Great Northern R. Co.*, 5 Jur. N. S. 284. The doctrine of all these cases, on the point under consid-eration, was approved in *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; 4 Am. & Eng. R. Cas. 265."

3. See *DIVIDENDS*, vol. 5, p. 743.

4. *Henry v. Great Northern R. Co.*, 4 K. & J. 1; *Cook, Stock and Stock-holders* (2d ed.) 267.

5. *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 15; *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395; *Covington v. Covington, etc., Bridge Co.*, 10 Bush (Ky.) 69; *Bates v. Androscoggin, etc., R. Co.*, 49 Me. 497; *Wright v. Ver-mont, etc., R. Co.*, 12 Cush. (Mass.) 68; *Waterman v. Troy, etc., R. Co.*, 8 Gray (Mass.) 433; *Cunningham v. Ver-mont, etc., R. Co.*, 12 Gray (Mass.) 411; *Barnard v. Vermont, etc., R. Co.*, 7 Allen (Mass.) 512; *Lockhart v. Van Alstyne*, 31 Mich. 81; 18 Am. Rep. 156; *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100; *Prouty v. Michigan South-ern, etc., R. Co.*, 1 Hun (N. Y.) 655;

authority is not an incidental corporate power, but must be expressly conferred by charter or by statute,<sup>1</sup> and that a mere by-law is not sufficient.<sup>2</sup> But this rule is subject to numerous modifications. Thus, there is high authority, though *obiter*, for the rule that a corporation may, before the issue of any shares, classify them into common and preferred, independent of charter provisions.<sup>3</sup> A general authority to increase the capital stock

West Chester, etc., R. Co. v. Jackson, 77 Pa. St. 321; Kent v. Quicksilver Min. Co., 78 N. Y. 177; Taft v. Hartford, etc., R. Co., 8 R. I. 310; 5 Am. Rep. 575; Rutland, etc., R. Co. v. Thrall, 35 Vt. 537; Richardson v. Vermont, etc., R. Co., 44 Vt. 613; St. John v. Erie R. Co., 22 Wall. (U. S.) 136; 10 Blatchf. (U. S.) 271; *In re* Anglo-Danubian Steam Nav. Co., L. R., 20 Eq. 339; *In re* Brighton R. Co., 44 Ch. Div. 28; Henry v. Great Northern R. Co., 1 De G. & J. 606; Matthews v. Great Northern R. Co., 28 L. J. Ch. 376; Memphis Grain, etc., Co. v. Memphis, etc., R. Co., 85 Tenn. 703; 30 Am. & Eng. R. Cas. 522; Bard v. Banigan, 39 Fed. Rep. 16; Taylor v. South & North Ala. R. Co., 4 Woods (U. S.) 575; Hutton v. Scarborough Cliff Hotel Co., 2 D. & S. 521; Ashbury v. Watson, 30 Ch. Div. 376; 16 Am. & Eng. Corp. Cas. 383; Guinness v. Land Corp., 22 Ch. Div. 349; *In re* South Durham Brewery Co., 31 Ch. Div. 261; Fielden v. Lancashire, etc., R. Co., 2 De G. & S. 531; Melhado v. Hamilton, 28 L. T. (N. S.) 578; 29 L. T. (N. S.) 364.

1. In Campbell v. American Zylonite Co., 122 N. Y. 455, the case and the principle governing it are thus stated by the court: "The articles of association divided the capital of the corporation into 7,500 shares, equal in amount and value. At the date of the agreement of May 22, 1885, by which it was provided that 3,000 of the shares should have priority over the remaining 4,500, all of the shares, save 20, had been sold, and were then registered in the names of their purchasers. The right of every shareholder to his proportion of the profits of the corporation was vested, and, in the absence of some power to change the relative value of the shares, conferred by statute or by the articles of association, no change could be made without the consent of all the shareholders," citing Kent v. Quicksilver Min. Co., 78 N. Y. 159.

2. Guinness v. Land Corp., 22 Ch. Div. 349; Hutton v. Scarborough Cliff

Hotel Co., 4 De G. J. & S. 671; Ashbury v. Watson, 30 Ch. Div. 376; 16 Am. & Eng. Corp. Cas. 383.

3. In Kent v. Quicksilver Min. Co., 78 N. Y. 159, Folger, J., says: "We are not prepared to say that, at the first, the corporation might not have lawfully divided the interest in its capital stock into shares arranged in classes, preferring one class to another in the right it should have in the profits of the business. The charter gave power to make such by-laws as it might deem proper, consistent with constitution and law; and to issue certificates of stock representing the value of the property. We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscription thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired. . . . Shares of stock are in the nature of choses in action, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner, than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right; or is properly derived afterwards from a superior law giver. The certificate of stock is the muniment of the shareholder's title, and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him or

will, as a rule, warrant the enactment of by-laws providing for the issue of preferred shares.<sup>1</sup> So the validity of such an issue has been sustained on the ground of a right to raise funds by a sale of shares,<sup>2</sup> and on the power to borrow money,<sup>3</sup> but the latter ground has been repudiated by eminent authority.<sup>4</sup> It is immaterial that the capital stock has already been fixed, if au-

changed as to him without his prior dereliction, or under the conditions above stated. Now it is manifest that any action of a corporation which takes hold of the shares of its capital stock, already sold and in the hands of lawful owners, and divides them into two classes—one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterwards with the other in what earnings may remain—destroys the equality of the shares, takes away a right which originally existed in it, and materially varies the effect of the certificate of stock."

1. *Harrison v. Mexican R. Co.*, L. R., 19 Eq. 358; *In re South Durham Brewery Co.*, 34 W. R. 126; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 545; *Gordon v. Richmond, etc., R. Co.*, 78 Va. 501; 22 Am. & Eng. R. Cas. 33, where, however, the corporation was empowered to borrow money. But see *Moss v. Syers*, 32 L. J. Ch. 711.

2. *Chaffee v. Rutland R. Co.*, 55 Vt. 110; 16 Am. & Eng. R. Cas. 408; *State v. Cheraw, etc., R. Co.*, 16 S. Car. 524.

3. *Hazelhurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. 358; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 545. In this case the court says: "Now there is nothing in the terms of the charter, or the subscription, that forbids the pledging or mortgaging of the capital invested to secure further loans. In this form it certainly makes two classes of stockholders—one whose capital is invested without any security for profits or interest upon their money, except what the prospective success of the enterprise may afford;—the other, to whom a profit, usually higher than simple interest on their money, is guaranteed upon the amount subscribed. Notwithstanding the evils growing out of having two classes of stockholders, with conflicting interests, we believe it has been a mode of raising money much used in this kind of enterprise, and regarded only as in the nature of a mortgage. This form of

security practically, perhaps, does not make the conflict of interests of the different holders of securities any greater, or depreciate to any greater extent the value of the original stock, than if in the form of a loan or bond or mortgage, for those who purchase bonds secured by mortgage may also be stockholders and thus have the same motives for managing the company for their own interests as if their debt was in the form of preferred stock."

4. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159. The opinion of Folger, J., is especially valuable for its full review of the authorities. He says: "It is contended that the power to do so is an incidental and implied power, necessary to the use of the other powers of the corporation, and is a legitimate means of raising money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money, and to secure the repayment of it, with a compensation for the use of it. But that is when it is done in such way as to put the burthen upon every share of stock alike, and to enable every share of stock to be relieved therefrom alike; in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholder. Citations are made to us for the converse of this; but they do not come up—sometimes in their facts, sometimes in their declarations—to the necessity of the proposition. Either it is where the capital is not limited, and it is new shares that may be issued with a preference, and where there is express power to borrow on bond and mortgage (2 Redf. on Ry's, ch. 33, sec. 4, § 237; *Harrison v. Mexican R. Co.*, 12 Eng. Rep. 793; L. R., 19 Eq. 358); or the amount of the capital has not been reached and such stock is issued therefrom (*Hazelhurst v. Savannah, etc., R. Co.*, 43 Ga. 53; *Totten v. Tison*, 54 Ga. 139); or there was legislative authority (*Davis v. Proprietors of Meeting-House*, 8 Met. (Mass.) 321; *Rutland, etc., R. Co. v. Thrall*, 35 Vt.

thority may be found for issuing additional and preferred shares,<sup>1</sup> and new charter clauses may be substituted for the original ones which afford such authority,<sup>2</sup> or it may be entirely supplied by amendment.<sup>3</sup> Even where the issue of preferred stock would otherwise be invalid, it may be legalized by acquiescence and laches on the part of stockholders<sup>4</sup> or purchasers,<sup>5</sup> and particularly where the rights of third parties have intervened.<sup>6</sup> Hence, it has been held that a delay of ten,<sup>7</sup> or even of four<sup>8</sup> years, the

545); or a restriction to authorized capital, and there was unanimous consent of the stockholders (*Prouty v. Michigan Southern, etc., R. Co.*, 1 Hun (N. Y.) 663; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 53); or there was power to redeem, which was a transaction in the nature of a debt (*Westchester, etc., R. Co. v. Jackson*, 77 Pa. St. 321); or the opinion was *obiter* (*Bates v. Androscoggin, etc., R. Co.*, 49 Me. 491); or it was the cause of a subscription for stock with a condition for interest until the corporation was in operation (*Richardson v. Vermont, etc., R. Co.*, 44 Vt. 613); or it was an action on a subscription more favorable to defendant than to other subscribers, and it was held that defendant could not set up the lack of equality (*Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395); or a solemn determination of this question was not necessary for the disposal of the case (*Williston v. Michigan Southern, etc., R. Co.*, 13 Allen (Mass.) 400); or the issue was authorized by the articles of association (*In re Anglo-Danubian Steam Nav., etc., Co.*, L. R., 20 Eq. 339); or there was full knowledge on the part of all concerned (*Lockhart v. Van Alstyne*, 31 Mich. 81; 18 Am. Rep. 156); or the power in the corporate body was conceded, and it was denied that it existed in the directors (*McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100)."

1. *Harrison v. Mexican R. Co.*, L. R., 19 Eq. 358.

2. *In re Bridgewater Nav. Co.*, 39 Ch. Div. 1.

3. *Everhart v. West Chester, etc., R. Co.*, 28 Pa. St. 339; *Covington v. Covington, etc., Bridge Co.*, 10 Bush (Ky.) 69; *Curry v. Scott*, 54 Pa. St. 277.

4. *Kent v. Quicksilver Min. Co.*, 78 N.Y. 186; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Lockhart v. Van Alstyne*, 31 Mich. 81; 18 Am. Rep. 156; *Taylor v. South & North Ala. R. Co.*, 4 Woods (U. S.) 575; *McLaughlin v. Detroit, etc., R. Co.*, 8 Mich. 100;

*Harrison v. Mexican, etc., R. Co.*, 44 L. J. Ch. 403.

5. *Bard v. Banigan*, 39 Fed. Rep. 13; 134 U. S. 291; 31 Am. & Eng. Corp. Cas. 327. In this case it was held that a purchaser of preferred stock, issued without express statutory authority, who voluntarily subscribed and paid for it for the purpose of promoting the scheme under which it was issued, and who was a promoter of the scheme, may not hold it for twenty-eight months after the conditions upon which it was issued have been fulfilled, and then on the insolvency of the corporation recover his money on the ground of the invalidity of the issue.

6. "Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there it is not needed that there be an express assent thereto on the part of stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it." *Kent v. Quicksilver Min. Co.*, 78 N. Y. 187.

7. *Taylor v. South & North Ala. R. Co.*, 4 Woods (U. S.) 575.

8. "In our view of the matter, the holder of common stock had an equitable right to restrain the privileged payment to a preferred stockholder from the profits of the company, and to have the contract therefor declared invalid. It was his duty to have been prompt in his application to the courts for that relief, before evil could fall upon innocent parties; and where application to the courts therefor has been delayed by his neglect, and advantages have been gained by the corporate body, assistance should be denied (*Zabriskie v. Cleveland, etc., R. Co.*, 23 How. (U. S.) 398; *Evans v. Smallcombe*, L. R., 3 H. L. 249). It

acceptance of dividends on the preferred shares,<sup>1</sup> or the enjoyment of benefits in respect to them not shared by other stockholders,<sup>2</sup> would bar the right to attack the validity of the issue. Authority to issue preferred stock does not extend to more than the prescribed number of shares,<sup>3</sup> nor does it authorize the issue of common shares.<sup>4</sup>

c. STATUS AND RIGHTS OF PREFERRED SHAREHOLDERS—(1) *In General*.—Aside from their priority in respect to dividends, holders of preferred stock stand upon almost the same footing as ordinary shareholders. The ownership of such stock carries with it the voting power,<sup>5</sup> and, indeed, if by the terms of its creation purchasers are exempted from the rights and liabilities of membership, the transaction becomes a loan rather than an issue of preferred stock.<sup>6</sup>

(2) *Preferred Shareholders Not Creditors*.—Ordinarily the owners of preferred shares are stockholders and not creditors of the corporation.<sup>7</sup> As between the preferred shareholders and outside

is said that the common stockholder should have some time within which to seek relief. It is enough to say in answer, that four years at least went by before a holder of common stock asked for the aid of the courts, and then not until a holder of preferred stock asked that aid, to restrain proposed corporate action meant to put the common stock upon an equality with his own." *Kent v. Quicksilver Min. Co.*, 78 N. Y. 188.

1. *Branch v. Jesup*, 106 U. S. 468; 9 Am. & Eng. R. Cas. 558.

2. *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395.

3. *Melhado v. Hamilton*, 28 L. T., N. S. 578.

4. *Covington, etc., Co. v. Sargent*, 1 Cin. Super. Ct. (Ohio) 354.

5. *Warren v. King*, 108 U. S. 397; *Burt v. Rattle*, 31 Ohio St. 116. *Compare* *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

6. *Burt v. Rattle*, 31 Ohio St. 129.

7. *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736; *Bates v. Androscoggin, etc., R. Co.*, 49 Me. 491; *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156; *Nickals v. New York, etc., R. Co.*, 15 Fed. Rep. 575; 13 Am. & Eng. R. Cas. 139; *Miller v. Ratterman*, 47 Ohio St. 141; 43 Am. & Eng. R. Cas. 339; *Pittsburg, etc., R. Co. v. Allegheny Co.*, 63 Pa. St. 126; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; 16 Am. & Eng. R. Cas. 408; *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136.

In *Taft v. Hartford, etc., R. Co.*, 8 R.

I. 310; 5 Am. Rep. 575, the certificates promised the holders "preferred and guaranteed dividends at the rate of ten per cent. *per annum*, payable semi-annually, before any dividends shall be paid on any other stock in said company." It was held that these were payable only out of such earnings of the company as were legally applicable to the payment of dividends. The court also said: "The question presented is, what is the meaning and engagement of the company as expressed in these words? The relations between these parties are obviously those between shareholders and the corporation. They are not, on the face of the contract, those of creditor and debtor. A corporation may issue bonds or other obligations convertible, at certain times and upon certain contingencies, into stock. They may issue stock, as in this case, redeemable at a certain time and upon certain conditions. But until such change is made in either case the original relation remains. A holder of the stock retains his right to share in the management of the corporation and to participate in its profits. He is not its creditor in this relation. If he is to be constituted its creditor, there are well known modes and words by which that relation can be expressed. If, instead of adopting them, he receives a certificate of stock, and then claims to be both its creditor and stockholder by virtue of the same contract, the burden is upon him to show that such anomalous relation exists. The presumption of law and the

creditors, the lien of the latter has priority.<sup>1</sup> But in order that dividends may be declared upon preferred stock, it is not necessary that the corporation be free from floating debt.<sup>2</sup> Where preferred stock is issued under the authority of a statute which expressly declares that the rights and liabilities of stockholders shall not attach to the purchasers thereof, they are creditors.<sup>3</sup> So parties from whom the corporation effects a loan, securing them by the issue of stock indorsed "preferred," and which is afterwards surrendered for mortgage bonds, have been held to be *bona fide* creditors.<sup>4</sup> The issue of preferred stock has been declared to be "a form of mortgage,"<sup>5</sup> and there is even authority for the view that the status of the owner of preferred shares is dual, including rights both of stockholders and creditors.<sup>6</sup>

usual course of business are against him. In this case, the evidence of the relation is a certificate of stock, and the subject of the engagement or contract is the dividends, so called, to be paid upon it."

Where preferred shares are issued to redeem bonded indebtedness, as allowed under the *Ohio* Statute, they are held to be certificates of stock and not evidences of debt, unless the latter were clearly intended. *Miller v. Rat-terman*, 47 *Ohio St.* 141; 43 *Am. & Eng. R. Cas.* 339.

1. *Chaffee v. Rutland R. Co.*, 55 *Vt.* 110; 16 *Am. & Eng. R. Cas.* 408; *Garrett v. May*, 19 *Md.* 177; *Belfast, etc., R. Co. v. Belfast*, 77 *Me.* 445; 23 *Am. & Eng. R. Cas.* 736; *King v. Ohio, etc., R. Co.* (Ind. 1880), 9 *Rep.* 431; *Branch v. Atlantic, etc., R. Co.*, 3 *Woods (U. S.)* 481; *Warren v. King*, 108 *U. S.* 389; *St. John v. Erie R. Co.*, 22 *Wall. (U. S.)* 137; 10 *Blatchf. (U. S.)* 27. In the first named case the court, per Veazey, J., said: "Upon the plaintiff's theory, there was an unqualified obligation to declare and pay dividends of preferred stockholders from the earnings and income, notwithstanding there were debts of the company greater than the earnings and the income. The creditor must come after the stockholder. Under this claim the rule universally recognized in the books that the property of a corporation is a trust fund pledged for the payment of the debts of the corporation, and the distinction everywhere upheld between a stockholder and creditors, would have to be disregarded. In our view the terms of the charter neither force nor import such construction."

2. *Hazeltine v. Belfast, etc., R. Co.*,

79 *Me.* 411; 19 *Am. & Eng. Corp. Cas.* 456; 1 *Am. St. Rep.* 330. But see *Chaffee v. Rutland R. Co.*, 55 *Vt.* 110; 16 *Am. & Eng. R. Cas.* 408.

3. *Burt v. Rattle*, 31 *Ohio St.* 116; *Chaffee v. Rutland R. Co.*, 55 *Vt.* 110; 16 *Am. & Eng. R. Cas.* 408. In the former case the purchasers were secured by a bond and mortgage, and the court, in determining their status, said: "To call a thing a wrong name does not change its nature. A mortgage creditor, although denominated a 'preferred stockholder, is a mortgage creditor nevertheless; and interest is not changed into a 'dividend' by calling it a dividend. Nothing is more common in the construction of statutes and contracts than for the court to correct such self-evident misnomers by supplying the proper words. To use the language of the court in *Corcoran v. Powers*, 6 *Ohio St.* 19, 'the question in such cases is not what did the parties call it, but what do the facts and circumstances require the court to call it.' A man who advances his money to a corporation, and takes a bond and mortgage for its repayment, and who, by express agreement between the parties, takes no interest or risk in the concerns of the company, is a creditor of the company, and to call him a 'stockholder' is a simple misnomer. He is a creditor and remains a creditor, until by some future act of his own he elects to become a stockholder, or otherwise changes his relation. The right to become a stockholder does not make its possessor a stockholder."

4. *Totten v. Tison*, 54 *Ga.* 139.

5. *West Chester, etc., R. Co. v. Jackson*, 77 *Pa.* St. 321; *Rutland, etc., R. Co. v. Thrall*, 35 *Vt.* 536.

6. *Emerson v. New York, etc., R.*



(3) *Remedial Rights*.—The declaration of dividends usually rests in the sound discretion of the directors,<sup>1</sup> and there is high authority for applying this rule to preferred stock.<sup>2</sup> But the prevailing doctrine is, that where a dividend is guaranteed and the directors refuse to pay, though funds exist for that purpose, the courts will interfere and compel such payment.<sup>3</sup> It has been held

Co., 14 R. I. 555; 16 Am. & Eng. R. Cas. 404, where the court says: "As a stockholder he had rights to a dividend and to repayment of the principal of his stock in preference to any of the ordinary stockholders. As a creditor he was entitled to be paid the amount of his debt in the same manner as other creditors, but with no preference over them."

1. *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736; *King v. Patterson, etc., R. Co.*, 29 N. J. L. 88; *Union Pac. R. Co. v. U. S.*, 99 U. S. 402.

2. In *New York, etc., R. Co. v. Nickals*, 119 U. S. 296, an agreement between creditors and shareholders provided for noncumulative dividends "in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year as declared by the board of directors." The directors passed a resolution, at the end of a fiscal year, reciting that they did "not deem it wise or expedient" to declare a preferred dividend. In an action by the preferred shareholders the circuit court held (15 Fed. Rep. 575) that the directors should be compelled to pay the preferred dividend. But, on appeal, the supreme court, by Mr. Justice Harlan, said: "This, in our judgment, is an erroneous interpretation of both the agreement and the company's charter. There is nothing in the language of either necessarily depriving the directors of the discretion with which managing agents of corporations are usually invested, when distributing the earnings of property committed to their hands. As was said by the court, in *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 40, 'when any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized.' The directors of such corporations, having opportunities not ordinarily possessed by others

of knowing the resources and condition of the property under their control, are in a better position to determine than stockholders, whether, in view of the duties which the corporation owes the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings, when necessary, for the preservation or improvement of the property intrusted to its control."

3. *Hazeltine v. Belfast, etc., R. Co.*, 79 Me. 411; 1 Am. St. Rep. 330; *Dickinson v. Chesapeake, etc., R. Co.*, 7 W. Va. 390; *Mackintosh v. Flint, etc., R. Co.*, 32 Fed. Rep. 350; *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736. In this case the court observes: "As a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion. The company usually establishes its financial policy for itself; yet when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it. Directors are not allowed to use their power illegally, or oppressively. See cases *supra*; also *Williston v. Michigan Southern, etc., R. Co.*, 13 Allen (Mass.) 400; *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; 4 Am. & Eng. R. Cas. 265; *Jermain v. Lake Shore, etc., R. Co.*, 91 N. Y. 483; 1 Am. & Eng. Corp. Cas. 111. In the present case we are by all the parties invited to accept jurisdiction; the facts are agreed, and all technicalities are waived. We may

that *assumpsit* would lie to recover preferred dividends,<sup>1</sup> and that specific performance would be decreed of a contract to pay them.<sup>2</sup> So injunction will lie to restrain the payment of a general dividend until there are sufficient funds,<sup>3</sup> or until the preferred stockholders have been paid.<sup>4</sup> In actions to enforce the rights of preferred stockholders the common stockholders are not always necessary parties,<sup>5</sup> nor are the corporate officers.<sup>6</sup> A consolidated corporation is liable for dividends guaranteed to shareholders in the old companies.<sup>7</sup> But in *Massachusetts* an action at law is not maintainable to recover undeclared dividends,<sup>8</sup> and the payment of preferred stockholders in any case will not be com-

adopt such a standard of judgment in determining the question as we think would and should regulate the exercise of sound discretion of directors, acting in good faith, in deciding the same question. *Barnard v. Vermont, etc., R. Co.*, 7 Allen (Mass.) 521."

1. *West Chester, etc., R. Co. v. Jackson*, 77 Pa. St. 321, where dividends were guaranteed "from the time of payment for the stock." Compare *Chaffee v. Rutland R. Co.*, 55 Vt. 110; 16 Am. & Eng. R. Cas. 408.

2. *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; 4 Am. & Eng. R. Cas. 265.

3. *Sturge v. Eastern Union R. Co.*, 7 De G. M. & G. 158; 56 Eng. Ch. 157. See also *Crauford v. North Eastern R. Co.*, 3 K. & J. 723; *Stevens v. South Devon R. Co.*, 9 Hare 313; *Corry v. Londonderry, etc., R. Co.*, 29 Beav. 263; *Henry v. Great Northern R. Co.*, De G. J. 606.

4. *Prouty v. Michigan Southern, etc., R. Co.*, 1 Hun (N. Y.) 655; *Henry v. Great Northern, etc., R. Co.*, 4 K. & J. 1. Where the common stockholders claim that they are being defrauded by the preferred stockholders, a preliminary injunction will not be ordered unless imminent danger is shown. *Mackintosh v. Flint, etc., R. Co.*, 32 Fed. Rep. 350.

5. *Thompson v. Erie R. Co.*, 45 N. Y. 468.

6. *Chase v. Vanderbilt*, 62 N. Y. 307. Here the action was brought by preferred stockholders of one of two consolidated corporations to enforce a contract to pay specified dividends. The court says: "The claim of the plaintiff, as a stockholder, is a claim against the company and not against the directors, and cannot be regarded as in the nature of an action against directors for diverting funds to pur-

poses not authorized by law, to the detriment and injury of the stockholders, or in the nature of a case where they fraudulently and collusively refuse to institute a suit. The corporation may sue and be sued, in its corporate name. It has a legal existence as such, and is liable to answer for any act which may be done, connected with its transactions. If the action could properly be brought against the corporation, the directors, as its officers, were bound to look after the rights of all the stockholders and parties in interest and to see that they were properly protected and cared for. As individual defendants, they could do no more, and, as officers, were bound to do thus much. It is not obvious how parties thus made defendants can be of any essential benefit in the conduct of the action. If, as may be assumed, they are adverse in interest to the plaintiff, clearly they could not be of any service to those who may have been similarly situated. If they agreed with the object of the suit then they could bring an action, or be benefited by success in the action brought by the plaintiff. They were clearly not necessary parties for the determination of the action. Nor were they proper parties under the circumstances presented, because in no way does it appear that the fact of their being parties was required, or was in any sense important, either in the prosecution of the suit, in obtaining the relief demanded, or in the defense of the same."

7. *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 181; 4 Am. & Eng. R. Cas. 265; *Prouty v. Lake Shore, etc., R. Co.*, 52 N. Y. 363; *Chase v. Vanderbilt*, 62 N. Y. 307. Compare *In re Sage*, 70 N. Y. 220.

8. *Williston v. Michigan, etc., R. Co.*, 13 Allen (Mass.) 400.

pelled where it would work injustice to creditors or other stockholders.<sup>1</sup>

*d. EXCHANGE OF COMMON FOR PREFERRED STOCK.*—When preferred stock is issued, with an option to the common shareholders of exchanging their stock therefor, the option must be exercised within the time prescribed, or, if no time is fixed, then within a reasonable time.<sup>2</sup>

A mere barter by the directors of certain preferred shares, held as corporate assets, for special common shares, in order to effect a settlement of certain claims, is not a transaction authorized by a resolution which provides for the issue of preferred stock with the option to exchange.<sup>3</sup>

*e. PREFERRED DIVIDENDS*—(1) *General Nature.*—Preferred dividends have been defined as “a charge upon all accruing profits at the stipulated rate, before anything is divided among the ordinary shareholders.”<sup>4</sup> The guaranty of a dividend is said to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend.<sup>5</sup>

(2) *From What Funds Payable*—(a) *Earnings and Profits.*—Since the holders of preferred stock are not creditors but members of the corporation,<sup>6</sup> the fund from which their income is derived is usually the same for them as for other stockholders. Hence it is said that “The preference is limited to profits whenever earned.”<sup>7</sup>

1. *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367.

2. *Holland v. Cheshire R. Co.*, 151 Mass. 231. In this case the company had authorized its directors to issue preferred stock with the privilege of exchange, and under this plan exchanges continued to be made for some three years, during which time most of the common stock was surrendered. After a lapse of thirty-three years plaintiff sought to avail himself of the option. Independently of the question whether the terms of the resolution did not fix a limit, the court held that the plaintiff's offer was not within a reasonable time and he was therefore barred.

*Converting Corporate Bonds or Loan Notes into Shares.*—So, if the privilege is given of converting corporate bonds (*Muhlenberg v. Philadelphia, etc., R. Co.*, 47 Pa. St. 16; or loan notes, *Campbell v. London, etc., R. Co.*, 5 Hare 519; 26 Eng. 515) into shares, time is of the essence of the transaction, and the right may not be claimed after the expiration of the limit.

The case of *Pearson v. London, etc., R. Co.*, 14 Sim. 541, was not an instance of the issue of preferred stock at all, nor are the two cases last above

cited, though the text writers have discussed them under this head. See *Cook, Stock and Stockholders*, p. 278; 2 *Beach, Corp.*, p. 820.

3. *Holland v. Cheshire R. Co.*, 151 Mass. 231.

4. *Henry v. Great Northern R. Co.*, 1 De G. & J. 606, where the Lord Chancellor further says “This is substantially interest chargeable exclusively on profits.”

5. *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310; 5 Am. Rep. 575.

6. See *supra*, this title, *Preferred Shareholders Not Creditors*.

7. *Veazey, J.*, in *Chaffee v. Rutland R. Co.*, 55 Vt. 110; 16 Am. & Eng. R. Cas. 408, citing *Field on Corporations*, § 121; *Corry v. Londonderry, etc., R. Co.*, 29 Beav. 263; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *St. John v. Erie R. Co.*, 10 Blatchf. (U. S.) 271; 22 Wall. (U. S.) 136; *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. St. Rep. 156; *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310; 5 Am. Rep. 575. See also *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 233; 9 Am. & Eng. R. Cas. 639; *Griffith v. Paget*, 6 Ch. Div. 511; *In re London India Rubber Co., L. R.*, 5 Eq. 519; *In re Quebrada R., etc., Co.*, 40 Ch. Div. 363; 26 Am. & Eng. Corp. Cas.

So a contract to pay dividends on preferred stock, whether or not the corporate earnings will justify such payment, has been held to be contrary to public policy and void.<sup>1</sup> Nevertheless, there is high authority for the rule that a statutory guaranty of specific dividends on preferred stock is absolute, and not conditioned upon the earning of sufficient profits.<sup>2</sup> Where the construction obtains that preferred dividends are payable only if the corporate earnings will permit, net earnings and profits are meant.<sup>3</sup> The phrase "net earnings" has been defined as the "excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the constructing and equipment of the works themselves."<sup>4</sup> The term is practically synony-

380; also *St. John v. Erie R. Co.*, 10 Blatchf. (U. S.) 271; 22 Wall. (U. S.) 136; *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; 4 Am. & Eng. R. Cas. 265; *Prouty v. Lake Shore, etc., R. Co.*, 52 N. Y. 363; *Thompson v. Erie R. Co.*, 45 N. Y. 465; *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736; *Bates v. Androscoggin, etc., R. Co.*, 49 Me. 491; *Union Pac. R. Co. v. U. S.*, 99 U. S. 402; *Nickals v. N. Y., etc., R. Co.*, 15 Fed. Rep. 575; 13 Am. & Eng. R. Cas. 139.

In *Miller v. Ratterman*, 47 Ohio St., 141; 43 Am. & Eng. R. Cas. 339, the court, by Spear, J., said: "Nor did the stipulation guarantying to the holders of the preferred stock payment of dividends thereon negative the idea that they were stockholders. It was not a stipulation to pay dividends in any event, but a stipulation to pay only out of surplus profits; for the company must be presumed to have proceeded in view of the terms of the second section of the act referred to, and the general rule of law on the subject. That rule is, that payment of dividends to preferred stockholders differs from such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock. Dividends to either are to come from one common source, to-wit: from funds properly applicable to the payment of dividends; that is to say, net earnings. In the nature of things, this must be so. As well might one member of a partnership be permitted to appropriate to his own use assets of the firm to the prejudice of creditors, as for a stockholder of a corporation to do it. A contract to permit this to be done would be contrary to public policy, and void. *Pierce*, R. R. 124, 125; *St.*

*John v. Erie R. Co.*, 22 Wall. (U. S.) 136; *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156; *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310; 5 Am. Rep. 575; *Painesville, etc., R. Co. v. King*, 17 Ohio St. 534. And now provision to the same effect is made by statute. 1 *Smith & B. Rev. St.* 935."

1. *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156, where Cooley, J., says: "An agreement to pay semi-annual dividends from earnings, when there are any, and from capital, when there are not, is only a new form of the undertaking by which the debtor is to pay from his profits if the ship comes in, and from the pound of flesh if it does not; every dividend from the capital being an attack upon the very life of the corporation, before which, under ordinary circumstances, it must inevitably and speedily give away. And thus the contract, the only justification for which is the strengthening of the corporation, is found to contain within itself a provision which, except in the event of steady prosperity, must inevitably tend to its weakening and almost certainly to its destruction." See also *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310; 5 Am. Rep. 575. Compare *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395; *Miller v. Ratterman*, 47 Ohio St. 141; 43 Am. & Eng. R. Cas. 339.

2. *Williams v. Parker*, 136 Mass. 206; 6 Am. & Eng. Corp. Cas. 566.

3. *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 184; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; 16 Am. & Eng. R. Cas. 408.

4. *Bradley, J.*, in *Union Pac. R. Co. v. U. S.*, 99 U. S. 402. In *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736, *Peters, C. J.*, defines

mous with "net income,"<sup>1</sup> or "surplus earnings."<sup>2</sup> But before dividends may be declared there should be deducted from the net earnings an amount sufficient to pay interest on the debts of the corporation and to supply the needs of a sinking fund, if one has been established.<sup>3</sup>

(b) **Capital.**—As a general rule, capital of the corporation is not subject to preference. Even upon dissolution the general rule is that the preferred have no seniority over the common shareholders in the distribution of assets and capital.<sup>4</sup> Still, it has been held that upon a division of the assets guaranteed stockholders are entitled to be paid therefrom to the exclusion of others.<sup>5</sup> And if the general law governing the dissolution of corporations provides that the surplus funds shall be divided among the common stockholders "After payment of the preferred stockholders," the latter are entitled to preference in the distribution of capital, and the fact that the corporation is being wound up by its officers, and not under the direction of the

the "net earnings" of a railroad as "The gross receipts less the expenses of operating the road to earn such receipts." See further for definition: *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; 10 Am. & Eng. Corp. Cas. 231; *N. Y., etc., R. Co. v. Nickals*, 119 U. S. 296; *Salisbury v. Metropolitan R. Co.*, 22 L. T., N. S. 839; *Colt-ness Iron Co. v. Black*, 51 L. J., Q. B. 626; *Corry v. Londonderry, etc., R. Co.*, 29 Beav. 263.

1. *Phillips v. Eastern R. Co.*, 138 Mass. 122; 22 Am. & Eng. R. Cas. 247; *People v. Niagara Co.*, 4 Hill (N. Y.) 23. Compare *Park v. Grant Locomotive Works*, 40 N. J. L. 114; 10 Am. & Eng. Corp. Cas. 231.

2. *Williams v. Western Union Tel. Co.*, 93 N. Y. 191; 3 Am. & Eng. Corp. Cas. 139.

3. *Belfast, etc., R. Co. v. Belfast*, 77 Me. 445; 23 Am. & Eng. R. Cas. 736.

4. In *Griffith v. Paget*, 6 Ch. Div. 511, Sir George Jessel, M. R., states as follows, the reason for the prevailing rule on this point, using the term "partnership" in its English sense of associated enterprise in general: "Therefore, if there were no provision to be found anywhere, you would distribute the assets in proportion to the capital, and the mere arrangement for the division of profits *inter se* during the continuance of the partnership would have no direct bearing on the division of the capital, as distinguished from profits earned up to the time of the dissolution, after the dissolution of the company." See also *McGregor v. Home*

*Ins. Co.*, 33 N. J. Eq. 181; *In re London India Rubber Co.*, L. R., 5 Eq. 519; *In re Bridgewater Nav. Co.*, L. R., 14 App. 525; 32 Am. & Eng. Corp. Cas. 586.

5. *Gordon v. Richmond, etc., R. Co.*, 78 Va. 501; 22 Am. & Eng. R. Cas. 33; *In re Bangor, etc., Slate Co.*, L. R., 20 Eq. 59. In the latter case preferential shares were issued under a resolution providing for interest and bonus "Before any dividend, interest or other money is payable to the original shareholders." The court said: "It is clear to me that the articles of association did authorize the creation of preference shares, having such privileges as the company should think fit, including a preference in every respect, both as to dividend and as to capital; and it seems highly probable that unless a company could give such preference, they would frequently be unable to raise the money they require for the undertaking. Then the only remaining question is whether they have exercised their power in such a manner as to give a preference as to capital as well as dividend. That depends upon the resolution of April, 1863, and, from the terms of that resolution, I am quite clear that the power was executed, and that a priority was given to the new shareholders. The surplus assets must therefore be distributed among the preference shareholders, *pro rata*, in repayment of their capital and interest, in accordance with the resolution of April, 1863, in priority to the ordinary shareholders."

court, does not alter the rights of the parties, nor change the method of distribution.<sup>1</sup>

(3) *Payment of Arrears*.—While, as above stated, it is the rule that preferred dividends are payable only in case that the net profits allow,<sup>2</sup> it is also generally true that where the accumulated earnings at any period of distribution are insufficient for that purpose, the arrears must be paid out of subsequent profits.<sup>3</sup> Moreover, acquiescence in the declaration of a dividend on common shares while there is an arrearage on the preferred is not a

1. *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181.

2. See *supra*, this title, *Preferred Dividends*.

3. *Crauford v. North Eastern R. Co.*, 3 Jur. N. S. 1093; *Sturge v. E. N. R. Co.*, 31 Eng. L. & Eq. 406; *Stevens v. South Devon R. Co.*, 9 Hare 313; 12 Eng. L. & Eq. 229; *Matthews v. Great Northern R. Co.*, 5 Jur. N. S. 284; *Corry v. Londonderry, etc., R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. 358. *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 173; 4 Am. & Eng. R. Cas. 265. In this case the court says: "The contract is explicit as to the amount and the source out of which the dividends shall be paid, and the times when payable annually are also designated. The design evidently was that the stockholders should realize ten per cent. each year, payable semi-annually, upon the investment actually made. As they were entitled to receive such dividends from the net earnings and to have ten per cent. upon the investment, and this was absolutely guaranteed, it necessarily follows that in the event that such earnings should not reach the amount, or at any time failed, the dividends must afterward be paid from the net earnings when earned and received by the company. The reasonable and fair interpretation of the contract is, that the dividends were not only to be preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits to be paid as arrears, before any other dividends were divided upon the common stock. The doctrine that preference shareholders are entitled to be first paid the amount of dividends guaranteed, and of all arrears of dividends and interest, before the other shareholders are entitled to receive anything, and although they can receive no profits where none are earned, yet as soon as there are profits

to divide they are entitled to the same, is fully supported by authority."

In *Henry v. Great Northern R. Co.*, 1 De G. & J. 606, Lord Justice Knight Bruce thus illustrated the rule: "A and B and C are partners in a trade, each having contributed an equal share of capital, but they agree that out of the profits 5 per cent. shall preferably and in the first instance be paid to A on his portion of the capital. The division of the profits among them is agreed to be and is periodically made. At one of the periodical divisions the profits fall short of a sufficiency to pay this amount to A from the time to which out of the profits his interest had previously been paid. Is the deficiency not afterwards to be made good to him from profits more than adequate to answer it? I have heard no reason why not. If, indeed, such a thing is prohibited by the terms of the contract, they must, of course, be abided by. Is there any such prohibition in the present instance? As it seems to me, clearly not. A part of the argument for the defendants having been illustrated by the figure of the filling of a cup, I may be excused for suggesting another case. Let us suppose a right to have a tun of wine from a vineyard. Is that the same merely as a right to have a tun of wine from a vintage? I do not think so. In the former case the deficiency of an earlier would have to be supplied by a later vintage; not so, possibly, in the other. Here, as I apprehend, the plaintiffs have the vineyard, and not merely the chance of a particular vintage to look to."

See also *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. Rep. 156; *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 233; 9 Am. & Eng. R. Cas. 639; *Prouty v. Michigan Southern, etc., R. Co.*, 1 Hun (N. Y.) 655; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Webb v. Earle*, L. R., 20 Eq. 556.

waiver of the right to such arrears at a subsequent period<sup>1</sup> or to arrears in general.<sup>2</sup> Still where the terms under which preferred stock is issued imply that the entire net profits of a year shall be paid out in dividends, arrearages cannot be carried over.<sup>3</sup> So a deficiency resulting from the fact that the amount payable in dividends on preferred stock has been limited by statute, cannot be supplied in a subsequent year.<sup>4</sup> Interest may be recovered on arrears where they are payable<sup>5</sup> and after the arrears have been satisfied common and preferred stock share equally.<sup>6</sup> The English Companies Clauses Act forbids the payment of arrears.<sup>7</sup> An assignment of preferred stock carries with it the undeclared and undivided arrears of dividends.<sup>8</sup>

**2. Interest Bearing Stock.**—Closely allied to preferred stock is another and at present less common variety issued by corporations with a promise to pay thereon a certain rate of interest. Such an issue of shares is generally valid and the promise enforceable,<sup>9</sup> and the owner of such stock cannot be compelled to

1. *Matthews v. Great Northern R. Co.*, 28 L. J. Ch. 375. Compare *Dent v. London Tramways Co.*, 16 Ch. Div. 344.

2. *Smith v. Cork, etc., R. Co.*, L. R., 5 Ir. Rep. Eq. 65.

3. *Hazeltine v. Belfast, etc., R. Co.*, 79 Me. 411; 19 Am. & Eng. Corp. Cas. 456; 1 Am. St. Rep. 330. In this case the by-law provided: "Dividends on the preferred stock shall first be made semi-annually from the net earnings of the road, not exceeding six per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made upon the non-preferred stock up to a like per cent. *per annum*; and should a surplus then remain of net earnings, after both of said dividends in any one year, the same shall be divided pro rata on all the stock."

In construing the above, the court said: "Had the by-law merely provided that the preferred shares should be entitled to a dividend of six per cent. annually, when earned, the arrearages of one year would have been payable out of the earnings of subsequent years, and there would have been no occasion for the present controversy between the two classes of stockholders. There is no question among the authorities on this point. Jones on Railways, § 620; Morawetz on Corporations (2d ed.), § 458; Cook on Stock and Stockholders, § 272. The latter author, in a note to section 269 of his work, published in 1887, cites *Belfast, etc., R. Co. v. Belfast*, 77 Me. 455; 23 Am. &

Eng. R. Cas. 736, *supra*, as inconsistent with the general rule, but states the ground for the variance: that inasmuch as the by-law implies that the entire net earnings of each year should be paid out in dividends, a deficiency of preferred dividend in any year could not be made up in subsequent years." Compare *Gordon v. Richmond, etc., R. Co.*, 78 Va. 501; 22 Am. & Eng. R. Cas. 33.

4. *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 233; 9 Am. & Eng. R. Cas. 639.

5. *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; 4 Am. & Eng. R. Cas. 265. But compare *Corry v. Londonderry, etc., R. Co.*, 29 Beav. 263.

6. *Bailey v. Hannibal, etc., R. Co.*, 1 Dill. (U. S.) 174; 17 Wall. (U. S.) 96; *Allen v. Londonderry, etc., R. Co.*, 25 W. R. 524.

7. 26 & 27 Vict., ch. 118, § 14.

8. *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; 4 Am. & Eng. R. Cas. 265; *Jermain v. Lake Shore, etc., R. Co.*, 91 N. Y. 483; 1 Am. & Eng. Corp. Cas. 111; *Manning v. Quick-silver Min. Co.*, 24 Hun (N. Y.) 361; *Hyatt v. Allen*, 56 N. Y. 553.

But it is otherwise if the dividend is declared prior to the assignment. *State v. Cleveland, etc., R. Co.*, 6 Ohio St. 489.

9. *Waterman v. Troy, etc., R. Co.*, 8 Gray (Mass.) 433; *Cunningham v. Vermont, etc., R. Co.*, 12 Gray (Mass.) 411; *Barnard v. Vermont, etc., R. Co.*, 7 Allen (Mass.) 512; *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395; *Rut-*

accept bonds of the corporation in lieu of interest.<sup>1</sup> So, railroad companies may invite subscriptions by guarantying interest on the par value of the shares from the time the latter are fully paid up until some particular stage is reached in the prosecution of the enterprise;<sup>2</sup> but an indefinite arrangement, fixing no mode or time of payment, is invalid.<sup>3</sup> And in general, the contract, in order to be lawful, must be construed as providing for the payment of interest only out of corporate profits; a promise to pay interest when the company has no resources for payment except its capital is *ultra vires*, and will not be enforced.<sup>4</sup> In *England*,

land, etc., *R. Co. v. Thrall*, 35 Vt. 536; *Richardson v. Vermont, etc.*, R. Co., 44 Vt. 613.

In *Wright v. Vermont, etc.*, R. Co., 12 Cush. (Mass.) 68, Shaw, C. J., in speaking of such an issue of stock, says: "Supposing the original vote of the stockholders should be regarded as declaring a general right of the stockholders, previously to paying in any installments on their shares, that each should be entitled to interest, to be computed on his payments from the time of each payment to the time when the railroad should go into operation, and be in a condition to earn income and pay dividends, this would be equitable, because it would put stockholders on an equal footing, whether they should pay earlier or later. It would encourage capitalists to advance their money early, to meet the exigencies of the company before it could enjoy any income; and it seems right that the use of such capital should be paid for as a common charge on all."

Such certificates constitute the owner a full stockholder. *McLaughlin v. Detroit, etc.*, R. Co., 8 Mich. 99.

In *Ohio v. Cleveland, etc.*, R. Co., 6 Ohio St. 490, the directors had passed the following resolution: "The treasurer is directed to allow interest on installments *as paid*, payable in stock, and carry to the account of each stockholder the interest annually, and, when the amount is sufficient, to issue stock certificates in payment." The interest was allowed to those who made payments on their subscriptions subsequent to the passage of the resolution, and the court held that those who had paid their subscriptions before the resolution had been passed were also entitled to claim its benefits and to demand the payment of interest.

1. *McLaughlin v. Detroit, etc.*, R. Co., 8 Mich. 99.

2. *Milwaukee, etc.*, R. Co. *v. Field*,

12 Wis. 340; *Racine Co. Bank v. Ayres*, 12 Wis. 512; *Rutland, etc.*, R. Co. *v. Thrall*, 35 Vt. 536.

But a contract between the corporation and the subscriber, that the latter "shall have the privilege of paying in at any time the whole or any part of his subscription and shall receive interest thereon until the road goes into operation," is binding only from the happening of the event therein named, and does not entitle the subscriber to receive interest until the completion of the enterprise. *Waterman v. Troy, etc.*, R. Co., 8 Gray (Mass.) 433.

And where the promise is to pay interest "until the road is completed," the stockholder is not entitled to interest beyond the time when the enterprise, as originally designed, is completed. The fact that an extension of the road to other points is subsequently authorized will not extend the interest bearing period. *Pittsburg, etc.*, R. Co. *v. Allegheny Co.*, 63 Pa. St. 126.

In *Miller v. Pittsburg, etc.*, R. Co., 40 Pa. St. 239; 80 Am. Dec. 570, it was held that where a railroad company had received subscriptions on a guaranty that they would pay interest on stock "as soon as paid," until the road was finished, interest would not accrue until the stock was fully paid, and where but a small part of the stock had been paid for by the defendant, he could not in a suit against him for the balance set up the non-payment of interest on his stock by the company as a breach of condition.

3. *Wright v. Vermont, etc.*, R. Co., 12 Cush. (Mass.) 75.

4. *Painesville, etc.*, R. Co. *v. King*, 17 Ohio St. 534; *Cunningham v. Vermont, etc.*, R. Co., 12 Gray (Mass.) 411; *Lockhart v. Van Alstyne*, 31 Mich. 75; 18 Am. Rep. 156; *Troy, etc.*, R. Co. *v. Tibbits*, 18 Barb. (N. Y.) 307; *Pittsburg, etc.*, R. Co. *v. Allegheny*



it is even held that payments of interest by the directors out of the capital renders them jointly and severally liable for the amounts so paid.<sup>1</sup>

**3. Special Stock.**—The statutes of *Massachusetts* provide for a peculiar variety known as "special stock."<sup>2</sup> Its characteristics have thus been summarized: "It is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in certificates; the corporation is bound to pay a fixed half-yearly sum, or dividend upon it, as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed."<sup>3</sup> It differs also from preferred stock in being payable absolutely and without regard to corporate earnings.<sup>4</sup> The statute provides for the issue of special stock at a meeting duly called for that purpose and upon a vote of three-fourths of the general stockholders.<sup>5</sup> Hence, it has been held that a vote to issue such stock at a meeting called to consider the matter of preferred shares, is invalid,<sup>6</sup> and that it must affirmatively appear from the record that the required number voted for the issue.<sup>7</sup> The holder of such stock which has been illegally issued cannot, by estoppel or otherwise, become a member in respect thereto,<sup>8</sup> but he may rescind his contract to accept it and prove the amount of his claim against the insolvent estate of the corporation,<sup>9</sup> even though such insolvency occurs before the rescission.<sup>10</sup>

**4. Other Kinds.**—Some corporations issue what they term "treasury stock."<sup>11</sup> In *England* the Companies Clauses Act pro-

Co., 63 Pa. St. 126; *McDougal v. Jersey, etc., Co.*, 2 Hen. & M. (Va.) 528; *Salisbury v. Metropolitan R. Co.*, 38 L. J., Ch. N. S. 249; *In re National Funds Assur. Co.*, 10 Ch. Div. 118.

In *Pittsburg, etc., R. Co. v. Allegheny Co.*, 63 Pa. St. 126, it is held that the payment of interest on stock before earnings are made is within the inhibition of a charter against the payment of dividends out of capital.

1. *In re National Funds Assur. Co.*, 10 Ch. Div. 118.

2. *Mass. Pub. Stats.*, ch. 106, §§ 42, 61.

3. *Allen, J.*, in *American Tube Works v. Boston Machine Co.*, 139 Mass. 9.

4. *Williams v. Parker*, 136 Mass. 204; 6 Am. & Eng. Corp. Cas. 566; *Allen v. Herrick*, 15 Gray (Mass.) 274.

5. *Mass. Pub. Stats.*, 1870, ch. 224, § 25.

6. *American Tube Works v. Boston Machine Co.*, 139 Mass. 5, citing *Peo-*

*ple's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Wiggin v. Freewill Baptist Church*, 8 Met. (Mass.) 310; *In re Bridport Old Brewery Co.*, L. R., 2 Ch. 191.

7. *American Tube Works v. Boston Machine Co.*, 139 Mass. 5, citing *Morrison v. Lawrence*, 98 Mass. 219; *Andrews v. Boylston*, 110 Mass. 214; *Judd v. Thompson*, 125 Mass. 553.

8. *American Tube Works v. Boston Machine Co.*, 139 Mass. 5.

9. *American Tube Works v. Boston Machine Co.*, 139 Mass. 5; *Reed v. Boston Machine Co.*, 141 Mass. 454; 12 Am. & Eng. Corp. Cas. 153.

10. *Reed v. Boston Machine Co.*, 141 Mass. 454; 12 Am. & Eng. Corp. Cas. 153.

11. Stock transferred to the company itself, before the whole of its capital stock has been issued, and sold under the name of "treasury stock," at prices greatly below par, must, though pur-

vides for the creation of "debenture stock," which is a charge on the net earnings and profits of the corporation.<sup>1</sup> The phrase "deferred stock," which appears often to be used as a synonym for common stock, is applied to that variety whose holders are entitled to no dividends until some other class of stockholders is paid.<sup>2</sup> Overissued or spurious stock is that issued in excess of the authorized capital, and, therefore, void,<sup>3</sup> while watered or fictitious stock is that which has been issued as fully paid up, when in fact it is not.<sup>4</sup>

**III. ISSUE<sup>5</sup>—1. General Considerations.**—The issue of stock, while one of the most important of corporate functions, is not an essential one.<sup>6</sup> The right to issue is a franchise held in trust for the stockholders, and must generally be exercised for the benefit of all.<sup>7</sup> But where the allotment of shares is discretionary with commissioners, they may apportion to some and exclude others.<sup>8</sup> It seems that a corporation has implied authority to reissue shares of its own stock which have been accepted in payment of or as security for debts due it,<sup>9</sup> and such a reissue is not a creation of new stock within the meaning of charter clauses relating to original subscriptions.<sup>10</sup> Where a certificate is issued to a

porting to be fully paid up, be deemed to be paid only to the extent of the actual price, the holders being liable for the balance. *Alling v. Wenzel*, 133 Ill. 264; 30 Am. & Eng. Corp. Cas. 133.

1. In *Attree v. Hawe*, 9 Ch. Div. 337, James, L. J., thus discusses and construes the statutory provision: "The company may, from time to time, raise money by the creation and issue, at such times, on such terms, subject to such conditions, and with such rights and privileges as the company thinks fit, of stock, and may attach to the stock so created such fixed and perpetual preferential interest as it may think fit, not exceeding the prescribed limit. By the 23d section it is directed that the debenture stock, with the interest thereon, shall be a charge on the undertaking prior to all shares and stock of the company, and shall be transmissible and transferable like other stock of the company, and shall in all other respects have the incidents of personal estates. By the 24th section it is provided that the interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, ordinary, preference or guaranteed. So far, it is clear that the stock is of the same nature as other stock of the company, only with the important difference

that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances, to take possession of a single item of the property of the company in specie, whether real or chattel."

2. Cook, *Stock and Stockholders*, §9.  
3. See *infra*, this title, *Issue—Overissue; Irregular Issue*; and there note the distinction between an over-issue and an irregular increase.

4. See *infra*, this title, *Issue of Watered Stock*.

5. See *supra*, this title, *Certificates of Stock; Preferred Stock*.

6. Subscription and payment are sufficient for the validity of corporate organization or the transfer of stock. *State v. Butler*, 86 Tenn. 614; 21 Am. & Eng. Corp. Cas. 289; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217.

7. *Reese v. Bank of Montgomery*, 31 Pa. St. 78; 72 Am. Dec. 726.

8. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

9. *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

10. *City Bank v. Bruce*, 17 N. Y. 507.

legatee under a will giving the administrator absolute power to assign the property, the corporation is not liable for failing to indicate the trust limitation upon the legatee's title.<sup>1</sup>

**2. Methods.**—There are two general methods of issuing stock; first, in pursuance of the contract of subscription,<sup>2</sup> and, second, by stock dividend.<sup>3</sup>

**3. Irregular Issue.**—It is said that the power to issue stock is not to be extended by implication.<sup>4</sup> Accordingly the absence of signatures of directors, when required, has been held to invalidate the issue of certificates,<sup>5</sup> and the same ruling has been made of an allotment effected at a meeting of which not all the directors were notified.<sup>6</sup> But the validity of the issue is not affected by failure to complete the enterprise and pay for the stock,<sup>7</sup> nor by the existence of vacancies in the board of directors.<sup>8</sup> Stock cannot be issued after the purpose for which it was authorized has ceased to be attainable.<sup>9</sup> A wrong apportionment of shares cannot be corrected by issuing more than the fixed number,<sup>10</sup> nor is such apportionment void,<sup>11</sup> but a subscriber who receives more than his proportion holds the excess in trust for the others whose allotment is deficient.<sup>12</sup> Stock issued in violation of the charter is void,<sup>13</sup> but where the power to effect the issue exists, those who have acquiesced therein cannot raise the objection of irregularity in the proceedings and thus prejudice the rights of creditors.<sup>14</sup> Moreover, an issue originally unauthorized may be rendered valid by a subsequent resolution<sup>15</sup> of the stockholders or by their acquiescence,<sup>16</sup> and a purchaser may waive irregularities in the issue by dealing with his vendor as the actual owner of the shares.<sup>17</sup> A fraudulent issue of shares will be set aside in equity.<sup>18</sup>

**4. Overissue or Ultra Vires Issue**<sup>19</sup>—(See also OFFICERS, vol. 17, p. 3; STOCKHOLDERS, vol. 23).—Stock sought to be created

1. *Smith v. Nashville, etc., R. Co.* (Tenn. 1892), 36 Am. & Eng. Corp. Cas. 278.

2. See STOCKHOLDERS, vol. 23; SUBSCRIPTION.

3. See DIVIDENDS, vol. 5, p. 738.

4. *Covington, etc., Bridge Co. v. Sargent*, 1 Cin. Super. Ct. (Ohio) 354.

5. *Holbrook v. Fauguier, etc., Turnpike Co.*, 3 Cranch (C. C.) 425. *Compare Hill v. Jewett Pub. Co.*, 154 Mass. 172.

6. *In re Portugese Copper Consolidated Min. Co.* 42 Ch. Div. 160.

7. *Savage v. Ball*, 17 N. J. Eq. 142.

8. *In re Scottish Petroleum Co.*, 23 Ch. Div. 413; 1 Am. & Eng. Corp. Cas. 193.

9. *Richmond's Case*, 4 K. & J. 305.

10. *Smith v. North American Min. Co.*, 1 Nev. 423.

11. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

12. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

13. *People v. Sterling, etc., Mfg. Co.*, 82 Ill. 457. See also *infra*, this title, *Overissue or Ultra Vires Issue*.

14. *Handley v. Stutz*, 139 U. S. 417; 34 Am. & Eng. Corp. Cas. 624; *Stutz v. Handley*, 41 Fed. Rep. 531; *Chubb v. Upton*, 95 U. S. 667; *Veeder v. Mudgett*, 95 N. Y. 295; 6 Am. & Eng. Corp. Cas. 485.

15. *Sewell's Case*, L. R., 3 Ch. 131.

16. *Richmond's Case*, 4 K. & J. 305; *Ex parte Barclay*, 1 Jur. N. S. 1045.

17. *Reed v. Hayt*, 109 N. Y. 659; 21 Am. & Eng. Corp. Cas. 295.

18. *Bailey v. Champlain Min., etc., Co.*, 77 Wis. 453.

19. Apropos of the term "over-issue", Judge Seymour D. Thompson has the following to say, in an article on "Fraudulent Overissues of Corporate Shares," in 36 Cent. Law Jour-

in excess of the legalized capital is void, even in the hands of *bona fide* holders;<sup>1</sup> and the subscription therefor cannot be collected by the corporation, or by an assignee thereof, occupying the place of the corporation.<sup>2</sup> Holders of such unauthorized stock are not estopped to set up its invalidity as a defense to an action in the interest of creditors brought against them, to recover the balance unpaid thereon, by the fact that they attended the meeting at which it was voted to issue the same, or that they received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock.<sup>3</sup> Such unauthorized issue may afterwards be rendered valid by a duly authorized increase.<sup>4</sup> But while the holder of overissued shares can realize nothing thereon he has a remedy against the corporation in damages,<sup>5</sup> the measure of which has been diversely

nal, p. 52: "It should be observed, at the outset, that notwithstanding the caption which the writer has placed at the head of this article there can, in strictness, be no such thing as a fraudulent overissue of shares. The reason is that there can be no overissue of shares at all. The capital of every stock corporation is fixed either by its charter or by its articles of incorporation, which, under the general statute permitting its organization, take the place of a charter granted by special act of the legislature. Now, if all the shares thus fixed have been issued, the power of the company in a primary sense (unless it increases its capital in the mode permitted by its charter or governing statute), and the power of its officers in a secondary sense, to issue any further shares, is exhausted; so that, if its officers thereafter assume to issue any further shares, they fail of their purpose by reason of mere want of power. The pretended shares so issued have been called *ultra vires* shares. There being no power to issue them, they are not shares at all, but are only the pretended similitude of shares. What then, is meant by the common expression, the fraudulent overissue of shares, is merely the fraudulent overissue of certificates purporting to represent shares."

1. *Scovill v. Thayer*, 105 U. S. 143; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Stace's Case*, L. R., 4 Ch. App. 682, note.

2. *Clark v. Turner*, 73 Ga. 1. See also *Page v. Austin*, 10 Can. Sup. Ct. 132.

But where a bill was filed against a corporation by the holder of shares overissued in violation of law, praying that their legality might be inquired into; that if they should be held to be illegal the plaintiff might be repaid the amount paid by him for the shares, and the corporation might be enjoined, pending the suit, from disposing of so much of its property as would indemnify the plaintiff, and that a receiver of that amount might be appointed; it appearing that the money received by the corporation had not been kept separate from its general funds, and could not be traced and identified, it was held that the injunction could not be granted nor the receiver be appointed. *Whelpley v. Erie, etc., Co.*, 6 Blatchf. (U. S.) 271.

So where the consideration for a promissory note was expressed in the note to be the stock of a railway corporation, and the directors of the corporation subsequently made an illegal and unauthorized increase in the stock of the company, which was not distinguishable from the valid stock, it was held that such illegal increase would constitute a defense to an action upon the note. *Merrill v. Gamble*, 46 Iowa 646; *Merrill v. Beaver*, 50 Iowa 404.

3. *Scovill v. Thayer*, 105 U. S. 143; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Sewell's Case*, 3 Ch. App. 131. But see *Fisk v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 513; *O'Brien v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 568.

5. *Allen v. South Boston R. Co.*, 150 Mass. 207; 15 Am. St. Rep. 185; *Tome v. Parkersburg, etc., R. Co.*, 39 Md. 36.

viewed as the market value of the stock at the time of demanding transfer,<sup>1</sup> or as the price paid therefor with interest.<sup>2</sup>

A transferee of overissued shares cannot assert against the corporation rights which he could not assert in the case of genuine stock because of his indebtedness to the corporation and a consequent lien on his stock.<sup>3</sup>

The officers of a corporation also are personally liable not only to the immediate purchasers from them of spurious stock falsely and fraudulently certified by them, but to any subsequent purchaser buying upon the faith of the false certificate and sustaining damage thereby.<sup>4</sup> And the injured party may recover from

17 Am. Rep. 540; *Western, etc., R. Co. v. Franklin Bank*, 60 Md. 36; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Bruff v. Mali*, 36 N. Y. 206; *Titus v. Great Western Turnpike Co.*, 61 N. Y. 237; *Kisterbock's Appeal*, 127 Pa. St. 601; *Bank of Kentucky v. Schuylkill Bank*, Par. Eq. Cas. (Pa.) 180; *Willis v. Philadelphia, etc., R. Co.*, 6 W. N. C. (Pa.) 461; *Willis v. Fry*, 13 Phila. (Pa.) 33; *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *Cartwright v. Dickinson*, 88 Tenn. 476; 17 Am. St. Rep. 910.

Where a corporation permits its agent to sell stock covered by certificates, where there is stock standing to their credit sufficient to cover such certificates, it is bound to make them good to the extent of any shares owned by the corporation within the limit of its capital stock, and such unsold shares should be applied to the oldest outstanding certificate of that character. *New York, etc., R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534.

1. *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *Willis v. Philadelphia, etc., R. Co.*, 6 W. N. C. (Pa.) 461.

In *Allen v. South Boston R. Co.*, 150 Mass. 207; 15 Am. St. Rep. 185, the court says: "The defendant cannot be compelled to issue new certificates, or to recognize the old ones as valid, because to do so would cause an over-issue of its capital stock, but it is liable in damages. In assessing damages, the superior court has taken the value of the stock to be its market value at the time when the defendant first refused to recognize the stock as valid, and to permit a transfer of it. This would be the rule of damages if the certificates were valid. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 49 Am. Dec. 306; *Wyman v. Ameri-*

*can Powder Co.*, 8 Cush. (Mass.) 168. We think that the same rule of damages applies to these certificates. *In re Railroad Co.*, L. R., 3 Q. B. 584."

2. *Tome v. Parkersburg, etc., R. Co.*, 39 Md. 36; 17 Am. Rep. 540.

3. *Mt. Holly Paper Co's Appeal*, 99 Pa. St. 513; *Sharswood, C. J.*, there observes: "It is said, however, that these certificates, fraudulently issued, were null and void. They evidenced no stock. It is asked, triumphantly, How can there be a lien on that which had no existence? The argument is certainly ingenious, but it rests upon a misapprehension of the rights of the appellants. Their claim on the company was not, indeed, on the stock. It was a claim to be indemnified for the fraudulent acts of the officers of the company, from which they allege that they have suffered damage. They might have demanded a transfer, and upon refusal might have brought an action for damages. The defense to such an action could have been Morton's indebtedness. If, instead of taking that course, they had sued for damages for the fraudulent act, they could still have been met by the same plea. If you had been in possession of valid certificates, you could not have recovered for a refusal to allow you a transfer; how, then, can you recover on these false and fraudulent certificates? This would clearly be inequitable; and this proceeding is in a court of equity."

4. *Shotwell v. Mali*, 38 Barb. (N. Y.) 445; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578; *Seizer v. Mali*, 41 N. Y. 619; *aff'd* 6 Abb. Pr. (N. Y.) 270, note, and *reversing* 32 Barb. (N. Y.) 76; 11 Abb. Pr. (N. Y.) 129; *Bruff v. Mali*, 36 N. Y. 200; *Fairbanks v. Humphreys*, 182 B. D. 54. See also *National Exchange Bank v. Sibley*, 71 Ga. 726.

the officers in an action against them, either jointly with the corporation, or separately.<sup>1</sup> The holder of overissued stock has no right of action if he receives it from an officer who is in fact his agent,<sup>2</sup> or if the certificates are signed by less than the required number of officers.<sup>3</sup> But incapacity to create the spurious stock would be no defense to an action.<sup>4</sup> Spurious certificates form a cloud upon the title of genuine stockholders which equity will remove.<sup>5</sup> The transfer of illegally issued stock will be enjoined,<sup>6</sup> and the corporation<sup>7</sup> or a stockholder<sup>8</sup> may sue for its cancellation. There is no recourse against the *bona fide* vendor of overissued stock.<sup>9</sup>

**5. Issue of Watered Stock.**<sup>10</sup>—The issue of shares fictitiously paid up has often been condemned by the courts,<sup>11</sup> and declared to be *ultra vires*.<sup>12</sup> Constitutional and statutory provisions in many of the states prohibit such an issue of stock, and this prohibition is designed to protect the public as well as the stockholders.<sup>13</sup> According to some of the authorities the stock so

1. Shotwell v. Mali, 38 Barb. (N. Y.) 445; Bruff v. Mali, 36 N. Y. 200; National Exchange Bank v. Sibley, 71 Ga. 726.

2. Wright's Appeal, 99 Pa. St. 425.

3. Holbrook v. Fauquier, etc., Turnpike Co., 3 Cranch (C. C.) 425. Compare Granger's L. Ins., etc., Co. v. Kamper, 73 Ala. 341; 6 Am. & Eng. Corp. Cas. 497; Hill v. Jewett Pub. Co., 154 Mass. 172, and cases cited.

4. New York, etc., Co. v. Schuyler, 34 N. Y. 30.

5. New York, etc., Co. v. Schuyler, 17 N. Y. 592; Ticknor v. Kenniston, 41 N. H. 271.

6. Sherman v. Clark, 4 Nev. 138; 97 Am. Dec. 516; Kent v. Quicksilver Min. Co., 78 N. Y. 159.

7. New York, etc., R. Co. v. Schuyler, 17 N. Y. 592. Compare Lehigh Valley R. Co. v. McFarland, 31 N. J. Eq. 730.

8. Wood v. Union, etc., B'ld'g Assoc., 63 Wis. 9.

9. People's Bank v. Kurtz, 99 Pa. St. 334; 44 Am. Rep. 112; State v. North Louisiana, etc., R. Co., 34 La. Ann. 947.

10. The subject of watered stock, in view of its interest and importance, will receive separate and independent treatment in a separate article, viz., WATERED STOCK.

11. "It is not claimed, and could not be claimed, that the corporation or its directors could create any valid stock by issuing the same without any consideration. The directors, assuming to issue stock in that way, would perpetrate a wrong upon the corporation

and its stockholders, and a fraud upon every person who took such stock as full-paid stock, relying upon the appearances and deceived thereby." Earl, J., in Barnes v. Brown, 80 N. Y. 534; citing Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Bruff v. Mali, 36 N. Y. 200; Morgan v. Skiddy, 62 N. Y. 319; Shotwell v. Mali, 38 Barb. (N. Y.) 445. See also Oliphant v. Woodburn Coal, etc., Co., 63 Ia. 338, where the court quotes with approval the following from Green's Brice's Ultra Vires: "The sale of stock in a corporation by the directors, at a less rate than the price fixed in the charter, is a fraud upon the law and the stockholders;" citing Sturges v. Stetson, 1 Biss. (U. S.) 246; Fosdick v. Sturges, 1 Biss. (U. S.) 255; Mann v. Cooke, 20 Conn. 188; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 513; O'Brien v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 568; Neuse River Nav. Co. v. Newbern, 7 Jones (N. Car.) 275; Osgood v. King, 42 Iowa 478. Compare Tobey v. Robinson, 99 Ill. 228; Ex parte Daniell, 1 De G. & J. 372.

12. "It is not a question of good faith, or of honest intention, or of wise policy, or skillful or discreet management on the part of the directors." Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 513. See also Ex parte Daniell, 1 De G. & J. 372; Bunn's Case, 2 De G., F. & J. 275; West Cornwall R. Co. v. Mowatt, 12 Jur. 407.

13. Fitzpatrick v. Dispatch Pub. Co., 83 Ala. 604; 19 Am. & Eng. Corp. Cas.

issued is void,<sup>1</sup> while others regard it as voidable at most,<sup>2</sup> and not necessarily fraudulent.<sup>3</sup> An agreement to issue shares for a grossly disproportionate price is fraudulent and void,<sup>4</sup> and a purchaser thereof may rescind and recover the amount paid.<sup>5</sup> Fraud is established by proving that the stock was issued with knowledge that it exceeded in value the consideration,<sup>6</sup> but the latter is presumed to be adequate,<sup>7</sup> and a mere difference of opinion as to the value of property accepted in exchange for shares will not render their issue fraudulent.<sup>8</sup> It is even held that a corporation is estopped to set up the invalidity of watered stock issued by its directors, though prohibited by the state constitution.<sup>9</sup>

**6. Issue of Stock by Corporate Officers to Themselves.**—Where officers of a corporation have general authority to issue stock under certain prescribed formalities, they may issue it to themselves in the same manner as to others.<sup>10</sup> Moreover, a transaction by which an officer reissues to himself, at par, shares previously issued to another, but reconveyed to the corporation, and standing at a premium, is at most only voidable, and if the stockholders have acquiesced therein, the company cannot compel a surrender of the certificate.<sup>11</sup> But where an officer, who completely controls the board of directors, procures the issue of stock to himself, under pretense of paying a claim, the transaction will be closely scrutinized by the court and set aside upon a showing

423; *Williams v. Evans*, 87 Ala. 725; 30 Am. & Eng. Corp. Cas. 109; *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187; 7 Am. & Eng. R. Cas. 101.

1. *Sturges v. Stetson*, 1 Bliss. (U. S.) 246; *Congress Spring Co. v. Knowlton*, 103 U. S. 49; 14 Blatchf. (U. S.) 364; *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. 518.

2. *Fosdick v. Sturges*, 1 Biss. (U. S.) 255; *Flinn v. Bagley*, 7 Fed. Rep. 785. Compare *Gilman, etc., R. Co. v. Kelly*, 77 Ill. 426; *Campbell v. Morgan*, 4 Ill. App. 100.

3. *Brant v. Ehlen*, 59 Md. 1; *New Haven Horseshoe Nail Co. v. Linden Spring Co.*, 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 71; *Douglass v. Ireland*, 73 N. Y. 100; *Schenck v. Andrews*, 57 N. Y. 133; *Boynnton v. Andrews*, 63 N. Y. 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

4. *State v. Timken*, 48 N. J. L. 87; 12 Am. & Eng. Corp. Cas. 34.

5. *Fosdick v. Sturges*, 1 Biss. (U. S.) 255.

6. *Douglass v. Ireland*, 73 N. Y. 100. 7. *Davis v. Montgomery Furnace, etc., Co.* (Ala. 1890), 8 So. Rep. 496.

8. *Medler v. Albuquerque Hotel, etc., Co.* (N. Mex. 1892), 28 Pac. Rep. 551.

9. *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 496.

10. *Titus v. Great Western Turnpike Road*, 61 N. Y. 237. Compare *Hill v. Jewett Pub. Co.*, 154 Mass. 172.

11. *St. Croix Lumber Co. v. Mittlestadt*, 43 Minn. 91, where the court says: "As those who now complain, and for whose benefit, it is said, this action is prosecuted, acquiesced in these acts for quite a period of time, and, on more than one occasion during the lifetime of Mr. Torinus, after being advised of all that had been done, ratified and approved the same, they cannot now be allowed to assail and cancel the certificate issued to him. The transaction, at most, was voidable, and, if the corporation, or any of its shareholders, desired to repudiate and avoid it, the option so to do should have been exercised within a reasonable time after knowledge. It certainly cannot be done after an express and undisputed ratification;" citing *Kelsey v. National Bank*, 69 Pa. St. 426; *Mt. Washington Hotel Co. v. Marsh*, 63 N. H. 230; *Fleckner v. Bank of U. S.*, 8 Wheat. (U. S.) 338; *Omaha Hotel Co. v. Wade*, 97 U. S. 13; *Indianapolis Rolling Mill Co. v. St. Louis, etc., R. Co.*, 120 U. S. 256.

of unfairness.<sup>1</sup> So, an issue by corporate officers to themselves, immediately after the sale of valuable property and before the declaration of a dividend therefrom, of stock previously unissued, is a breach of duty and will be enjoined.<sup>2</sup> The issue of fictitiously paid-up stock by directors to themselves is especially condemned by the courts.<sup>3</sup> Thus, transactions by which stock is issued to a director for land, at a gross overvaluation,<sup>4</sup> or to an officer who does not pay the full price therefor,<sup>5</sup> or in payment of unaudited accounts for labor performed under contract with the president, who sought to place the shares where they would be held for his benefit,<sup>6</sup> are fraudulent. The acceptance by directors of a worthless consideration for stock issued to one of their number charges them with its full value.<sup>7</sup> An officer who is active in effecting an issue of stock to which he subscribes, cannot afterward recover back the amount paid by him on the ground that the issue was *ultra vires*;<sup>8</sup> but a corporation is not estopped to impeach the validity of an unauthorized issue of shares to himself by its president<sup>9</sup> or secretary.<sup>10</sup>

1. *Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364; 33 Am. & Eng. Corp. Cas. 346.

2. In *Arkansas Valley Agricultural Soc. v. Eichholtz*, 45 Kan. 164; 36 Am. & Eng. Corp. Cas. 79, Green, Commissioner, observes: "The principle of public policy forbids transactions of this kind. It appears from the evidence that the property owned by this corporation had been sold, and the proceeds held by its officers. The assets at the time of the sale belonged to the then stockholders, and the officers and stockholders had no right to subscribe for the remaining stock at par, and enrich themselves to the detriment and loss of the other shareholders. The directors cannot lawfully benefit or favor any particular shareholder or class of shareholders. Every authority possessed by them is a power and discretion in the directors, who are trustees for the benefit of all the shareholders alike, which is to be exercised for the benefit of all of them; 1 Wat. Corp., p. 620; *Harris v. North Devon R. Co.*, 20 Beav. 384. The effort on the part of the officers and directors of a society to obtain the unsubscribed stock at par, when they knew that each share of the stock already issued was worth eighteen times its face value, was clearly a fraud upon the rights of the other stockholders, and a flagrant violation of their duties as directors and officers of such association. The officers and directors of a corporation are trustees of the stock-

holders, and in securing to themselves an advantage not common to all of the stockholders they commit a plain breach of duty. *Kochler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715; *Shorb v. Beaudry*, 56 Cal. 446; 1 Mor. Priv. Corp., § 518. The law does not permit the directors to manage the affairs of a corporation for their personal and private advantage, and this rule, we think, applies to the disposition of unsubscribed stock, as well as to other contracts. The character and relation of directors and officers of a corporation require of them the highest and most scrupulous good faith in their transactions for the corporation and the stockholders. *Hale v. Republican River Bridge Co.*, 8 Kan. 466; *Ryan v. Leavenworth, etc., R. Co.*, 21 Kan. 365; *Hentig v. Sweet*, 33 Kan. 244; 10 Am. & Eng. Corp. Cas. 326."

3. *Osgood v. King*, 42 Iowa 483.

4. *Tutwiler v. Tuscaloosa Coal, etc., Co.*, 89 Ala. 391; 31 Am. & Eng. Corp. Cas. 445.

5. *Huiskamp v. West*, 47 Fed. Rep. 236.

6. *Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364; 33 Am. & Eng. Corp. Cas. 346.

7. *Van Cott v. Van Brunt*, 2 Abb. N. Cas. (N. Y.) 283; *Ottawa, etc., R. Co. v. Black*, 79 Ill. 262.

8. *Banigan v. Bard*, 134 U. S. 291; 31 Am. & Eng. Corp. Cas. 327.

9. *Hill v. Jewett Pub. Co.*, 154 Mass. 172.

10. *Cincinnati, etc., R. Co. v. Citi-*



**IV. INCREASE OF STOCK—1. Authority and Validity—*a*. MUST BE EXPRESSLY AUTHORIZED.**—Neither the increase nor the reduction of the capital stock of the corporation can be effected without express charter authority.<sup>1</sup> Not even the unanimous consent of the members and officers of the corporation can legalize an increase when not so authorized.<sup>2</sup> Nor can the authority to increase be implied from the fact that the power to reduce capital stock has been conferred.<sup>3</sup>

***b*. POWER OF THE LEGISLATURE.**—Since the effect of material legislative changes in a corporate charter is to release sub-

zen's Nat. Bank, 24 Ohio L. J. (Cin. Super. Ct.) 108.

**1. No Implied Authority.**—Granger's L., etc., Ins. Co. v. Kamper, 73 Ala. 325; 6 Am. & Eng. Corp. Cas. 497; Crandall v. Lincoln, 52 Conn. 99; 10 Am. & Eng. Corp. Cas. 149; 52 Am. Rep. 560; Ferris v. Ludlow, 7 Ind. 517; Percy v. Millaudon, 3 La. 569; Oldtown, etc., R. Co. v. Veazie, 39 Me. 571; Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; Mutual L. Ins., etc., Co. v. McKelway, 12 N. J. Eq. 133; Mechanics' Bank v. New York, etc., R. Co., 14 N. Y. 599; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Lathrop v. Kneeland, 46 Barb. (N. Y.) 432; Sutherland v. Olcott, 95 N. Y. 100; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 235; Knowlton v. Congress, etc., Spring Co., 14 Blatchf. (U. S.) 364; Congress, etc., Spring Co. v. Knowlton, 103 U. S. 49; Seignouret v. Home Ins. Co., 24 Fed. Rep. 332; 10 Am. & Eng. Corp. Cas. 131; Scovill v. Thayer, 105 U. S. 148; Droitwich Patent Salt Co. v. Curzon, L. R., 3 Exch. 35; *In re* Financial Corporation, L. R., 2 Ch. 714; *In re* Ebbw Vale Steel, etc., Co., 4 Ch. Div. 827; Society v. Abbott, 2 Beav. 559; Smith v. Goldsworthy, 4 Q. B. 430; 45 E. C. L. 428. *Compare* Eidman v. Bowman, 58 Ill. 444; 11 Am. Rep. 90; Gill v. Balis, 72 Mo. 424; Howell v. Chicago, etc., R. Co., 51 Barb. (N. Y.) 378. Where the act of incorporation merely provides a limitation, and the full amount is not at first issued, an increase within the limit may be effected without further authority. Gray v. Portland Bank, 3 Mass. 364; 3 Am. Dec. 155.

*In* Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 35. Shaw, C. J., says: "Every subscriber has a right to calculate upon a fund computed to be commensurate with the object, and that

each of five thousand shares should be liable, like his own, to a tax of one hundred dollars, in order to produce that effect. A power in the corporation to reduce the shares to one thousand, without the power of taxing them beyond one hundred dollars, would be a power to expend one hundred thousand dollars and no more, upon a project, which, to be profitable or even useful, would require five times that amount."

*In* Finley Shoe, etc., Co. v. Kurtz, 34 Mich. 89, one of the officers of the corporation made an agreement with the defendant in error that the latter should receive shares of stock as remuneration for certain services which he had rendered to the company. The corporation itself took no steps to increase the capital, and as no individual stockholder, offered to assign shares sufficient to redeem the promise, suit was brought to compel an issue of the stock, but it was held that it was not within the implied power of any corporate officer to obligate the corporation to an increase of its capital stock.

Under the English company's act, a resolution providing for the reduction of the capital stock is invalid, unless the regulations of the company have been so ordered as to specifically authorize the reduction. *In re* Patent Invert Sugar Co., 31 Ch. Div. 166.

**2.** People v. Parker Vein Coal Co., 10 How. Pr. (N. Y.) 513.

**3.** Sutherland v. Olcott, 95 N. Y. 93; Lexington, etc., R. Co. v. Chandler, 13 Met. (Mass.) 314. In the latter case it was provided that the number of shares should "be determined from time to time by the board of directors." and Shaw, C. J., held that "these words authorize an enlargement, but could not authorize a reduction of the number."

scribers,<sup>1</sup> it would seem to follow that statutes providing for an increase or reduction of capital stock cannot be effectual, where the power cannot be inferred from the language of the charter, and where there is no reservation of legislative power;<sup>2</sup> but where the power of modifying or repealing charters is reserved by the legislature, or by the state constitution to the legislature, legislative amendments authorizing an increase or reduction may be valid and binding, even though the original charter was silent in regard thereto.<sup>3</sup> So, the necessary legislative power existing, the consent of the directors to its exercise may be sufficient,<sup>4</sup> or the consent of the stockholders;<sup>5</sup> and such consent may be implied from acquiescence.<sup>6</sup>

**2. Who May Direct Increase.**—Until vested with the power, directors alone cannot effect an increase of the capital stock;<sup>7</sup> but while that function is the prerogative of the stockholders, their consent to its exercise by the board of directors may be shown by acquiescence in the acts of the latter.<sup>8</sup> Courts have no power to

1. See STOCKHOLDERS, vol. 23; *Charter Changes*.

2. Changes in the purpose and object of an association, or in the extent of its constituencies or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot on general principles be made without the express or implied consent of the members. *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 236. Compare *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

But an issue of increased stock, without having the articles amended to permit it, does not invalidate the original issue, and purchasers of the increased stock, believing that it was the entire amount, cannot maintain a bill to cancel the original. *Byers v. Rollins*, 13 Colo. 22.

A corporation cannot compel one of its members to submit to the retirement of his stock, nor does he waive the right to object to such proceeding by voluntarily consenting to the sale and retirement of a portion of his shares. *Bergman v. St. Paul Mut., etc., Assoc.*, 29 Minn. 275.

3. *Joslyn v. Pacific Mail S. S. Co.*, 12 Abb. Pr. N. S. (N. Y.) 329; *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429.

4. *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

5. *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 235.

6. *Chicago City R. Co. v. Allerton*, 13 Wall. (U. S.) 235.

**7. Who May Direct Increase.**—*Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Finley Shoe, etc., Co. v. Kurtz*, 34 Mich. 89; *New York, etc., R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534; *affirmed*, 34 N. Y. 30; *In re Wheeler*, 2 Abb. Pr. N. S. (N. Y.) 361; *People v. Parker Vein Coal Co.*, 10 How. Pr. (N. Y.) 543. In *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90, Walker, J., says: "It would be a dangerous power to intrust to directors to increase the stock of the company at pleasure, and to sell it to whom they might choose. Such a power would be liable to great abuse: it would enable directors to perpetuate their positions almost indefinitely on a reserved capital stock of \$400,000; it would enable them, at pleasure, to depress the price of the stock in market; it would deprive the original shareholders of their just and legal right to dividends, if the new stock were issued to persons not already members of the corporation. Other injustice and wrong could be perpetrated, if this should be held to be an incidental power to be exercised by a board of directors of a corporation. The power is such that we will not infer its existence in a charter, unless clearly expressed; and the chapter in this case contains no such language."

8. *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Payson v. Stoeber*, 2 Dill. (U. S.) 428; *Payson v. Withers*, 5 Biss. (U. S.) 269; *Lane's Case*, 1 De G. J. & S. 504; *Sewell's Case*, L. R., 3 Ch. 131.

direct an increase,<sup>1</sup> but where an innocent purchaser would otherwise be deprived of his insignia of membership, and the remedy in damages would be inadequate, the corporation may be compelled to issue certificates to such party, in addition to those already inadvertently granted to another for the same stock.<sup>2</sup>

**3. Methods and Procedure—***a.* IN GENERAL.—A vote of the stockholders at a meeting called for that purpose is the normal method of increasing the capital stock,<sup>3</sup> but a formal vote at such meeting is not indispensable,<sup>4</sup> nor does a vote *per se* constitute an increase.<sup>5</sup> The proceeding has been held to be vitiated by a failure to give notice of the meeting in the precise form required by

In *Bailey v. Champlain Min., etc.*, Co., 77 Wis. 453, a mine owner entered into an agreement with certain parties to organize a corporation, to the capital of which the former was to contribute his mines and receive half of the stock issued, while the latter were to furnish \$20,000 and receive the remaining half of the stock. Through an oversight the articles of incorporation fixed the full capital stock at \$20,000 instead of \$40,000, as was intended. A resolution was subsequently passed increasing the capital stock to \$40,000, and the court held that the fact that such resolution was adopted at a meeting of the directors instead of the stockholders, even if an irregularity, was cured by the assent and acquiescence of the stockholders. *Citing* *Scovill v. Thayer*, 105 U. S. 143; *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513.

1. "When a corporation has issued certificates of stock (which are valid and not void) to the full extent of all the shares which by law and the constitution of the company it may issue, no court can order the issuance of other shares, because in that respect the powers of the corporation have been exhausted." *Beatty, J., in Smith v. North American Min. Co.*, 1 Nev. 429; *citing* *Mechanics Bank v. New York, etc., R. Co.*, 13 N. Y. 599. See also *Baker v. Wasson*, 59 Tex. 140; 53 Tex. 150.

2. An equitable action to compel a company to issue a new certificate of stock can be maintained where an adequate remedy at law for damages would not exist. *Baker v. Wasson*, 59 Tex. 140; *citing* *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 368; 32 Am. Rep. 315. See also *Pratt v. Machinists Nat. Bank*, 123 Mass. 110; *Boston, etc., R. Co. v. Richardson*, 135 Mass. 473;

*Machinists Nat. Bank v. Field*, 126 Mass. 345.

An officer of a corporation cannot obligate it to increase its stock by promising to remunerate an employee by issuing shares in payment of services rendered by him. *Finley Shoe, etc., Co. v. Kurtz*, 34 Mich. 89.

3. *Finley Shoe, etc., Co. v. Kurtz*, 34 Mich. 89.

Where the power is vested in the company, to be exercised by the directors, their action is discretionary, and a resolution "that the capital stock of the ——— company be fixed and limited at ——— dollars, and that a certificate to that effect be properly prepared and sworn to and filed in the office of the county clerk, as required by the General Manufacturer's Law," will be sufficient as to them. *Sutherland v. Olcott*, 95 N. Y. 93.

4. *Payson v. Stoeve*, 2 Dill. (U. S.) 428. And see generally *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233; *Payson v. Withers*, 5 Biss. (U. S.) 269; *Scovill v. Thayer*, 105 U. S. 143; *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513; *Lane's Case*, 1 De G. J. & S. 504; *Sewell's Case*, L. R. 3 Ch. 131.

5. In *Terry v. Eagle Lock Co.*, 47 Conn. 141, the resolution for the increase, though absolute in form, was understood to be contingent, and after the happening of the contingency a resolution to rescind the former action was adopted. The court said: "In such a case it cannot be said that the capital is actually increased until the new stock is subscribed for at least. Until then there is an element of uncertainty about it. It may never be taken. It is very clear that the vote to increase is not *per se* an increase. Nor is it such where the increase contemplated is from the surplus earnings."

statute,<sup>1</sup> and by a failure to announce the intended increase to the public.<sup>2</sup> But it is held that the validity of the increase is not affected by holding the meeting outside of the state,<sup>3</sup> or failing to record the resolution providing for the increase.<sup>4</sup> So the fact that the required time did not elapse between the passage of the resolution and its confirmation affects the stockholders *inter se* only, and does not relieve them from liability.<sup>5</sup> Until the increased stock is actually issued, a resolution for its issue may be rescinded.<sup>6</sup>

1. In *In re Wheeler*, 2 Abb. Pr. N. S. (N. Y.) 361, the statute required that notice of the meeting to effect an increase should be signed by a majority of the directors, and also that none but stockholders could be directors. The number of directors was seven, and the notice was signed by four, but one of the signers was not a stockholder; and the court held that the notice was deficient and the subsequent vote to increase the stock illegal.

2. In *State v. McGrath*, 86 Mo. 239, the statute required the filing with the secretary of state of a statement showing *inter alia* the newspaper publication of the notice of a proposed increase of the stock. This requirement had not been complied with, but it was contended on the argument that the provision was intended simply to notify the stockholders and secure their attendance, and that, inasmuch as notice had actually been given to them, and their attendance and unanimous consent to the increase had been secured, any prior illegality was thereby cured. The court held that the statutory provision above mentioned was not intended simply for the benefit of the stockholders, but that it was designed to protect the public as against frauds resulting from stock-watering, etc., and that the non-observance of the requirement was fatal to the validity of the increase.

3. In *Handley v. Stutz*, 139 U. S. 417; 34 Am. & Eng. Corp. Cas. 624, the case was one of a *Kentucky* corporation, and the statute of that state provided that "all elections for directors and other officers by private corporations . . . shall be held within the territorial limits of the State of *Kentucky*. . . . Any such election held outside of *Kentucky* shall be void." The meeting to effect the increase had been held at Nashville, Tenn., but the court held that the proceeding was nevertheless valid. Brown, J., said:

"Beyond the election of officers, however, there is no statutory restriction of corporate action to the limits of the state, and, in the absence of such inhibition, the proceedings of such meeting would, within the rule laid down by this court in *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, with regard to directors' meetings, be binding upon all those participating in it, as well as upon those acting upon the faith of its validity, or receiving stock authorized to be issued at such meeting. It is true there are cases holding that stockholders' meetings cannot be legally held outside of the home state of the corporation, but the question has generally arisen where a majority present at such meeting had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Hilles v. Parrish*, 14 N. J. Eq. 380. Indeed, so far as we know, the authorities are uniform to the effect that the action taken at such meetings is binding upon those who participate in or take the benefit of them. *Heath v. Silverthorn Lead Min., etc., Co.*, 39 Wis. 146. In this case the meeting was attended by all the stockholders but two, who were represented by proxy; the vote increasing the stock was unanimous, and it does not lie in the mouth of those who participated in this act or received the stock voted at this meeting to question its validity."

4. *Handley v. Stutz*, 139 U. S. 417; 34 Am. & Eng. Corp. Cas. 624, where the court says: "The failure to enter this resolution at the time it was adopted did not affect its validity. as most corporate acts can be proved as well by parol as by written entries;" citing *Moss v. Averell*, 10 N. Y. 449.

5. *In re Millers, etc., Lime Co.*, 31 Ch. Div. 211.

6. *Terry v. Eagle Lock Co.*, 47 Conn. 141.

*b.* **ISSUE OF SECURITIES CONVERTIBLE INTO SHARES.**—Aside from the normal method of increasing capital, corporations are sometimes authorized to issue bonds or notes convertible into stock, and may exercise this authority even after the full amount of stock has been regularly issued.<sup>1</sup> So a corporation empowered to increase its stock may issue new shares in exchange for an equal amount of its indebtedness.<sup>2</sup> The option to exchange is terminated by a tender of the shares on the part of the company,<sup>3</sup> and holders of notes convertible at a certain date are not entitled to exercise the option prior thereto because of an independent increase in the capital stock.<sup>4</sup>

*c.* **ISSUE OF STOCK DIVIDENDS.**—See **DIVIDENDS**, vol. 5, p. 744*a*.

**4. Stockholders' Prior Right to the Increase.**—See **STOCKHOLDERS**, vol. 23—*Right to Subscribe to New Stock*.

**5. Effect of Increase on Liability.**—See **STOCKHOLDERS**, vol. 23.

**V. REDUCTION OF STOCK**—1. **Authority and Validity.**—A corporation has no implied authority to reduce its capital stock.<sup>5</sup> Even

1. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, where the court, per Cardozo, J., said: "It is argued that this right can only be conferred when there is stock remaining unissued. The answer is, the statute has not said so. Nor has it said that the power, which is expressly granted to the 'directors,' not to the stockholders, shall be in any wise restricted or controlled by section 9, and it was very easy to have expressed it, if such had been the design, and I must assume that it would have been done, if such had been the intention, because there is nothing inconsistent in providing that the stockholders may increase the stock in a certain way, and that by the action of the directors an increase of stock may be worked in another way. The power to give the privilege of converting the bonds into stock is conferred in terms upon the directors, and no condition is imposed upon the right to give such option, except that the bonds shall have been issued for the purposes above mentioned." *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y.) 216; *Jones v. Terre Haute, etc., R. Co.*, 57 N. Y. 196; holding that owners of the securities are entitled to the stock and dividends thereon, though demand therefor is made immediately before a dividend is declared.

In *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. (N. Y.) 515, a transaction was held valid by which bonds were

issued at fifty per cent. of their par value, convertible into stock upon the payment of the remaining portion.

2. *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39.

3. *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. (N. Y.) 515.

4. *Pratt v. American Bell Teleph. Co.*, 141 Mass. 225; 12 Am. & Eng. Corp. Cas. 110. In this case notes were issued by the corporation on October 20, 1882, containing the following provision: "The holder hereof may, on the 20th of April, 1884, or on the 20th of October, 1884, and at no other time, exchange this note, coupons not due being attached, for the stock of the company at par, that is, for one share." On March 27, 1883, the capital stock was increased, and existing stockholders were given the right to subscribe to their portion of the new shares, but it was held that the holders of the convertible notes were not entitled to share with the members of the corporation in the distribution of the increase.

5. *Seignouret v. Home Ins. Co.*, 24 Fed. Rep. 332; 10 Am. & Eng. Corp. Cas. 131. In this case it was held that as the constitution and laws of *Louisiana* provide for the increase of the capital stock, but are silent as to a decrease, the power to reduce the stock of a corporation was intentionally denied.

A clause in a deed of settlement providing that "For the better conduct

where the power is expressly conferred, the directors cannot exercise it without the consent of the stockholders,<sup>1</sup> and all reductions must be fair and impartial as to the latter.<sup>2</sup> In some of the states and in *England* the power to reduce is regulated by statute,<sup>3</sup>

and management of the affairs of the company, it shall be lawful for a special general meeting, called for the purpose from time to time, to amend, alter, or annul, either wholly or in part, all or any of the clauses of the said deed, or of the existing regulations and provisions of the company," does not authorize a reduction of the capital stock. *Smith v. Goldsworthy*, 45 E. C. L. 428. And see generally cases cited in note 1, *supra*, this title, *Increase of Stock*. But the fact that, at the time when a class of preference shares was created, the articles of association did not authorize a reduction, will not prevent the company from reducing the number of such shares if a special resolution is first passed authorizing a reduction. *In re Barrow, etc., Steel Co.*, 39 Ch. Div. 582.

1. *Percy v. Millaudon*, 3 La. 569; *Gill v. Balis*, 72 Mo. 424.

2. *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. Div. 287; 16 Am. & Eng. Corp. Cas. 358; *In re Direct Spanish Tel. Co.*, 34 Ch. Div. 307; 16 Am. & Eng. Corp. Cas. 377.

A reduction which throws the whole burden upon the common stockholders to the exclusion of the preferred is unfair. *In re Quebrada, R. etc., Co.*, 40 Ch. Div. 363; 26 Am. & Eng. Corp. Cas. 380.

A reduction of one-fourth on the ground that the capital to that extent had been lost is not unfair to preferred stockholders, if there is nothing in the company's bargain with them which prevents such reduction, though the articles confer no such power. *In re Barrow, etc., Steel Co.*, 39 Ch. Div. 582.

Under the English Companies Acts of 1867 and 1877, it is not essential, though regular, that reduction should be uniform on all shares. *In re Barrow, etc., Steel Co.*, 39 Ch. Div. 582.

3. In *Strong v. Brooklyn Cross-Town R. Co.*, 93 N. Y. 426, 433; 3 Am. & Eng. Corp. Cas. 160, it was held that the object of the *New York Act*, 1878 (Ch. 264, Laws 1878), was to provide for an equalization of the capital stock with the value of the corporate assets, and that it was immaterial

whether or not the capital had been paid in if the rights of third parties were not infringed.

Where stockholders in a national bank, acting under U. S. Rev. St. 1878, § 5143, effected a reduction of their capital stock, and at the same time voted to withdraw certain depreciated securities from the assets, and place them in the hands of trustees, it was held that such withdrawal could not be permitted, as the comptroller of the currency would be presumed to take into consideration any value which these collaterals might have in order to determine the degree of impairment which the capital had suffered. *McCann v. First Nat. Bank (Ind. 1892)*, 30 N. E. Rep. 893.

The Railway Companies' Act of 1862 did not authorize a reduction of the capital stock or a decrease in the size of the shares. *In re Financial Corp's Appeal*, L. R., 2 Ch. App. 714. A company originally empowered to reduce its capital stock, and which afterwards registered under the act of 1862 was held to have lost that power. *Droitwich Patent Salt Co. v. Curzon*, L. R., 3 Exch. 35.

Under the English Companies Act of 1867, a reduction based on a shrinkage in value of the corporate property and for the purpose of making the capital stock equal thereto is not authorized. *In re Ebbw Vale Steel, etc., Co.*, 4 Ch. Div. 832.

Portions of the capital used by a company in preliminary expenses cannot be treated as "lost capital or capital unrepresented by available assets," so as to authorize a reduction by the amount so expended as provided by section 3 of the Companies Act of 1877. *In re Abstainers, etc., Ins. Co.* (1891), 2 Ch. 124.

A reduction of the entire original capital may be sanctioned by the court aside from any reduction of the preference capital. *In re Agricultural Hotel Co.* (1891), 1 Ch. 396.

For an application of the English Companies Act of 1877, see *In re Dicedo Peer Co.* (1891), 2 Ch. 354.

Under the English Companies Acts of 1867 and 1877, a company has no

and a strict compliance with the provisions thereof is commonly exacted.<sup>1</sup>

**2. Particular Methods—*a*. PURCHASE BY THE CORPORATION OF ITS OWN STOCK.**—This may operate as a merger thereof, and a consequent reduction of the capital,<sup>2</sup> though the effect of such a transaction depends largely upon intent.<sup>3</sup>

*b*. REFUNDING, ETC.—Another method of reducing the capital stock is by refunding to each stockholder a certain proportion of his shares.<sup>4</sup> But reduction cannot be effected by merely "writing off" a loss which the company has suffered.<sup>5</sup>

**3. Distribution of Surplus After Reduction.**—After the capital stock has been reduced, the surplus, if any, may be apportioned among the stockholders,<sup>6</sup> and an action will lie on the part of the latter to compel the apportionment.<sup>7</sup> But such a disposition of the surplus is subject to the claims of those who were creditors before the reduction.<sup>8</sup>

**4. Effect of Reduction Upon Liability.**—See STOCKHOLDERS, vol. 23.

**VI. ATTACHMENT AND EXECUTION.**—(See also FOREIGN ATTACHMENT, vol. 8, p. 310.)

power to reduce a portion only of its shares. *In re* Union Plate Glass Co., 42 Ch. Div. 513. *Contra*, *In re* Gatling Gun, 43 Ch. Div. 628.

A corporation cannot cover up losses by reducing its stock. *In re* Ebbw Vale Steel, etc., Co., 4 Ch. Div. 827. Where the entire capital stock consists of land, a sale of a surplus portion thereof will be enjoined under the English Companies Act as a reduction of the stock. *Holmes v. Newcastle-upon-Tyne, etc., Co.*, 1 Ch. Div. 682.

Evidence of the loss of capital held to be insufficient, reduction illegal, and stockholders receiving reduced shares still liable. *In re* New Chili Gold Min. Co., 38 Ch. Div. 475; 21 Am. & Eng. Corp. Cas. 372.

1. *Granger's L., etc., Ins. Co. v. Kamper*, 73 Ala. 325; 6 Am. & Eng. Corp. Cas. 497; *Ferris v. Ludlow*, 7 Ind. 517; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

A statute providing for reduction does not necessarily authorize a purchase by the corporation of the shares of individual stockholders. Each stockholder should be allowed to surrender his due proportion. *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

Under a statute prohibiting loans to stockholders, and the issue of stock except for money and services actually received, a corporation cannot reduce its capital stock one-half and at the same time issue bonds for trust deeds

to pay stockholders the amount of the surplus. *Coquard v. St. Louis Cotton Press Co. (Mo.)*, 21 Am. & Eng. Corp. Cas. 377.

2. *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418; *State v. Smith*, 48 Vt. 266. See also *infra*, this title, *Sales—Corporation as Purchaser of Its Own Stock*.

3. *State v. Smith*, 48 Vt. 266; *City Bank v. Bruce*, 17 N. Y. 507; *American, etc., Co. v. Haven*, 101 Mass. 402; 3 Am. Rep. 377.

4. *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

5. *In re* Ebbw Vale Steel, etc., Co., 4 Ch. Div. 832.

6. *Strong v. Brooklyn Cross-Town R. Co.*, 93 N. Y. 426; 3 Am. & Eng. Corp. Cas. 160; *Seely v. New York Nat. Exch. Bank*, 8 Daly (N. Y.) 400.

7. *Seely v. New York Nat. Exch. Bank*, 8 Daly (N. Y.) 400.

But where the stock of a national bank has been lawfully reduced because of the impairment of the capital, by reason of matured and suspended claims, the fact that the latter were subsequently realized upon and carried into the assets, will not entitle a stockholder to compel a distribution of the funds so realized in proportion to the stock surrendered by him. *McCann v. First Nat. Bank*, 112 Ind. 354; 19 Am. & Eng. Corp. Cas. 365.

8. See STOCKHOLDERS, vol. 23; *Liability—Effect of Reduction*.

1. **Authority and Validity.**—At common law shares of stock are not subject either to attachment or execution.<sup>1</sup> Statutes authorizing these remedies have been enacted in most of the states, but the courts do not appear to be agreed as to what language will be sufficient to provide for them. On the one hand, it has been held that acts providing for the attachment of "estate"<sup>2</sup> and "rights and credits"<sup>3</sup> would include shares of stock; on the other hand, the latter have been held not to be included under the phrases "real and personal property"<sup>4</sup> and "estate both real and personal."<sup>5</sup> Stock in a corporation organized for "sporting purposes" is not subject to execution, though the statute authorizes that proceeding as to shares in "any joint stock company."<sup>6</sup> So, it is held that seizure of shares by a tax collector is not authorized, though by statute they are subject to attachment and execution.<sup>7</sup> In *Vermont*, attachment proceedings have been sustained by virtue merely of the lien of the corporation on stock,<sup>8</sup> and the tendency of the courts seems to be to hold stock subject to these remedies if possible.<sup>9</sup>

2. **Locus and Venue.**—The *situs* of stock, for the purposes of attachment and execution, is the domicil of the corporation and that place alone.<sup>10</sup> Accordingly, the mere fact that the officers of a foreign corporation are within a state, even though engaged

1. *Denny v. Hamilton*, 16 Mass. 402; *Ross v. Ross*, 25 Ga. 297; *Planters' etc., Bank v. Leavens*, 4 Ala. 753; *Williamson v. Smoot*, 7 Martin (La.) 31; 12 Am. Dec. 494; *Stewart v. Jones*, 40 Mo. 140; *Denton v. Livingston*, 9 Johns. (N. Y.) 96; 6 Am. Dec. 264; *Anderson v. Nicholas*, 28 N. Y. 600; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Plimpton v. Bigelow*, 93 N. Y. 602; 3 Am. & Eng. Corp. Cas. 131; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372; *Blair v. Compton*, 33 Mich. 414; *Van Norman v. Circuit Judge*, 45 Mich. 204; *Goss, etc., Mfg. Co. v. People*, 4 Ill. App. 510; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290; *Merchants' Mut. Ins. Co. v. Brower*, 38 Tex. 234; *Voorhis v. Terhune*, 50 N. J. L. 147; 9 Am. St. Rep. 781; *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369; *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257; *Cooper v. Canal Co.*, 2 Murph. (N. Car.) 195. Compare *Haley v. Reid*, 15 Ga. 437; *Nashville Bank v. Ragsdale*, 10 Peck (Tenn.) 296; *Howe v. Starkweather*, 17 Mass. 240; *Foster v. Potter*, 37 Mo. 525; *Price v. Brady*, 21 Tex. 614; *Taylor v. Gillean*, 23 Tex. 514; *Barnes v. Hall*, 55 Vt. 420; 3 Am. & Eng. Corp. Cas. 168.

2. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. (Va.) 502.

3. *Curtis v. Steever*, 36 N. J. L. 304; *Union Nat. Bank v. Byram*, 131 Ill. 92.

4. *Foster v. Potter*, 37 Mo. 525.

5. *Haley v. Reid*, 16 Ga. 437.

6. *Lyon v. Denison*, 80 Mich. 371.

7. *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494; 36 Am. & Eng. Corp. Cas. 127; *Barnes v. Hall*, 55 Vt. 420; 3 Am. & Eng. Corp. Cas. 168. See also *Smith v. Northampton Bank*, 4 Cush. (Mass.) 1; *McNeal v. Mechanics' B'd'g, etc., Assoc.*, 40 N. J. Eq. 351; 12 Am. & Eng. Corp. Cas. 131. It was held otherwise in *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172; 32 Am. & Eng. Corp. Cas. 334.

8. *Sabin v. Bank of Woodstock*, 21 Vt. 353.

9. *Quarl v. Abbett*, 102 Ind. 233; 13 Am. & Eng. Corp. Cas. 27; 52 Am. Rep. 662. See also *Wait, Fraudulent Conveyances*, § 24.

10. *Plimpton v. Bigelow*, 93 N. Y. 593; 3 Am. & Eng. Corp. Cas. 131, where the court says: "We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by indentment of law always remains, to-wit, in the state or country of its creation. In all other places it is an alien."



in promoting its business,<sup>1</sup> or that one of its branch registry offices is located in such state and that certificates may be found within its borders,<sup>2</sup> will not entitle a creditor to attach shares of stock in such foreign corporation. In *Kentucky*, it has been held that a statute conferring upon a foreign corporation all the privileges, with some minor restrictions, granted to it in the state of its domicil, does not constitute it a domestic corporation,<sup>3</sup> but in *Tennessee*, the compliance by a foreign corporation with a statute requiring it to file its articles with the secretary of state sufficiently renders it a domestic corporation to authorize the attachment of its stock.<sup>4</sup>

**3. Procedure.**—It is generally held that statutory provisions regarding the exercise of the remedies of attachment and execution against stock are imperative.<sup>5</sup> Thus, levies<sup>6</sup> and sales,<sup>7</sup> without the statutory notice, or with a notice which fails to state the precise number of shares to be sold,<sup>8</sup> have been declared void. In *Iowa*, a provision that the levy shall include "notification" to a corporate officer, requires written notice,<sup>9</sup> but in *Alabama*, under a similar provision, oral notice is sufficient.<sup>10</sup> Sales not in accordance with the advertisement<sup>11</sup> or at a time of day other than that prescribed<sup>12</sup> are invalid. In *Illinois*, a levy is effected by leaving an attested copy of the writ with an officer of the corporation.<sup>13</sup> In *Louisiana*, seizure of shares consists in taking

It may send its agents abroad or transact business abroad as any other inhabitant may do, without passing personally into the foreign jurisdiction or changing its legal residence. But such agents are not the corporation, and do not represent the corporation in respect to rights as between the corporation and its shareholders incident to the ownership of shares." *Winslow v. Fletcher*, 53 Conn. 390; 13 Am. & Eng. Corp. Cas. 39; 55 Am. Rep. 122; *Morton v. Grafflin*, 68 Md. 567; 21 Am. & Eng. Corp. Cas. 515.

1. *Plimpton v. Bigelow*, 93 N. Y. 592; 3 Am. & Eng. Corp. Cas. 131.

2. *Christmas v. Biddle*, 13 Pa. St. 222; *Childs v. Digby*, 24 Pa. St. 23; *Moore v. Gennett*, 2 Tenn. Ch. 375.

3. *Martin v. Mobile, etc., R. Co.*, 7 Bush (Ky.) 116.

4. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752.

5. *Stamford Bank v. Ferris*, 17 Conn. 259; *Benson v. Smith*, 42 Me. 415; 66 Am. Dec. 285; *James v. Pontiac, etc., Plank Road Co.*, 8 Mich. 91. Compare *Moor v. Walker*, 46 Iowa 164.

6. *Commercial Nat. Bank v. Farmers', etc., Bank* (Iowa 1891), 47 N. W.

Rep. 1080, where the sheriff sought to make the levy by merely entering a transfer to the judgment on the stub of a certificate, though the statute required notice to the debtor.

7. *Princeton Bank v. Crozer*, 22 N. J. L. 383; 53 Am. Dec. 254; *Voorhis v. Terhune*, 50 N. J. L. 147; 7 Am. St. Rep. 781.

8. *Blair v. Compton*, 33 Mich. 443; *Keating v. J. Stone & Sons Live Stock Co.* (Tex. 1892), 18 S. W. Rep. 797. See, however, *O'Brien v. Mechanics', etc., Ins. Co.*, 56 N. Y. 52.

9. *Moore v. Marshalltown, etc., Co.*, 81 Iowa 45.

10. *Abels v. Planters', etc., Ins. Co.*, 92 Ala. 382; citing *Martin v. Brown*, 75 Ala. 442; *Wade*, Notice, § 831. See, generally, *NOTICE*, vol. 16, p. 787.

11. *Titcomb v. Union Marine F. Ins. Co.*, 8 Mass. 326; *Howe v. Starkweather*, 17 Mass. 240.

12. *Carnick v. Myers*, 14 Barb. (N. Y.) 9.

So in the absence of a provision as to the time of day, a sale after nine o'clock at night when but few are present is void. *McNaughton v. McLean*, 73 Mich. 250.

13. *Union Nat. Bank v. Byram*, 131 Ill. 92.

possession either of the certificates or of the stockholder's interest in the corporate property;<sup>1</sup> but this formality may be waived.<sup>2</sup> The provisions of the charter as to levy and sale supersede those of a previous general statute governing the same subject.<sup>3</sup> The shares may be sold in bulk instead of separately.<sup>4</sup> A written instrument of conveyance from the officer to the execution purchaser is necessary to vest title in the latter.<sup>5</sup> Contrary to the general rule in such cases, it has been held that *mandamus* would lie to compel a registry of the purchaser as a stockholder,<sup>6</sup> but he must allege a tender of the papers and a refusal on the part of the corporation.<sup>7</sup> The purchaser merely takes the place of the indebted stockholder and receives his shares subject to all existing liens and liabilities.<sup>8</sup>

**4. Garnishment**—(See also GARNISHMENT, vol. 8, pp. 1152, 1158).—Similarly garnishment is dependent upon statutes for its validity, and in the absence of statute is not available to a creditor in respect to shares of stock belonging to his debtor.<sup>9</sup> When garnishment is authorized, the prescribed mode must be strictly followed. Constructive service of the writ, by leaving a copy of it in a room adjoining and connecting with that used by the garnishee corporation as its place of business, is insufficient.<sup>10</sup> So, a proceeding intended as an attachment, but rather in the

1. *Parker v. Sun Ins. Co.*, 42 La. Ann. 1174; 32 Am. & Eng. Corp. Cas. 334.

2. *People v. Goss, etc., Mfg. Co.*, 99 Ill. 355. In this case the officer of the corporation, without demanding an attested copy, gave to the sheriff a certificate of the number of shares held by the judgment debtor, and an indorsement of such shares as levied upon was made by the sheriff on the execution. The surrender of this certificate without first requiring the attested copy was considered to be a waiver of the right to the latter. The case reverses *Goss, etc., Mfg. Co. v. People*, 4 Ill. App. 510.

3. *Titcomb v. Union Marine F. Ins. Co.*, 8 Mass. 326.

4. *Morris v. Connecticut, etc., R. Co.* (Montreal Court of Appeals, Sept. 1886).

5. *Morgan v. Thames Bank*, 14 Conn. 99.

6. *Bailey v. Strohecker*, 38 Ga. 259; 95 Am. Dec. 88; *State v. First Nat. Bank*, 89 Ind. 302. *Contra* *Durham v. Monumental Silver Min. Co.*, 9 Oregon 41.

7. *Lippitt v. American Wood Paper Co.*, 14 R. I. 301.

8. *Titcomb v. Union Marine F. Ins. Co.*, 8 Mass. 326; *Howe v. Starkweather*, 17 Mass. 240; *Stamford Bank*

*v. Ferris*, 17 Conn. 258; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Grant v. Mechanics' Bank*, 15 S. & R. (Pa.) 140; *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285; *West Branch Bank v. Armstrong*, 40 Pa. St. 278.

9. **Garnishment not Available in Absence of Statute.**—*Planters', etc., Bank v. Leavens*, 4 Ala. 753; *Denny v. Hamilton*, 16 Mass. 402; *Foster v. Potter*, 37 Mo. 525; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Dayton v. Borst*, 31 N. Y. 435; *Johns v. Johns*, 1 Ohio St. 350; *Mansfield, etc., R. Co. v. Hall*, 26 Ohio St. 310; *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. (Va.) 502; *Up-ton v. Tribilcock*, 91 U. S. 45; *Rockville, etc., Turnpike Co. v. Andrews*, 2 Cranch (C. C.) 451.

In *Ross v. Ross*, 25 Ga. 297, the court said: "Is stock in this railroad such a debt ('indebtedness') of the railroad to the stockholder that a garnishing creditor of the stockholder can enter up judgment for it against the railroad? It is not; it is a debt which the railroad dare not pay even to the stockholder himself. The railroad may pay him dividends, but that is all."

10. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612.

form of garnishment, will not avail as against a subsequent transfer.<sup>1</sup>

**5. Relative Rights of Levying Creditors and Transferees**—(See also PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 615).—Where there is no statutory or charter provision requiring transfers to be registered on the books of the corporation, transferees of stock naturally take precedence of their assignors' creditors who subsequently levy upon the same.<sup>2</sup> So a *bona fide* purchaser at execution sale may hold the stock as against the transferee under a prior unrecorded transfer.<sup>3</sup> But where, as is generally the case, the requirement of registration exists, the question of priority as between one claiming under an unrecorded transfer and subsequent levying creditors has given rise to some want of harmony in the decisions. According to one group, constituting probably the weight of authority, *bona fide* purchasers who fail to register their transfers, will be protected nevertheless against subsequent attachment or execution.<sup>4</sup> Opposed to this group is another class of cases holding that levying creditors are entitled to all the protection afforded to subsequent purchasers, and that their rights are superior to those of a previous transferee who has failed to register.<sup>5</sup> But even under this doctrine a creditor who has actual

1. *Moor v. Walker*, 46 Iowa 164.

2. *Boston Music Hall v. Cory*, 129 Mass. 435; *Scott v. Pequonnock Nat. Bank*, 15 Fed. Rep. 494; 1 Am. & Eng. R. Cas. 32.

3. *Weston v. Bear River, etc.*, Min. Co., 5 Cal. 186; 63 Am. Dec. 117; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Sabin v. Bank of Woodstock*, 21 Vt. 353.

4. **Unregistered Purchasers Preferred to Levying Creditors.**—*New Orleans Canal, etc., Co. v. New Orleans*, 30 La. Ann. 1371; *Smith v. Crescent City Live-Stock, etc., Co.*, 30 La. Ann. 1378; *Pitot v. Johnson*, 33 La. Ann. 1286; *Lund v. Wheaton, etc., Co.* (Minn. 1892), 52 N. W. Rep. 268; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *aff'd in Hunterdon Co. Bank v. Nassau*, 17 N. J. Eq. 496; *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317; *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 218; *Com. v. Watmough*, 6 Whart. (Pa.) 117; *U. S. v. Vaughan*, 3 Binn. (Pa.) 394; 5 Am. Dec. 375; *Finney's Appeal*, 59 Pa. St. 398; *Eby v. Guest*, 94 Pa. St. 160; *Fraser v. Charleston*, 11 S. Car. 486; *Seeligson v. Brown*, 61 Tex. 114; 10 Am. & Eng. Corp. Cas. 143; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369; *Scott v. Pequonnock Nat. Bank*, 15 Fed. Rep. 494; 1 Am. & Eng. Corp.

Cas. 32. *Compare* *Mechanic's, etc., Bank v. Debolt*, 18 How. (U. S.) 380; *Bullard v. National Eagle Bank*, 18 Wall. (U. S.) 589; *Littell v. Scranton Gas., etc., Co.*, 2 Luz. Leg. Obs. (Pa.) 82.

5. **Levying Creditors Preferred to Prior Unrecorded Purchasers.**—*Berney Nat. Bank v. Pinckard*, 87 Ala. 577; 30 Am. & Eng. Corp. Cas. 52; *Hardaway v. Semmes*, 38 Ala. 657; *Jordan v. Mead*, 12 Ala. 247; *Abels v. Planters, etc., Ins. Co.*, 92 Ala. 382; *Fisher v. Jones*, 82 Ala. 117; 19 Am. & Eng. Corp. Cas. 450; *Weston v. Bear River, etc., Min. Co.*, 5 Cal. 186; 63 Am. Dec. 117; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 558; *People's Bank v. Gridley*, 91 Ill. 457; *People v. Goss, etc., Mfg. Co.*, 99 Ill. 355; *State v. First Nat. Bank*, 89 Ind. 302; *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373; *Blanchard v. Dedham Gas-Light Co.*, 12 Gray (Mass.) 213; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216; *Rock v. Nichols*, 3 Allen (Mass.) 342; *Central Nat. Bank v. Williston*, 138 Mass. 244; 10 Am. & Eng. Corp. Cas. 113. *Compare* *Sibley v. Quinsigamond Nat. Bank*, 131 Mass. 520; *Buttrick v. Nashua, etc., R. Co.*, 62 N. H. 413; *Young v.*

notice (though it is not received until after the levy)<sup>1</sup> of a prior unrecorded transfer, takes subject thereto,<sup>2</sup> and may be prevented even from taking steps to protect his title.<sup>3</sup> So it is held that where the corporation wrongfully refuses to register the transfer, the transferee will be protected against a subsequent levy,<sup>4</sup> and may recover damages from the corporation for its refusal.<sup>5</sup> Registration will protect the transferee, though he has not formally accepted the stock as required by statute.<sup>6</sup> When he purchases stock after an order dissolving an attachment thereof he acquires title, though an appeal from such order is pending, the statute not otherwise providing.<sup>7</sup> Transfers of stock in fraud

South Tredegar Iron Co., 85 Tenn. 189; 4 Am. St. Rep. 752; *In re Murphy*, 51 Wis. 519.

In *Massachusetts*, the rule seems to be so far modified as to protect the transferee if only the by-law will require registration. *Sargent v. Essex*, etc., R. Co., 9 Pick. (Mass.) 202; *Boston Music Hall v. Cory*, 129 Mass. 435.

In *Maryland*, a pledgee who delays for ten years to assert any claim to the stock has no rights as against a subsequent attaching creditor or against the corporation. *Noble v. Turner*, 69 Md. 519; 26 Am. & Eng. Corp. Cas. 439.

Purchase of the judgment by the unregistered transferee merges the attachment lien. *Stout v. Natoma*, etc., Min. Co., 9 Cal. 78.

1. *Wilson v. St. Louis*, etc., R. Co. (Mo. 1891), 36 Am. & Eng. Corp. Cas. 290. But see *Jones v. Latham*, 70 Ala. 164; 3 Am. & Eng. Corp. Cas. 172.

2. *Weston v. Bear River*, etc., Min. Co., 6 Cal. 425; 63 Am. Dec. 117; *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571; *Van Cise v. Merchants' Nat. Bank* (Dak. 1887), 33 N. W. Rep. 897; *Black v. Zacharie*, 3 How. (U. S.) 483; *Bridgewater Iron Co. v. Lissburger*, 116 U. S. 8.

A purchaser at execution sale obtains no title where he has knowledge that the judgment debtor had already parted with his ownership of the stock. *Blakeman v. Puget Sound Iron Co.*, 72 Cal. 321; *Mowry v. Hawkins*, 57 Conn. 453. But compare opinion of Cooley, J., in *Newberry v. Detroit*, etc., Mfg. Co., 17 Mich. 141.

But a corporation is not chargeable with knowledge on the part of a director who had notice of the transfer but not of the attachment. *Buttrick v. Nashua*, etc., R. Co., 62 N. H. 413.

3. *Cheever v. Meyer*, 52 Vt. 66; *People v. Elmore*, 35 Cal. 653. But see

*contra*, *Farmers Nat. Gold Bank v. Wilson*, 58 Cal. 600.

4. **Wrongful Refusal of Registration.**—*Colt v. Ives*, 31 Conn. 25; 81 Am. Dec. 161; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. (Mass.) 454; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *aff'd* 72 Mo. 77; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82. Compare *Fiske v. Carr*, 20 Me. 301.

5. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Robinson v. Nat. Bank*, 95 N. Y. 637; 6 Am. & Eng. Corp. Cas. 548. See also *Hazard v. Nat. Exch. Bank*, 26 Fed. Rep. 94; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. (Mass.) 454.

The corporation may be liable also to the purchaser of an outstanding certificate for allowing registry to one who buys at an execution sale. *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317. See also *Rogers v. Stevens*, 8 N. J. Eq. 167. But the plaintiff must allege that he is a purchaser for value. *Littell v. Scranton Gas*, etc., Co., 42 Pa. St. 500.

6. *Woodruff v. Harris*, 11 U. C. Q. B. 490.

7. *Loveland v. Alvord*, etc., Min. Co., 76 Cal. 562. Here the court said: "As attachment is merely a creature of statute, its existence and operation in any case can continue no longer than the statute provides it may. And there is no express authority given to a sheriff to retain in his custody property seized by him under and by virtue of a writ of attachment issued out of a justice's court, after a judgment in the action in which the attachment issued is rendered in favor of the defendant. No provision is made for his detention of it pending an appeal from such a judgment. In the ab-

of creditors will justify the interposition of courts of chancery,<sup>1</sup> as well as the remedy by attachment,<sup>2</sup> and an attaching creditor may, under a cross-bill, have a decree requiring the registration of the shares in his name.<sup>3</sup> In other cases than those of fraud, however, equity as a general rule, will not interfere in the absence of statutory warrant to do so.<sup>4</sup>

**VII. TRANSFER—1. The Right of Transfer—a. IN GENERAL.**—It has been shown above that shares of stock are personal property.<sup>5</sup> An incident of the ownership of any species of property is the unrestricted right of alienation—the *jus disponendi*.<sup>6</sup> When the law makes stock personal property, it clothes it with all the incidents of personal property, and the owner has full dominion over it and may dispose of it at will.<sup>7</sup>

**b. ORIGIN AND FOUNDATION OF RIGHT.**—The right of alienation, though now an incident of the ownership of property, is not, as often seems to be taken for granted, an inseparable and

sence of any such provision, it seems quite clear that, under section 553 of the Code of Civil Procedure, the defendant K., after judgment in his favor, could make any disposition of the property which he could have made before it was attached, with like force and effect. If that be so, it follows that his transfer of it to defendant O. was valid."

1. *Hadden v. Spader*, 20 Johns. (N. Y.) 554; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Lathrop v. McBurney*, 71 Ga. 815; *Van Norman v. Circuit Judge*, 45 Mich. 204; *Gillett v. Bate*, 86 N. Y. 87.

2. *Beckwith v. Borroughs*, 14 R. I. 366; 6 Am. & Eng. Corp. Cas. 553; 51 Am. Rep. 392.

3. *Abels v. Planters, etc., Ins. Co.*, 92 Ala. 382.

4. *Williams v. Reynolds*, 7 Ind. 623; *McFerran v. Jones*, 2 Litt. (Ky.) 219; *Disborough v. Outcalt*, 1 N. J. Eq. 298; *Erwin v. Oldhan*, 6 Yerg. (Tenn.) 185; 27 Am. Dec. 458; *Brightwell v. Malory*, 10 Yerg. (Tenn.) 198; *Donovan v. Finn*, Hopk. Ch. (N. Y.) 59; 14 Am. Dec. 531. So in *England*: *Dundas v. Dutens*, 1 Ves. 196; *Nantes v. Corrock*, 9 Ves. 182; *Bank of England v. Lunn*, 15 Ves. 569; *McCarthy v. Gould*, 1 B. & B. 387; *Grogan v. Cooks*, 2 B. & B. 230. But see, *contra*, *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 511; *Watkins v. Dorsett*, 1 Bland. Ch. (Md.) 530.

5. See *supra*, this title, *Shares Personal Property*.

6. The right of alienation is an incident of property, and a by-law pro-

hibiting this right, or imposing any restriction on its exercise, would be in restraint of trade and against public policy, and therefore void. *Moore v. Bank of Commerce*, 52 Mo. 377.

It is a universal principle of the common law that the absolute ownership of property carries with it the right to transfer or dispose of it as the owner may see proper. *Miller v. Great Republic Ins. Co.*, 50 Mo. 57.

So, in *Poole v. Middleton*, 29 Beav. 646, Lord Romilly says: "Shares in joint stock companies which do not belong to any of the directors, are perfectly distinct from such cases; they are, in fact, in the nature of property, and . . . therefore, unless there is something which prevents him from entering into such a contract he has a right to dispose of his property in any share in a joint stock company, which is a right to receive the dividends." See also *Moffatt v. Farquhar*, 7 Ch. Div. 605.

7. *In re Klaus*, 67 Wis. 401; 15 Am. & Eng. Corp. Cas. 568. See also *Trisconi v. Winship*, 43 La. Ann. 45; 33 Am. & Eng. Corp. Cas. 271; *Allen v. Montgomery R. Co.*, 11 Ala. 451; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Farmer's, etc., Bank v. Wasson*, 48 Iowa 336; *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Moore v. Bank of Commerce*, 52 Mo. 377; *Chouteau Spring Co. v. Harris*, 20 Mo. 381; *Miller v. Great Republic Ins. Co.*, 50 Mo. 57; *Heart v. State Bank*, 2 Dev.

inherent one, but rather the result of a long period of judicial evolution.<sup>1</sup> But shares of stock came to be recognized as a species of property rather too late to be affected by the older doctrine by which alienation was regarded more as a limited privilege than as a right. Still there are traces of it even here.<sup>2</sup> There are later cases also which appear to recognize the principle that the right to transfer stock is derived from the corporate charter.<sup>3</sup> But the modern tendency of judicial thought which favors the free and untrammelled interchange of property rights,<sup>4</sup> has not been without its influence upon shares of stock. In nearly all of the later decisions it is assumed that the right to transfer them is incidental to their ownership, and this assumption is based upon the broad ground that shares of stock are characterized by the same features as other forms of property.<sup>5</sup>

c. ILLUSTRATIONS OF THE DOCTRINE.—Since, therefore, the right of transfer is incidental to the ownership of stock, it is generally true that corporate regulations which prohibit or otherwise unreasonably restrict this right, are void. It was said in an early

Eq. (N. Car.) 111; *Feckheimer v. National Exch. Bank*, 79 Va. 80; 5 Am. & Eng. Corp. Cas. 156; *Gould v. Head*, 41 Fed. Rep. 240; 31 Am. & Eng. Corp. Cas. 231; *In re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425; *Weston's Case*, L. R., 4 Ch. 20; *In re Stranton Iron, etc., Co.*, L. R., 16 Eq. 559.

1. Gray, *Restraints on Alienation*, secs. 3-6, where the development of this doctrine is traced with admirable clearness.

2. In *Duvergier v. Fellows*, 5 Bing. 248; 15 E. C. L. 436, decided by the king's bench in 1828, it was said that "Members of corporations cannot assign their interest . . . without the authority of an act of Parliament." The judgment was affirmed in 10 B. & C. 826; 21 E. C. L. 346.

3. *Johnson v. Laffin*, 5 Dill. (U. S.) 74; *Bank of Attica v. Manufacturer's, etc., Bank*, 20 N. Y. 501.

4. Gray, *Restraints on Alienation*, secs. 3-6.

5. *Poole v. Middleton*, 29 Beav. 560. See also *Trisconi v. Winship*, 43 La. Ann. 45; 33 Am. & Eng. Corp. Cas. 271; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *In re Klaus*, 67 Wis. 401; 15 Am. & Eng. Corp. Cas. 568; *Moffatt v. Farquhar*, 7 Ch. Div. 605; *In re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425.

In *Weston's Case*, L. R., 4 Ch. 20, it was contended on the argument that

the directors had implied discretion to approve or reject proposed transfers. Of the counsel who advanced this view, Lord Justice Selwyn asked *arguendo*: "How, according to your argument would the shares be transferable at all?" to which it was replied: "They are transferable by the common law of partnerships, subject to conditions, which are changed, first, by incorporation, from the unanimity of the partners to the will of a majority, and secondly, by the powers given to directors, from the assent of a majority in general meeting to that of the directors." But Lord Justice Wood, in delivering his opinion, said: "The very object of all the parties who enter into these companies is to have shares which are not like shares in ordinary partnerships, but which are transferable; and all the articles are framed on the supposition that they are so transferable. Indeed, it has always been a subject of discussion whether the establishment of joint stock companies were or not politic, for the very reason that the partners can immediately get rid of all their liability. I was therefore greatly surprised at the argument which has been addressed to us to-day, namely, that unless there is something in the articles which makes the shares transferable, they are not transferable at all, except by resolution of a general meeting. I apprehend the shares are transferable by virtue of the statute, and that the province of the

*Massachusetts* case, "A by-law which limits the transfer of stock to be made only at the office, personally or by attorney and with the consent of the president, would be in restraint of trade and contrary to the general law of the commonwealth."<sup>1</sup> So a by-law which makes approval by the directors a condition precedent to transfer, cannot be enforced so as to defeat the rights of third parties,<sup>2</sup> and one which requires the assent of all the stockholders to a transfer is void as against public policy, even where the would-be transferrer voted for the by-law and the stockholders

articles is to point out the mode in which they shall be transferred, and the limitations (if any) to which a shareholder shall be subjected before he can transfer."

1. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306. In this case the court said: "We think it cannot be maintained, that the right to the shares in the capital stock of this corporation cannot be transferred without a literal compliance with the by-laws. It is personal property. . . . It might be conveyed by will; it might descend from an intestate to his heir. It may be assigned without deed, by a delivery of the certificate with an indorsement upon it for a valuable consideration. *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476. And in such cases the legatee, heir, or assignee would be entitled to have the transfer made in the books, and to a certificate of his property. A by-law which limits the transfer of the stock to be made only at the office personally or by attorney, and with the assent of the president, would be in restraint of trade and contrary to the general law of the commonwealth, which permits the right to personal property and incorporeal hereditaments to be transferred in various other ways. The purchaser or other person entitled should make his right known to the corporation, that it may be entered upon their books; to the end that they may have proper evidence to whom the dividends or profits should be paid." See also *Bond v. Mount Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49.

But in *Dane v. Young*, 61 Me. 160, a by-law provided "that shares shall be transferable by indorsement in writing and subscribed by the holder in presence of the cashier, or two other witnesses, . . . and in every case of transfer the former certificate shall be delivered up to the cashier to be

canceled and a new certificate shall be issued in favor of the transferee;" and the court said: "We see nothing in these provisions of the by-laws inconsistent with the laws of the state or the charter of the bank. . . . The requirement that transfers of stock shall be by indorsement of the certificate of stock 'subscribed by the holder in the presence of the cashier or two other witnesses,' furnishes the other stockholders, and if need be the public, with the means of ascertaining as far as may be the nature of the transaction and the standing of the parties to it." And in *Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, a by-law providing that "all transfers of stock shall be made in a book kept at the office of the company in the presence of the president or secretary, and no new certificate of stock shall be issued until the old is surrendered, except in case of loss," was under discussion; and the court said: "The mode of transferring stock provided by the by-laws, is intended for the protection and security of the bank, or of third persons who in good faith, on a valuable consideration, may in that mode acquire the stock, without notice of prior equitable transfers, or of outstanding equities. The legal title to the stock cannot pass, unless this mode of transfer is observed. But a complete equitable title may be acquired by a transfer in any form or manner appropriate to pass property of that kind, divesting the stockholder of all right and interest, and entitling the transferee to demand that he be invested with the legal title."

2. In *Farmers', etc., Bank v. Wasson*, 48 Iowa 339, Beck, J., says: "While it may be lawfully enforced to protect rights of the corporation, it cannot, in other cases, be exercised without limitation so as to defeat the rights of others. If the corporation has no rights to be protected by its exercise, and other parties would be deprived of

originally were partners.<sup>1</sup> A by-law authorizing the corporation to "regulate the transfer of stock" does not confer the power to restrain transfers, prescribe to whom they may be made, or prohibit them from being made to an insolvent,<sup>2</sup> and an attempt to prohibit such transfers is void, though notice of the by-law is indorsed on the certificate.<sup>3</sup> The mere fact that the transferee

their property thereby, it cannot be enforced in such cases. Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate. As the restriction is not imposed by express authority of the statute of the state, it cannot, in such cases, be enforced. These conclusions are supported by the following authorities: *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Angell & Ames on Corporations*, § 567; *U. S. v. Vaughan*, 3 Binn. (Pa.) 394; 5 Am. Dec. 375; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *Chouteau Spring Co. v. Harris*, 20 Mo. 382." See also *Feckheimer v. National Exch. Bank*, 79 Va. 80; 5 Am. & Eng. Corp. Cas. 156.

1. *In re Klaus*, 67 Wis. 401; 15 Am. & Eng. Corp. Cas. 568, where the court says: "Enough and perhaps too much has been said on general principles, and once for all we hold that a by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all of the stockholders is void and against public policy. It is an unwarrantable and unlawful restriction upon the sale of personal property, the sale and interchange of which the law favors, and in restraint of trade." In reference to the former partnership character of the concern, it was further said: "It is again very plausibly argued by the learned counsel of the appellant that what might be against public policy in a public or quasi public corporation, would not be in a strictly private corporation, and that the latter corporation was in substance only an incorporated partnership. We cannot give countenance to any such distinction. The policy of incorporating a strictly private business with a limited liability of the stockholders towards their cred-

itors, is at least questionable. But when a private business or partnership has become incorporated under the general law, and greatly favored by privileges and franchises and by restricted liability, there is no reason for making any distinction between such a corporation and others, and our statute makes none. The incorporators have secured the advantages of a corporation, and they should be governed by all the other incidents of a corporation. Why not? They cannot be a corporation and still remain, in respect to the same business, a copartnership. The one must completely displace the other. We cannot, therefore, be governed by any authorities which make such a distinction. The stockholders, directors and officers cannot act as partners, or be personally bound as partners. The incorporators, if formerly partners in the same business, and the partnership are merged in the corporation, not partially, but fully and completely."

But on this latter point compare *Harper v. Raymond*, 3 Bosw. (N. Y.) 29, where the nature of a partnership "association," whose rules were sustained and enforced, is thus described by the court: "The parties to the original association, in the 6th article, contemplate and allow a sale of a share or shares, but stipulate and direct that such sale shall not constitute the purchaser a partner. They intend also that such a sale shall not work a dissolution of the association. They contemplate a subsequent allotment of profits to the vendor in such sale. The purchaser being registered, and getting his certificate, could demand and receive the profits declared as belonging to his vendor, by getting a power of attorney or other authority for that purpose from him. In fact, it seems that such vendor was to be still regarded as a partner for management. At least he is not excluded." See also *Tatam v. Williams*, 3 Hare 347.

2. *Chouteau Spring Co. v. Harris*, 20 Mo. 382.

3. *Feckheimer v. National Exch.*



gives as his address a place at which he is but an occasional visitor, will not justify refusal of transfer, though the company is in difficulties and the transferer sold his shares to escape responsibility.<sup>1</sup> The company may be estopped to refuse registration to one who has received a certificate from its secretary,<sup>2</sup> and if it has a valid excuse for declining to allow a transfer, the same must be urged at the time of application; it is not subsequently available as a defense if the refusal was based upon a different reason.<sup>3</sup> Moreover, the existence of the alleged grounds must be established clearly and urged promptly,<sup>4</sup> and courts will hesitate long before enjoining transfers by particular persons while others continue to exercise the right.<sup>5</sup>

*d.* TRANSFERS BY DIRECTORS.—Until recently, there seems to have been some question as to the right of directors to exercise that almost unrestricted power of alienation to which other owners of shares are entitled. This was especially true of "qualification shares," *i. e.* those which one must own in order to be eligible

Bank, 79 Va. 80; 5 Am. & Eng. Corp. Cas. 156.

1. *Weston's Case*, L. R., 4 Ch. 20. "The object of the address being given," says Wood, L. J., "is not, generally speaking, to know where the shareholder is to be served with process, but where his notices are to be sent."

2. *Shaw v. Port Philip Gold Min. Co.*, 13 Q. B. Div. 103.

3. *Bond v. Mount Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49; *American Wire Nail Co. v. Bayless* (Ky. 1891), 15 S. W. Rep. 10. In the former case a by-law of the defendant company required its members to first give it the option of purchasing their shares before transferring them. An applicant having been refused transfer because of failure to comply with this by-law, brought suit against the corporation, which set up the defense that at the time of the application its president was sick and unable to sign a certificate. The court, without passing directly upon the validity of the by-law, held that the defense finally urged was not available and that plaintiff was entitled to recover the value of his shares.

4. *In American Wire Nail Co. v. Bayless* (Ky. 1891), 15 S. W. Rep. 10, which was an action to compel transfer, the defense urged was that the stock was issued to plaintiff's vendor upon his fraudulent representations made more than three years before. Meanwhile the company had made no attempt to cancel the stock and had

even accepted some of it as collateral. The court found as a matter of evidence, that the defense was not supported by the evidence, and further said: "The company has not only by delay, but by positive action, ratified the issue of the stock. It has accepted some of it as collateral. It has held it out to the world as valid; and if it were, in fact, not so, yet the appellant and the Gedges have unreasonably delayed saying so, or taking steps to annul it. It is transferable by delivery of the certificates so as to pass all the rights of the assignor, and is protected in the hands of an innocent holder, whatever may be its infirmity. Hence every reason exists for prompt action if the corporation or a stockholder claims it is invalid. A transfer upon the company's books is merely to protect the company and others who might propose to purchase the stock, as the contract of sale passes the rights of the vendor, and the vendee may, by proper action, compel the transfer upon the records of the company." 4 Wait, Act. & Def., p. 164; 8 Wait, Act. & Def., p. 79; *Johnston v. Laffin*, 103 U. S. 800; *Mor. Priv. Corp.*, § 326 *et seq.* In view, therefore, of the laches of the appellant, its silence and conduct as to this stock until this suit was brought, were we in doubt upon the evidence as to the right of the case, the inclination would be to the side of the appellees."

5. *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 19 Am. & Eng. Corp. Cas. 448.

to the directorship.<sup>1</sup> So late as 1870, Lord Romilly said, in reference to such an attempted transfer: "Whether a director can do that is a question which has never yet been determined. I apprehend that he cannot."<sup>2</sup> The subject was somewhat further obscured by later decisions, where either attempted transfers by directors were fraudulent<sup>3</sup> or the directors were required by the charter to continue in office.<sup>4</sup> But it was held, subsequently, that a director might mortgage his qualification shares.<sup>5</sup> In another recent English case the right of transfer by a director not indebted to the company was upheld, even though he was seeking to evade liability,<sup>6</sup> and a late judgment of the supreme court of *Louisiana* declared that directors "had the right to dispose at their pleasure, of the shares which they owned in the corporation."<sup>7</sup> It may, therefore, be accepted as the settled law that the status of directors in this regard is not different from that of ordinary stockholders.<sup>8</sup>

c. MOTIVE AND EFFECT OF THE TRANSFER AS GROUNDS FOR REFUSAL.—It is said that the motives or objects of parties to a transfer are of no concern to the company<sup>9</sup> or its ministerial officers,<sup>10</sup> and hence do not constitute valid reasons for denying registration. Questions of this kind have most frequently arisen concerning transfers for the purpose of distributing the privileges of membership, multiplying votes and influencing corporate elections. The weight of authority certainly is that these purposes do not afford sufficient ground for declining to permit the consum-

1. Buckley on Companies (5th ed.) 25. See an article in 8 Ry. & Corp. L. J. 99., reprinted from the Law Times.

2. Gilbert's Case, 34 L. T., N. S. 34. As a reason for this view it was further stated that "His situation is that of trustee for the shareholders, and therefore he is not at liberty to do things which he does not think for the benefit of all the shareholders of the company." While this reasoning appears to have been repudiated by Lord Justice Giffard on appeal, the judgment itself was affirmed. L. R., 5 Ch. 559.

3. *In re* South London Fish Market Co., 39 Ch. Div. 324; 60 L. T. Rep., N. S. 68.

4. *Portal v. Emmens*, 1 C. P. Div. 664.

5. *Reeves v. Bainbridge*, Weekly Notes (1889), 228.

6. *In re* Cawley, L. R., 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425.

7. *Trisconi v. Winship*, 43 La. Ann. 45; 33 Am. & Eng. Corp. Cas. 271.

8. *Trisconi v. Winship*, 43 La. Ann. 45; 33 Am. & Eng. Corp. Cas. 271; *In re* Cawley, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 271. Compare Beach, Corporations, § 613, where the author

says: "Granting that the director who transfers his qualification shares gives up his seat on the board, cannot he make a perfectly valid transfer of his shares? As between him and the company he is no longer under the slightest obligation to retain the shares. Parting with his directorate, the shares no longer qualify him for anything, for no qualification is needed by him. He can surely transfer them as fully and as freely as can any shareholder in the company."

9. *State v. McIver*, 2 S. Car. 25.

10. *In re* Klaus, 67 Wis. 401; 15 Am. & Eng. Corp. Cas. 568. In this case, the secretary of the corporation, W., had refused to register the transfer by one M., and the court said: "Whatever may have been the motives of M. in making his transfer, it is of no concern to W. His duties are purely ministerial and clerical in entering upon the books transfers of stock. He certainly has not the judicial power to pass upon the motives and intentions of the parties to the assignment of stock," citing *Helm v. Swiggett*, 12 Ind. 194; *State v. Smith*, 48 Vt. 266.

mation of the transfer.<sup>1</sup> It is the general rule, sanctioned by the policy of the law, that those who have the largest interest in corporations may control them, as they have the largest interest that they shall be well managed.<sup>2</sup> Even where the *personnel* of transferees is subject to the approval of the directors, the latter cannot object on the ground that a transfer is colorable and designed to increase the voting power of the transferer.<sup>3</sup> So where the number of votes to which a member is entitled is limited by the charter, his transferees cannot be prevented from voting on the grounds that they are not the beneficial owners, but hold the shares merely to enable the transferer to evade the charter limitation.<sup>4</sup> Similarly it has been held that the right of a majority stockholder to demand a new election of directors cannot be defeated on the ground that he purchased his shares with the money of rival companies, and that his designs, including the proposed election, are inimical to the corporate interests.<sup>5</sup> Want of consideration between the parties to the transfer will not authorize a denial of registry by the corporation,<sup>6</sup> nor will the mere fact that the transferee is insolvent.<sup>7</sup> There are, nevertheless, cases which appear to qualify the above rule, and it has

1. *Moffatt v. Farquhar*, 7 Ch. Div. 591; *In re Stranton, etc.*, Iron Co., L. R., 16 Eq. 559.

In *State v. Smith*, 48 Vt. 290, Redfield, J., says: "It is insisted that this stock was transferred for the purpose of giving the preponderance of votes to the respondents. We have no doubt that such motives were strong inducements at the time, and that the respondents were determined to resort to every lawful agency to maintain their position, and repel the movement of the relator. We have no opinion of the merits of the controversy, or of the wisdom or propriety of the acts of the parties, as disclosed by the testimony. There are some matters disclosed which, in the forum of conscience, would be obnoxious to criticism, that are not unlawful and are not properly brought in question in this proceeding. The case shows that this stock was not merely transferred, but sold, and that the sale was actual, not colorable; and that there was no secret trust or condition; that the sale was for a necessary purpose, and beneficial to the company; that the full value was paid to the corporation which has gone to its use. We think such sale is not void, but like any other sale, can be impeached only for cause; and, that the controlling inducement for the purchase at the time, of this stock, was, to enable the purchaser and his

friends to outvote the relator and his friends, does not vitiate the sale, if otherwise for honest purposes and for full value."

Jessel, M. R., says in *Pender v. Lushington*, 6 Ch. Div. 75: "In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise—that is as regards a court of law as distinguished from a court of morality or conscience, if such a court exists. . . . That is really the question, because if these shareholders have a right of property, then I think all arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question."

2. *Earl, J.*, in *Barnes v. Brown*, 80 N. Y. 527.

3. *Moffatt v. Farquhar*, 7 Ch. Div. 591; *In re Stranton Iron, etc., Co.*, L. R., 16 Eq. 559.

4. *Pender v. Lushington*, 6 Ch. Div. 70; *In re Stranton Iron, etc., Co.*, L. R., 16 Eq. 559.

5. *Camden, etc., R. Co. v. Elkins*, 37 N. J. Eq. 274.

6. *Helm v. Swiggett*, 12 Ind. 194.

7. *Chouteau Spring Co. v. Harris*,

been said that courts do not look with favor upon transfers effected with improper objects.<sup>1</sup> Thus, in an action against corporate officers to compel registration, an answer in which it is alleged that the acquisition of the stock by the plaintiff was without consideration, and for the purpose of obtaining control of the company, to the exclusion of parties interested, states a good defense.<sup>2</sup> An interesting modification of the doctrine first stated appears in *Pennsylvania*. Shares of stock in a certain theatre corporation entitled its owners to free admission, and colorable transfers by heavy stockholders to outside parties, made for the purpose of conferring the privilege of admission, and with the understanding that the shares would be re-transferred at the end of the season, were enjoined.<sup>3</sup> So in *England*, mandamus to

20 Mo. 382; *Feckheimer v. National Exch. Bank*, 79 Va. 80; 5 Am. & Eng. Corp. Cas. 156.

1. *Kingman v. Rome, etc., R. Co.*, 30 Hun (N. Y.) 73.

2. *Gould v. Head*, 41 Fed. Rep. 240; 31 Am. & Eng. Corp. Cas. 331.

3. *Baker's Appeal*, 108 Pa. St. 510; 10 Am. & Eng. Corp. Cas. 137; 56 Am. Rep. 231. The court, while disclaiming any suspicion of fraud by the parties to the transfer, said: "It cannot be doubted that both at law and in equity the title to the shares in question was in the transferrers at all times. They held the certificates of stock and they held also the executed powers of attorney for the transfer. The transferees had not purchased the stock. No money was to be paid to them when the re-transfer was made upon the books. They were to do nothing in order to complete the re-transfer. That which they did buy, to-wit, —tickets of admission—they received, held and used. They have no right and did not and could not under the contract claim any right to anything more than this. They could not assert any ownership of any kind, legal or equitable, to the stock which the certificates represented. Why then shall we treat them as owners or holders? Because it is said the stock stood in their names on the books of the corporation. But the whole effect of that fact is evidentiary only. It is some evidence, *prima facie* evidence, of ownership. But this *prima facies* gives way instantly to proof of actual ownership. As a mere technical fact it is of no avail against an opposing possession of the certificate, together with an executed power of attorney for its transfer. The force of the fact of registry disappears, therefore, and is nugatory

in the face of the other facts. Of course there are circumstances in which the registered title is sufficient for certain purposes. Upon it votes may be cast and dividends paid, and in special situations innocent purchasers may be protected. But these cases are exceptional and do not in any degree affect the present. Nor do we see how the understanding that the re-transfer shall not be made till the end of the season can change the question of ownership. It is but a postponement of the time when the holder of the certificate may change the registered title from another to himself. It does not affect the actual title conferred by the real ownership of the stock, by the possession of the certificate, and by the executed and delivered power of attorney. It is but an agreement that the one *prima facie* fact of registry shall remain as it is, to-wit: a *prima facie* fact only, during the stipulated period. After all has been said, and all theories exhibited and exhausted, we must fall back to the inquiry, who is the real actual owner and holder of the stock, and to that question there can be but the one answer. For by the terms of the law which authorizes the issue of the tickets they can only be given to holders of stock. How can we possibly say that this means persons who seem to be holders, or who are apparently holders, or who possess one *inducium* of holdership? How can a court, construing the law, say it means anything else than actual, real, true holders? It is not possible in any view of the case. We are not dealing with a shadow but with a substance. This is not a controversy over possible rights acquired innocently under a deceptive

compel transfer has been refused to one whose real object was not the enjoyment of the rights of membership.<sup>1</sup>

*f. AUTHORIZED RESTRICTIONS.*—But while in general the stockholder's right of alienation is inviolable, it is nevertheless subject, in some cases, to restrictions by the company. Thus, the latter may prescribe certain formalities of transfer,<sup>2</sup> for non-compliance with which it may refuse registration. It may also, as a means of enforcing its lien on shares, prohibit transfer by one indebted to it. This restriction is, indeed, of such importance to need separate treatment elsewhere.<sup>3</sup> The corporation may also limit the right of transfer by denying registry to an applicant who is guilty of laches,<sup>4</sup> or if the stock has already been transferred to another.<sup>5</sup> In the charters of English<sup>6</sup> and Canadian<sup>7</sup> companies, it is not infrequently provided in express terms that all transfers shall be subject to approval by the directors. Where such is the case the directors may absolutely refuse transfers if they do so *bona fide* and for the benefit of the company.<sup>8</sup> Nor are they bound to disclose their reasons for rejecting a transferee, if

appearance of title, or in spite of facts which an opposing party is estopped from asserting. On the contrary the parties dealt at arm's length, with their eyes open, and virtually attempted to create a position by means of which they could defeat the substance of a statute by a nominal adherence to its letter. Between themselves this might avail, and equity might refuse to hear either complaining of the other. But between them and others, strangers whose rights become implicated, the question is entirely different. These latter may stand upon their strictest rights, and may set up whatever obstacles are within their reach against interference with them."

1. *Reg. v. Liverpool, etc.*, R. Co., 21 L. J., Q. B. 284.

2. See *infra*, this title, *Formalities of the Transfer*.

3. See *infra*, this title, *Lien of the Corporation on Stock*.

4. Where the pledgee of stock delays for ten years to register the transfer, or to give notice to the corporation of any claim to the stock, and in the meantime the stock has been attached and sold as the property of the pledgor, and a transfer has been made by the sheriff on the books, as authorized by the statute, the pledgee is barred by his laches from setting up any claim to the stock as against the corporation and the purchaser at the execution sale. *Noble v. Turner*, 69 Md. 519; 26 Am. & Eng. Corp. Cas. 438.

A person proceeding under the stat-

ute to levy upon stock and sell it under execution, is bound within a reasonable time to have his title perfected, by having it transferred upon the books of the company, that it may obtain the rights against him which it is entitled by law to exercise against its stockholders; and a party who delays for several years to have such transfer recorded, and waits until the stock has become valuable by the activity and enterprise of others, and new interests have intervened, and then applies to obtain an account and transfer, is estopped from setting up such claim, and equity will not enforce his demands. *Newberry v. Detroit, etc.*, Iron Co., 17 Mich. 141.

5. *State v. Warren Foundry, etc.*, Co., 32 N. J. 430. When stock sold under execution is afterward, on devolutive appeal, decreed to belong to an intervenor, he cannot recover against the corporation for having refused to transfer to him, and permitted the judicial purchase, even though the stock is sold without appraisal. *Chapman v. New Orleans Gas Light, etc.*, Co., 4 La. Ann. 153.

6. *Robinson v. Chartered Bank, L. R.*, 1 Eq. 32; *Shepherd's Case*, L. R., 2 Eq. 564; *Payne's Case*, L. R., 9 Eq. 223; *Ex parte Penny*, L. R., 8 Ch. 446; *Shortridge v. Bosanquet*, 16 Beav. 84; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

7. *Smith v. Canada Car Co.*, 6 U. C. P. R. 107.

8. *Shepherd's Case*, L. R., 2 Eq. 564.

they fairly consider the question at one of their meetings and there is no showing of bad faith.<sup>1</sup> Under such a provision, moreover, where the directors have permitted a transfer which is subsequently shown to be fraudulent, the transaction may be avoided entirely, and the name of the transferrer placed upon the list of contributories, even after the lapse of three years.<sup>2</sup> But this power of approval must be exercised reasonably and will not authorize the directors to refuse transfers to anyone.<sup>3</sup> Whether a refusal in a particular case is reasonable, has been held to be a question for the courts of equity.<sup>4</sup> As before stated, objections to the motive or objects of the transferrer do not constitute sufficient grounds for refusal,<sup>5</sup> nor can the power of approval be insisted upon unless it has been expressly conferred.<sup>6</sup>

**2. Formalities of the Transfer—*a*. IN GENERAL.**—The form, procedure, and methods of transferring stock are a legitimate subject of corporate regulation, and by-laws which attempt no more than this are valid. On this principle by-laws have been sustained when requiring registration in the presence of certain corporate officers,<sup>7</sup> and execution of the transfer in the presence of attesting witnesses.<sup>8</sup> Where the act of incorporation requires the delivery of a deed of transfer to the secretary, it must be such an instrument as he can properly accept, and if returned by him on account of not being stamped and dated, this will prevent the legal title from passing.<sup>9</sup>

***b*. SEALS.**—At common law, and independent of charter provisions and by-laws, no seal is required in order to effect a transfer of shares.<sup>10</sup> And where the articles of association authorize

1. *Ex parte Penny*, L. R., 8 Ch. 446, where James, L. J., says: "I cannot conceive that any director would choose to accept office, or exercise the power intrusted to him, if he were liable to be called upon to say what the particular reasons were or the particular motive was which influenced him in coming to the conclusion that any person was not eligible as a shareholder. I think, therefore, that these directors were well advised in not subjecting themselves to be cross-examined and interrogated as to what particular reasons they might have for personally objecting to this gentleman, and in confining themselves to saying, by their secretary, that the question was discussed at a board of the directors, that the propriety of the transfer to the particular transferee was the subject matter for discussion, and having taken that into their consideration, they had arrived at the conclusion to which they had arrived."

2. *Payne's Case*, L. R., 9 Eq. 223.

3. *Robinson v. Chartered Bank*, L.

R., 1 Eq. 32; *Smith v. Canada Car Co.*, 6 U. C. P. R. 107, where Richards, C. J., says: "I do not think they have any such power; if permitted to exercise such power they would, in effect, prevent the transfer of shares, which the statute and charter clearly contemplate, and arbitrarily control the value of the property of the stockholders."

4. *Taft v. Harrison*, 10 Hare 474. This case was decided, however, before the amalgamation of law and equity by the Judicature Acts.

5. See *supra*, this subdivision of the title.

6. *Weston's Case*, L. R., 4 Ch. 20, and see, generally, *supra*, this subdivision of title.

7. *Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585.

8. *Dane v. Young*, 61 Me. 160.

9. *Nanney v. Morgan*, 37 Ch. Div. 346.

10. *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Atkinson v. Atkinson*, 8 Allen (Mass.) 15. Compare *German*

transfers by "an instrument in writing," a deed is not necessary even though it has been the uniform practice of the company to require one.<sup>1</sup> But the requirement of a seal may be imposed by charter<sup>2</sup> or by-laws,<sup>3</sup> and it then becomes imperative, so that its omission will render the attempted transfer void.<sup>4</sup> When such is the requirement, the words "place of seal" are not sufficient,<sup>5</sup> and a blank transfer signed by the transferrer, with the word "seal" inclosed in brackets, is of no effect.<sup>6</sup> Where certain rules are prescribed as to the mode in which, and the persons by whom, and in whose presence, the seal shall be affixed, these must be observed,<sup>7</sup> but in the absence of such regulations, no particular formalities are required, and a seal affixed by the direction of parties who in fact manage the affairs of the company, is valid, even though it has not been authorized by a resolution of the board of directors.<sup>8</sup>

c. WAIVER.—Formalities prescribed in the execution of transfers may be waived by the corporation, either expressly or by implication. The latter is the case where a certain formality has

Union Bldg., etc., Assoc. v. Sendmeyer, 50 Pa. St. 67; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (U.S.) 407; *In re Tees Bottle Works*, 33 L. T., N. S. 834; *Easton v. London, etc., Bank*, 55 L. T. Rep. 678; *Walker v. Bartlett*, 36 Eng. L. & Eq. 368; *Ortigosa v. Brown*, 47 L. J., Ch. 168; and see cases cited *supra*, this title, where blank transfers are held to be valid.

1. *Ex parte Sargant*, L. R., 17 Eq. 273.

2. *Hibblewhite v. McMorine*, 6 M. & W. 200, where Baron Parke says: "Assuming the instrument to be a deed, it was wholly improper if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol. and then delivered, in the absence of the principal, as a deed, would be a violation of the principle, that an attorney to execute and deliver a deed for another must himself be appointed by deed. The only case cited in favor of the validity of a deed in blank, afterwards filled in, is that of *Texira v. Evans*, citing 1 Anst. 228, where Lord Mansfield held that a bond was valid which was given, with the name of the obligee and the sum in blank, to a broker to obtain money upon it; and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston, in his edition of Shepp. Touch. 68, 'as it assumes there could be an attorney without deed;' and we think it cannot be considered to be law. On the other

hand, there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filed up." *Taylor v. Great Indian Peninsula R. Co.*, 4 De G. & J. 559; *Société Générale v. Tramways Union Co.*, 14 Q. B. Div. 424.

3. *Bishop v. Globe Co.*, 135 Mass. 132; 5 Am. & Eng. Corp. Cas. 161.

4. *Hibblewhite v. McMorine*, 6 M. & W. 200; *Taylor v. Great Indian Peninsula R. Co.*, 4 De G. & J. 559.

5. *In re Balkis Consolidated Co.*, W. N. C. (1888) 3.

6. In *Bishop v. Globe Co.*, 135 Mass. 132; 5 Am. & Eng. Corp. Cas. 161, the court said: "The blanks in the instrument of transfer for the name of the transferee, the number of shares to be transferred, and the name of the attorney, have not been filled, and the instrument was not under seal as required by the by-laws of the defendant. As we understand from the report, only the word 'seal' between brackets, was written or printed on the instrument, and this was not a seal. *Bates v. Boston, etc., R. Co.*, 10 Allen (Mass.) 251."

7. *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389; *Darcy v. Tamar, etc., R. Co.*, L. R., 2 Exch. 158; *Weeks v. Maillardet*, 14 East 568; *Nation's Case*, L. R., 3 Eq. 77.

8. *In re Barnard's Banking Co.*, L. R., 3 Ch. 105.

long been disregarded in practice.<sup>1</sup> So, where the non-observance of a requirement is due to the negligence of the corporation,<sup>2</sup> or where the latter unjustly refuses registration,<sup>3</sup> the prescribed formalities are thereby waived. Moreover, in general, those requirements which are intended for the benefit of the corporation may be waived by it.<sup>4</sup> Payment of dividends to a registered transferee,<sup>5</sup> or the enrollment of his name on the list of stockholders,<sup>6</sup> or the failure of the company to provide books of transfer,<sup>7</sup> will constitute a waiver of the requirement of registration. A provision requiring the consent of the directors to a transfer may, when valid at all, be waived by them.<sup>8</sup> But the company is not bound to notify a transferor of its refusal to permit registration, and a failure to do so will not waive the requirement.<sup>9</sup> Where the directors are empowered to refuse to register an irresponsible transferee, undue delay by them in acting will not effect a waiver of the condition precedent that the transferee must be responsible.<sup>10</sup>

**3. Steps in the Transfer.**—The transfer of shares in a corporation usually involves three separate acts: viz., the assignment of the certificate, the surrender of the certificate to the corporation, and registration of the transfer on the books of the company. Each of these proceedings is important in itself, and will be treated separately.

**a. ASSIGNMENT OF CERTIFICATE.**—While an assignment in writing is at once the most common and the safest mode of transferring the certificate, it does not appear to be essential to pass title to the shares. For where no certificate has ever been issued to the stockholder, his transferee may, nevertheless, acquire com-

1. *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487; *Walter's Case*, 3 De G. & S. 149; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

2. *Ex parte Bagge*, 13 Beav. 162; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

3. *Robinson v. National Bank*, 95 N. Y. 637, where the court says: "The requirement of a registry, existing only for its own protection and convenience, must be deemed waived and non-essential when it wrongfully refuses to obey its own rule. (*Isham v. Buckingham*, 49 N. Y. 220; *Billings v. Robinson*, 94 N. Y. 415.)" *Compare Bond v. Mt. Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49; *Chouteau Spring Co. v. Harris*, 2 Mo. 382; *State v. McIver*, 2 S. Car. 25; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; 74 Mo. 77.

4. *Robinson v. National Bank*, 95 N. Y. 637; *Taylor v. Hughes*, L. R., 6 Ir. Eq. 480.

5. *Cutting v. Damerel*, 88 N. Y. 410.

6. *Upham v. Burnham*, 3 Biss. (U. S.) 431.

7. *Isham v. Buckingham*, 49 N. Y. 220, where the court says: "It has never been held that a corporation can avail itself of its own negligence as a basis of a cause of action against a stockholder, nor that it is not competent to waive a performance of its own rules, nor that it may not be estopped by its own acts and official declarations, the same as natural persons. If it did not provide a transfer book or did not transfer the stock according to the prescribed form, the fault was its own and not the defendant's. It could waive the observance of any other rules which it had adopted." See also *Purchase v. New York Exch. Bank*, 3 Robt. (N. Y.) 164; *Billings v. Robinson*, 94 N. Y. 420.

8. *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *Ex parte Walton*, 3 Jur. N. S. 853; 26 L. J., Ch. 545.

9. *Gustard's Case*, L. R., 8 Eq. Cas. 438.

10. *Shipman's Case*, L. R., 5 Eq. 219.



plete title.<sup>1</sup> So the mere manual delivery of the certificate to another may be sufficient to vest in him the ownership of the stock.<sup>2</sup> The common mode of assignment is the execution of an instrument of transfer coupled with a blank power of attorney and signed by the owner of the stock.<sup>3</sup> The validity of this method has been firmly established by usage and judicial sanc-

1. *First Nat. Bank v. Gifford*, 47 Iowa 575. In this case the court said: "The by-law of the plaintiff referred to in the nineteenth finding provides 'that certificates of stock shall be signed by the president and cashier, with the seal of the corporation attached, . . . and registered in a book kept for that purpose. Certificates may be assigned by indorsement on the back, but no transfer of stock shall be valid except when made on the books of the bank, and upon the return of the certificate to be transferred.' The former owner of the stock, Mr. Ochs, delivered the certificate held by him to Porter, and the stock was assigned by the former to the latter by means of what is termed a transfer ticket, and an entry thereof was made in the transfer book of the bank. No certificate was ever issued to Porter, and the Ochs certificate was canceled, or at least the defendant does not claim that it was ever assigned to him. It is useless to consider what would be the rights of the defendant if a certificate had been issued to Porter, and by him assigned to the defendant, and no transfer entered on the books of the bank, for no such state of facts is presented by the finding. As between Porter and the corporation he was the undoubted owner of the stock. No certificate was required to perfect his title. It mattered not whether one ever was issued. He being such owner, and the bank not chargeable with notice of defendant's rights, Porter had the right to sell and transfer said stock, and the bank was bound to recognize his transferee as owner. Whatever title Porter had was obtained by Smith and Whitaker. It seems to us that the transfer on the books of the bank was sufficient to make Porter's title full and complete. A stock certificate would only be additional evidence of his title, but it was by no means essential. The foregoing views are supported by the following authorities: *Agricultural Bank v. Burr*, 24 Me. 263; *Dutton v. Connecticut Bank*, 13 Conn. 493; *New York, etc.,*

*R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Chouteau Spring Co. v. Harris*, 20 Mo. 383."

In *Brigham v. Mead*, 10 Allen (Mass.) 245, an owner of stock for which the corporation had not yet issued certificates, effected a sale. Sometime afterward the company offered to issue certificates upon the payment of an assessment which had been levied since the sale. The court held that it was the duty of the purchaser to pay this assessment and said: "The transfer of the property as between the parties was effected by the bill of sale. The purpose of a certificate is not to make the transfer, but to furnish a species of evidence of a transfer which has already taken place between the parties. It is important for several collateral purposes; but not for the purpose of a transfer as between the parties. The issuing of a certificate is not the act of the vendor, but of the corporation." See also *Boatmen's Ins., etc., Co. v. Able*, 48 Mo. 136; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50; 36 Am. & Eng. Corp. Cas. 306.

2. *Walsh v. Sexton*, 55 Barb. (N. Y.) 251; *Allerton v. Lang*, 10 Bosw. (N. Y.) 362. Compare *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Sitgreaves v. Farmers, etc., Bank*, 49 Pa. St. 359; *Fraser v. Charleston*, 11 S. Car. 486.

3. The procedure is thus described at length by Mr. Justice Chitty, in *Colonial Bank v. Hepworth*, 36 Ch. Div. 44, where the litigation involved the transfer of shares in the *New York Central Railroad Company*: "The normal mode of transfers, as appears from the documents themselves and the evidence, is as follows: The transfer and power of attorney are signed by the registered shareholder whose name appears on the face of the certificate, and his signature is attested by a witness. The name of the transferee is filled in and the documents are taken to the office of the company; the certificates are surrendered and canceled, and a new certificate is issued to the transferee whose name has been entered on the

tion,<sup>1</sup> and a complete title may thus be vested in the transferee.<sup>2</sup> The blank may be filled out by any *bona fide* holder, with the number of the shares and the name of the attorney,<sup>3</sup> and such insertions, when made, cause the transfer to relate back to the date of the assignment.<sup>4</sup> But, of course, the blanks cannot be

register. According to a practice which has extensively prevailed and has been recognized and acted upon by the company, the transferor signs the transfer and power of attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are canceled, the transferee is registered, and new certificates in his name are issued in the manner already described."

1. In *McNeil v. Tenth Nat. Bank*, 46 N. Y. 331, Rapallo, J., says: "The common practice of passing the title to stock by delivery of the certificates with blank assignments and power, has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 41, and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of *Kortright v. Buffalo Commercial Bank* (20 Wend. (N. Y.) 91, and 22 Wend. (N. Y.) 348), the same usage was established as existing in *New York* and other states, and it was expressly held that even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature." See also *Walker v. Detroit Transit R. Co.*, 47 Mich. 338; *Cutting v. Damerel*, 88 N. Y. 410; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80; *German Union Bldg., etc., Assoc. v. Sendmeyer*, 50 Pa. St. 67; *Ex parte Sargant*, L. R., 17 Eq. 273; *Ortigosa v. Brown*, 47 L. J. Ch. 168; *In re Barnard's Banking Co.*, L. R., 3 Ch. 105. Also *Colonial Bank v. Hepworth*, 36 Ch. Div. 36; *Williams v. Colonial Bank*, 36 Ch. Div.

659; *Nanney v. Morgan*, 57 L. T. Rep. 48.

2. *Cutting v. Damerel*, 88 N. Y. 414; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 624; *Driscoll v. West Bradley, etc., Mfg. Co.*, 59 N. Y. 101.

3. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 623; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 331; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91; 22 Wend. (N. Y.) 348; *Leavitt v. Fisher*, 4 Duer (N. Y.) 2; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (U. S.) 396; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 231; *Otis v. Gardner*, 105 Ill. 436; *Mount Holly Turnpike, etc., Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 N. J. Eq. 479; *Hawkins v. Maltby*, L. R., 3 Ch. 188; *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 844; *Colonial Bank v. Hepworth*, 36 Ch. Div. 36; *Ex parte Sargant*, L. R., 17 Eq. 273; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277; 81 Am. Dec. 701; *Leitch v. Wells*, 48 N. Y. 585; *Persch v. Quiggle*, 57 Pa. St. 247.

4. *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 274, where the court says: "We are satisfied that in this country the rule of law is that a blank power of attorney, although under seal, may be filled up in conformity with the agreement of the parties, and when so filled up takes effect as of its date. The rule we suppose to be otherwise in *England*, where the old principle of the common law on the subject is more rigorously applied, and where the policy of the stamp system influences their decisions. The cases in this country in which the view taken by us is supported are numerous, and may be found in *Redfield on Railways*, § 35; and Mr. *Redfield*, himself a jurist of much learning and of long experience on the bench, gives it as his opinion that the doctrine of the American cases is decidedly preferable to that of the English. Nor can any reason be assigned, which is founded in good sense and is not entirely tech-

filled up so as to give the instrument a legal effect contrary to the intention of the parties.<sup>1</sup> It is said that the power of attorney is in the nature of things irrevocable by implication,<sup>2</sup> and, at any rate, the death<sup>3</sup> or bankruptcy<sup>4</sup> of the transferrer, even when occurring before the exercise of the power, does not revoke it.

*b. SURRENDER OF CERTIFICATE*—(1) *In General*.—The second step, normally, in the transfer of shares is the delivery of the assigned certificates by the transferrer to the corporation. As is shown elsewhere, it is not only the right of the company to prescribe this formality, but, when prescribed, compliance with it should be insisted on as a precautionary measure. The requirement often appears in the form of by-laws,<sup>5</sup> but a mere provision to this effect on the face of the certificate is sufficient to make its surrender necessary,<sup>6</sup> and it has been even held that the re-

nical, why a blank in an instrument under seal may not be filled up by the party receiving it, after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties and nothing but an extreme technical view, derived from the ancient law of *England* can justify the making of any distinction between them."

1. *Buffalo Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 358. *Compare* *Mechanics' Banking Assoc. v. Mariposa Co.*, 3 Robt. (N. Y.) 395; *Denny v. Lyon*, 38 Pa. St. 98; 80 Am. Dec. 463.

2. "An express declaration that the power is irrevocable is, indeed, sometimes made, and then no question can arise. But the intention of the parties is usually to be gathered only from the circumstances under which the power is given and from the objects to be accomplished by its use. Now, if the object of the power is to put the property beyond the control of the principal, it is very evident that he is not to have power to take the property back again at pleasure. When the owner of the stock sells it, it is clear that he does not intend the passage of the legal title to depend upon the continuance of his life; it is clear, therefore, that a power of attorney, given to a purchaser of stock in order to enable him to transfer it on the books of the corporation, is irrevocable. And it is equally clear that a power of attorney, given as part of a security, cannot be revoked by the principal, for otherwise the chief object in taking the security would be lost." *Lowell, Transfer of*

*Stock*, p. 42-3, *citing* *Story on Agency*, § 477; *Wharton on Agency*, § 95; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Marziou v. Pioche*, 8 Cal. 522; *Bonney v. Smith*, 17 Ill. 531; *Gilbert v. Holmes*, 64 Ill. 548.

3. *Fraser v. Charleston*, 11 S. Car. 486; *Merry v. Lynch*, 68 Me. 94; *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Davis v. Lane*, 10 N. H. 156; *U. S. v. Cutts*, 1 Sumn. (U. S.) 144. *Compare* *Knapp v. Alvord*, 10 Paige (N. Y.) 205; 40 Am. Dec. 241.

"It is not merely that the principal has given to his agent a power to sell the stock and has contracted that he will transfer the stock as the attorney desires, or even that he will accept as his own the future act of the attorney; but he has, in effect, granted away the right to sell, and the attorney transfers by virtue of a right that has become vested in himself. The right is derived from the principal, it is true, but it has been conveyed to the attorney. This is not a case of estoppel, for it is a matter of right, not of excuse; and it makes no difference that the death of the principal is known. He has simply conveyed something which he cannot recall in his lifetime, and which is not destroyed by his death." *Lowell, Transfer of Stock*, § 42.

4. *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208.

5. *First Nat. Bank v. Gifford*, 47 Iowa 575; *State v. New Orleans, etc., R. Co.*, 30 La. Ann. 308; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Cleveland, etc., R. Co. v. Robbins*, 35 Ohio St. 483. See also *Seligson v. Brown*, 61 Tex. 114; 18 Am. & Eng. Corp. Cas. 143.

6. *In Cushman v. Thayer Mfg. Co.*,

quirement was imposed by a statute which provided for transfer by delivery of the certificates.<sup>1</sup> Where no other condition is required for transfer than the surrender of the certificate, the corporation, after such requirement has been complied with, is estopped to claim that the shares are not transferable.<sup>2</sup> It is not essential to the title of the transferee that new certificates be issued to him.<sup>3</sup>

(2) *Effect of Failure to Surrender.*—While a provision regarding the surrender of the old certificate is imperative so far as the corporation is concerned, what the effect of its non-observance is, as between the parties to the transfer, is less certain. In a leading *New York* case it is said that "The non-production and surrender of the certificate at the time of the transfer, is not fatal to the title of the transferee. It is only essential to the safety of the corporation."<sup>4</sup> The court below had held in the same case that provisions like the one under consideration could not affect third parties who were ignorant of their contents.<sup>5</sup> On the other hand it is held that a by-law requiring the surrender and cancellation of certificates is for the company's benefit only, and that a transfer without complying therewith is valid as against an attaching creditor of the vendor.<sup>6</sup> There is high authority for the rule that the purchaser must see that his vendor's certificate has been surrendered,<sup>7</sup> but this decision has been somewhat severely

76 N. Y. 370, Miller, J., said: "The assignments to Beals, which, it is claimed, are entitled to priority, bore date sometime after the transfer to plaintiff. As they were subsequent to such transfer, and as by the certificate the stock was only transferable upon the books of the company upon a surrender of the same, no title could pass, unless the transfer was thus made." See also *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369; *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *Smith v. Crescent City, etc., Co.*, 30 La. Ann. 1378; *Brisbane v. Delaware, etc., R. Co.*, 25 Hun (N. Y.) 438.

1. *Factor's, etc., Ins. Co. v. Marine, etc., Co.*, 31 La. Ann. 149.

2. *Driscoll v. West Bradley, etc., Mfg. Co.*, 36 N. Y. Super. Ct. 488.

3. *First Nat. Bank v. Gifford*, 47 Iowa 575; *Chouteau Spring Co. v. Harris*, 20 Mo. 382. See also *Comins v. Coe*, 117 Mass. 45.

4. *Per Davis, J., in New York, etc., R. Co. v. Schuyler*, 34 N. Y. 81. This was a part of the extensive litigation which arose out of the great frauds perpetrated by Robert Schuyler, the President of the New York & New Haven Railroad, between 1846 and 1854. His fraudulent acts consisted

chiefly in the issue and sale of spurious stock.

"A regulation that stock shall be transferred only on surrender of the certificates does not render a transfer without the surrender of the certificates invalid. A person who obtains a transfer in violation of the rule gets the legal title of the stock, and, if he is a *bona fide* purchaser for value, his title cannot be assailed in equity; because, if the corporation makes no objection to the transfer, he may presume that no certificate has been issued, or that it has already been surrendered and canceled. He has no means of knowing about these facts, but the corporation knows from its books whether a certificate is outstanding or not." Lowell, *Transfer of Stock*, § 122.

5. *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30.

6. *Seligson v. Brown*, 61 Tex. 114; 10 Am. & Eng. Corp. Cas. 143.

7. *Moore v. Citizens' Nat. Bank*, 111 U. S. 156; *Hall v. Rose Hill, etc., Road Co.*, 70 Ill. 673; *Seligson v. Brown*, 61 Tex. 114; 10 Am. & Eng. Corp. Cas. 143. In the first case the plaintiff, Mrs. Moore, made an extensive loan to the cashier of the defendant bank, accepting as security there-

criticised.<sup>1</sup> It is held that the owner of outstanding certificates has no right of action against one who purchases without requir-

for a certificate of shares of stock in the bank for an amount equal to the loan, and which were claimed by the cashier to represent stock owned by him. The certificates contained a provision requiring surrender before transfer, but nothing of the kind was done, and, in fact, the certificate was one which the president of the bank had signed in blank, and had left for use in case of need, and which the cashier had fraudulently filled out and delivered to plaintiff. The cashier being insolvent, Mrs. Moores brought an action against the bank for the value of the certificate. The reasoning of Mr. Justice Gray concerning the effect of the cashier's acts is as follows: "The certificate which he delivered to the plaintiff was not in his name, but in hers, stating that she was entitled to so much stock, and showed, upon its face, that no certificate could be issued without the surrender of a former certificate and a transfer thereof upon the books of the bank. The by-laws, passed under the authority expressly conferred by the act of Congress under which the bank was organized, contained a corresponding provision, designed for the security of the bank as well as persons taking legal transfers of stock without notice of any prior equitable title therein. *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Black v. Zachary*, 3 How. (U. S.) 513. The very form of the certificate was such as to put her upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert B. Moores for stock which she supposed him to hold as his own. She knew that she had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see that the proper transfer thereof was made in the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a

new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity."

1. *The Doctrine Criticised.*—In 29 Albany Law Journal 364, appears an extensive review by J. L. Thorndike, of the foregoing case of *Moores v. Citizens Nat. Bank*, 111 U. S. 156, from which the following excerpt is taken: "The circumstance that the person with whom the plaintiff dealt was the cashier, borrowing on his own account, is not alluded to as a ground of the decision, and the case is treated as if he had been any one else. The decision is placed simply on the ground that the certificate showed on its face that no certificate could be lawfully issued without the surrender of a former certificate and a transfer on the books. Now, it is submitted with deference that the certificate showed nothing of the kind. It contained the very common clause, quoted above, stating that the shares specified in the certificate were transferable only on the books of the bank on the surrender of this certificate. It says nothing about a former certificate or about previous transfers. And it is not the fact that it could not have been lawfully issued without the surrender of a former certificate. There might have been no former certificate, and the shares might have been transferred on the books of the bank many times from one owner to the other without any certificate having been issued. Shares are often properly transferred in this way by those who have many dealings in them. It is only when a certificate has been issued that its surrender is required upon a transfer. It is plain, therefore, that the certificate did not give the notice supposed, and if such notice had been given, it would have been contrary to the fact. It is mentioned in the opinion that the plaintiff had no notice of any irregularity otherwise than from the certifi-

ing a surrender of the old certificate,<sup>1</sup> though the rule seems to be different if the purchaser knows that his vendor had already

cate. The certificate would have obviously given to any one else that saw it the same notice that it gave to the plaintiff. The consequences are startling, for, if the decision be sound, any one who purchased the shares from the plaintiff, and paid for them on the faith of the certificate, would have been affected with the same notice as the plaintiff, and so would have had no claim to damages against the bank. A corporation, therefore, will never be liable to any one who acts on the faith of a certificate improperly issued, if it contains the clause that the shares are transferable only on the books of the corporation on surrender of the certificate. If a purchaser taking such a certificate ascertains that the legal prerequisites were actually complied with, and that a former certificate was surrendered, the former certificate would also give him notice of similar prerequisites to its validity, and he would have to continue his inquiry into the fulfillment of legal prerequisites *ad finitum*. But was it in any way material that Mrs. Moores knew (as she must have known) that there must have been a valid transfer of the shares to her before a certificate that she was entitled to them could lawfully be issued? The certificate was a representation by the bank that everything had been done that ought to have been done to make her the owner of the shares. This is the only ground on which a corporation is ever liable to one who acts on the faith of a certificate. The step Mrs. Moores took to assure herself that the legal prerequisites were complied with, was to get the certificate of the bank to that effect before she parted with her money. Saying that she knew it could not be lawfully issued unless the legal prerequisite, a transfer of the shares to her, had been complied with, is only equivalent to saying that she knew the representation ought not to have been made unless it was true. Yet it was because she knew this (who does not?), that she was held not entitled to recover. It should be added that if this legal prerequisite to the validity of the certificate had been complied with, she certainly would have had no cause of action."

And in *Dowell on the Transfer of*

Stock, p. 123, n. 2, the author thus criticises the above named case: "In the first place, it is said that the corporation has power to waive the rule which requires a surrender of the outstanding certificate before transfer . . . and if this is true, it follows that a purchaser of stock has no notice of any defect in his title, even if he knows the new certificate was issued to him without the surrender of an old one. Again, it is to be noticed that the rule which requires the surrender of the old certificate when stock is transferred limits the authority of the agent, and although the form of the certificate gives notice of this limitation to the purchaser, yet, without any such rule, the agent would have no authority to issue a new certificate except when stock had been transferred by the owner, and this every purchaser must know without any special notice in the certificate. If, therefore, the purchaser in the principal case was bound to see that the old certificate had been surrendered, it would seem that a purchaser ought to be bound, in any case, to see that the former owner has in fact transferred his stock. But such a doctrine would mean that a corporation could never be liable to the first holder of a certificate fraudulently issued. Thirdly, the rule laid down in the principal case does not allow the purchaser to presume that the transfer is properly made unless he has reason to suspect the contrary, but obliges him to discover facts which lie peculiarly within the knowledge of the agent of the corporation; for the officers of the corporation certainly have peculiar means of knowing whether a certificate has been issued, and whether it has ever been canceled. If it were an uncommon thing for a purchaser to receive a fresh certificate in his own name without seeing the certificate of his vendor, the case would present a different aspect, for in that case the absence of the certificates would naturally cause the purchaser to suspect that something was wrong. But, as a matter of fact, far from being uncommon, this mode of conveying stock is customary among brokers, and most of the transfers of stock are now made in that way."

1. *Baker v. Wasson*, 53 Tex. 150.

transferred the unsurrendered certificates, the element of fraud, actual or constructive, then entering into the case.<sup>1</sup>

c. REGISTRATION—(1) *Importance and Necessity*.<sup>2</sup>—Most modern corporations have a provision, either in their acts or articles of incorporation, charters, or by-laws, that stock shall be transferable only upon the books of the company. The question of the effect of a failure to observe this requirement has been answered by the courts in several ways. There is a substantial agreement in the cases that a transfer, in other respects regular, but without the required registration, is valid as between the parties, and passes the interest of the transferrer.<sup>3</sup> But where the rights of third parties, innocent purchasers, or creditors, are in judgment, the authorities are at variance as to the effect of the unregistered

1. *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571.

2. In this connection questions arise, at once the most complicated and important of those concerning the law of stock. The subject derives additional interest from its relation to the question of land transfer reform. Should the present movement for the adoption of the "Torrens" or Australian system of registration of title prove successful, resulting legal problems must arise, in the solution of which, the principles already applied to the law of the transfer of stock, will afford much light. See articles in 25 Am. L. Rev., pp. 367, 755, 806. Report of Am. Bar Ass'n. 1890, President's Address.

3. *Unregistered Transfer Passes the Transferrer's Interest*.—*Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472; *People v. Elmore*, 35 Cal. 652; *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Parrott v. Byers*, 40 Cal. 614; *Farmer's, etc., Bank v. Wasson*, 48 Iowa 336; 30 Am. Rep. 398; *People's Bank v. Gridley*, 91 Ill. 457; *Otis v. Gardner*, 105 Ill. 436; 1 Am. & Eng. Corp. Cas. 643; *Bruce v. Smith*, 44 Ind. 1; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Smith v. Crescent City Live Stock, etc., Co.*, 30 La. Ann. 1378; *Baltimore, etc., R. Co. v. Sewell*, 35 Md. 238; *Swift v. Smith*, 65 Ind. 428; 14 Am. & Eng. Corp. Cas. 111; 57 Am. Rep. 336; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Sargent v. Essex, etc., R. Corp.*, 9 Pick. (Mass.) 202; *Brown v. Smith*, 122 Mass. 589; *Dickinson v. Metacomet Nat. Bank*, 130 Mass. 132; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Newberry v. Detroit, etc., Iron Co.*, 17 Mich. 41; *Baldwin v. Canfield*, 26 Minn. 43; *Lund v. Wheaton*

*Roller Mill Co. (Minn.)*, 52 N. W. Rep. 268; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *White v. Salisbury*, 33 Mo. 150; *Wilson v. St. Louis, etc., R. Co.* (Mo. 1891), 36 Am. & Eng. Corp. Cas. 290; *Scripture v. Francetown Soapstone Co.*, 50 N. H. 587; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Bates v. New York Ins. Co.*, 3 Johns. Cas. (N. Y.) 238; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 627; *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 318; *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 350; *Cutting v. Damerall*, 23 Hun (N. Y.) 339; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Cushman v. Thayer Mfg., etc., Co.*, 76 N. Y. 365; 32 Am. Rep. 315; *Haldeman v. Hillsborough, etc., R. Co.*, 2 Handy (Ohio) 101; *Conant v. Reed*, 1 Ohio St. 298; *U. S. v. Vaughan*, 3 Binn. (Pa.) 394; 5 Am. Dec. 375; *Wood v. Maitland*, 10 Phila. (Pa.) 84; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Beckwith v. Burrough*, 13 R. I. 294; *Lippitt v. American Wood Paper Co.*, 15 R. I. 141; *Cornish v. Richards*, 3 Lea (Tenn.) 1; *Rio Grande Cattle Co. v. Burns* (Tex. 1891), 36 Am. & Eng. Corp. Cas. 306; *Ex parte Murphy*, 51 Wis. 519; *Black v. Zacharie*, 3 How. (U. S.) 513; *Johnston v. Lafin*, 103 U. S. 804; *Becker v. Wells Foundry Mill Co.*, 1 McCrary (U. S.) 62; *Crawford v. Provincial Ins. Co.*, 8 U. C. C. P. 263; *Société Générale v. Walker*, L. R., 11 App. Cas. 20; *Colonial Bank v. Hepworth*, L. R., 36 Ch. Div. 36; 19

transfer; some holding that it gives the transferee a legal title, or one that will protect him, and some that it passes only an equitable title, inferior to the prior rights of third parties.<sup>1</sup> A few of the cases appear to announce different distinctions, holding that the element of notice determines the priorities, and that

Am. & Eng. Corp. Cas. 480; *Roots v. Williamson*, L. R., 38 Ch. Div. 485; 21 Am. & Eng. Corp. Cas. 444.

Some of the early *Connecticut* cases appear to announce the doctrine that no title (legal or equitable) passes without the required registry. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton*, etc., *Turnpike Co.*, 3 Conn. 544; *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 552.

So in *New York*: *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 362. But the later authorities are in line with the text. See *Colt v. Ives*, 31 Conn. 25; 81 Am. Dec. 161; and *New York* cases above cited.

Where the corporation has no register, an assignment on the back of the certificate makes the transferee the equitable owner, and after notice to the corporation, he is entitled to the dividends. *Telford*, etc., *Turnpike Co. v. Gerhab* (Pa.), 21 Am. & Eng. Corp. Cas. 471.

Where the corporation neglects to provide transfer books, as required by law, and the certificate is not signed by the officers, but the transfer is acquiesced in, original stockholders are not liable for unpaid stock and subsequently transferred stock. *Isham v. Buckingham*, 49 N. Y. 216.

An unregistered transferee from the lawful owner takes priority from an unregistered purchaser in good faith from one who has the certificate in his possession without authority. *Bangor Electric Light, etc., Co. v. Robinson*, 52 Fed. Rep. 520.

1. **Equities of Transferee and Prior Claimants.** — *Lowell's Transfer of Stock*, p. 103, note, collates and classifies the authorities as follows: "In the following cases this is made part of the *ratio decidendi*: *Ross v. Southwestern R. Co.*, 53 Ga. 532; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 463; 74 Mo. 77; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 252 (but see other *Missouri* cases *infra*, this note); *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341; *Scripture v. Frances-town Soapstone Co.*, 50 N. H. 571 (*semble*); *Leitch v. Wells*, 48 N. Y. 585; *Smith v. American Coal Co.*, 7

*Lans.* (N. Y.) 317; *Noyes v. Spaulding*, 27 Vt. 420; *Cherry v. Frost*, 7 Lea (Tenn.) 13. In the following cases the same principal was laid down *obiter*: *State v. Leete*, 16 Nev. 250; *Eastman v. Fiske*, 9 N. H. 182; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313; *Johnson v. Underhill*, 52 N. Y. 203; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 623; *Cushman v. Thayer Mfg., etc., Co.*, 76 N. Y. 371; 32 Am. Dec. 315; and see *Purchase v. New York Exchange Bank*, 3 Robt. (N. Y.) 164. In *Adderly v. Storm*, 6 Hill (N. Y.) 624, *Bronson, J.*, draws this distinction: if the stock is transferred by means of an assignment which is to be recorded on the books, the title passes before the record is made; but if the parties prefer to convey the stock by executing a power of attorney to make a transfer on the books, the title does not pass until the transfer is made on the books. But such a distinction does not seem to be in accordance with the object of the rule, or with the intention of the parties.

"That the legal title does not pass until transfer on the books. In the following cases . . . this principle is made a part of the *ratio decidendi*: *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Lowry v. Commercial, etc., Bank*, *Taney's Dec.* (U. S.) 310; *Brown v. Adams*, 5 Biss. (U. S.) 181; *Williams v. Mechanics Bank*, 5 Blatchf. (U. S.) 59; *Becher v. Wells Flouring Mill Co.*, 1 Fed. Rep. 276; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton, etc., Turnpike Co.*, 3 Conn. 544; *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 552; *Dutton v. Connecticut Bank*, 13 Conn. 493; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197; *Helm v. Swiggett*, 12 Ind. 194 (*semble*); *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373; *Boyd v. Rockford Steam Cotton Mills*, 7 Gray (Mass.) 406; *Blanchard v. Dedham Gas Light Co.*, 12 Gray (Mass.) 213; *M'Courry v. Suydham*, 10 N. J. L. 245; *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 350; *Mechanics Bank v. New York, etc., R. Co.*, 13 N. Y. 599;



New York, etc., *R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534 (but see later *New York* cases, *supra*); *Lockwood v. Mechanics Nat. Bank*, 9 R. I. 331; 11 Am. Rep. 253. In the following cases the same doctrine is laid down *obiter*: *Black v. Zacharie*, 3 How. (U. S.) 483; *U. S. v. Cutts*, 1 Sumn. (U. S.) 133 (this was, however, a case of government debt, not of corporate stock); *Planters, etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Otis v. Gardner*, 105 Ill. 436 (*semble*); 1 Am. & Eng. Corp. Cas. 643. And see *Kellogg v. Stockwell*, 75 Ill. 68; *People's Bank v. Gridley*, 91 Ill. 457; *Bruce v. Smith*, 44 Ind. 1; *State v. First Nat. Bank*, 89 Ind. 302; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; 97 Am. Dec. 107; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 519; *White v. Salisbury*, 33 Mo. 150; *Boatmen's Ins., etc., Co. v. Able*, 48 Mo. 136 (but see other *Missouri* cases, *supra*); *Conant v. Reed*, 1 Ohio St. 298; *U. S. v. Vaughan*, 3 Binn. (Pa.) 394; 5 Am. Dec. 375; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Fraser v. Charleston*, 11 S. Car. 486 (*semble*).

"In the following cases the question is raised but no opinion upon it is given: *Johnston v. Laffin*, 103 U. S. 800; 5 Dill. (U. S.) 65; *People v. Robinson*, 64 Cal. 373; *Colt v. Ives*, 31 Conn. 25; 81 Am. Dec. 161; *Green Mount, etc., Turnpike Co. v. Bulla*, 45 Ind. 1; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Com. v. Watmough*, 6 Whart. (Pa.) 117; *Finney's Appeal*, 59 Pa. St. 398; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 105. See also *Bank of America v. McNeil*, 10 Bush (Ky.) 54. The case of *Fiske v. Carr*, 20 Me. 301, turned on a statute which provided expressly that the title should not pass until transfer on the books.

"In the following cases nothing is said of the legal title, but it is laid down that the rule avails *bona fide* purchasers: *People v. Belmont*, 35 Cal. 653; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Wonson v. Fenno*, 129 Mass. 405. (In this case no transfer rule appears, but doubtless there was one.) *Cady v. Potter*, 55 Barb. (N. Y.) 463. (No transfer rule appears in the report, but the case professes to follow the case *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30, *supra*) *Sabin v. Bank of Woodstock*, 21 Vt. 353. And see *Morrison v. Harrison*, 3 Rettle 406."

#### Additional and Later Authorities.—

To the foregoing list of cases may be added under the first head (that the legal title passes): *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472; *Smith v. Crescent City Live Stock, etc., Co.*, 30 La. Ann. 1378; *Sargent v. Essex, etc., R. Corp.*, 9 Pick. (Mass.) 202 (where simply by-laws required registry); *Newberry v. Detroit, etc., Iron Co.*, 17 Mich. 141; *Pinkerton v. Manchester R. Co.*, 42 N. H. 424 (diligence required of pledgee); *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Hunterdon Bank v. Nassau Bank*, 17 N. J. Eq. 496; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Fraser v. Charleston*, 11 S. Car. 486; *Cheever v. Meyer*, 52 Vt. 66.

"A complete equitable and legal title passes by the act of the owner in assigning the certificate." *Smith v. Nashville, etc., R. Co.* (Tenn. 1892), 18 S. W. Rep. 546.

Where the owner has his stock registered in the name of a third party, the legal title is in the latter. *Dawson v. Rishworth*, 1 B. & Ad. 574.

In *Wilson v. St. Louis, etc., R. Co.* (Mo. 1891), 18 S. W. Rep. 286; 36 Am. & Eng. Corp. Cas. 290, it was held that where only a by-law required registration a transferee's title was good against that of an execution creditor who had no notice of the transfer at the time of the levy, but received notice before he purchased at the execution sale. But see *Jones v. Latham*, 70 Ala. 164; 3 Am. & Eng. Corp. Cas. 172.

The rights of an assignee, without the required registration, are superior to those of subsequent attaching creditors, if notice be given to the corporation. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507. So where the corporation refuses to register the transfer. *Merchants Nat. Bank v. Richards*, 6 Mo. App. 454.

In *England*, a pledge of blank certificates signed by the pledgor passes legal title, if the articles of incorporation do not require a deed; otherwise only equitable title. *Ex parte Sargent, L. R.*, 17 Eq. 273.

Under the second head (that the legal title does not pass without registration): *Weston v. Bear River, etc., Water, etc., Co.*, 5 Cal. 186; 63 Am. Dec. 117; *Strout v. Natoma Water, etc., Co.*, 9 Cal. 78; *Naglee v. Pacific Wharf. Co.*, 20 Cal. 529; *Otis v. Gardner*, 105 Ill. 436; 1 Am. & Eng. Corp.

a *bona fide* transferee without notice of existing equities will be protected.<sup>1</sup> Still others construe the requirement as one existing

Cas. 643; *Hall v. Rose Hill, etc.*, Road Co., 70 Ill. 673; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270; 16 Am. & Eng. Corp. Cas. 419; *Koons v. First Nat. Bank*, 89 Ind. 178; 3 Am. & Eng. Corp. Cas. 176; *Dane v. Young*, 61 Me. 160; *Swift v. Smith*, 65 Md. 428; 14 Am. & Eng. Corp. Cas. 111; 57 Am. Rep. 336; *Baltimore, etc., Brick Co. v. Mali*, 65 Md. 93; 13 Am. & Eng. Corp. Cas. 49; 57 Am. Rep. 304; *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424; *Wight v. Steinkemeyer*, 6 Mo. App. 575; *Worrall v. Judson*, 5 Barb. (N. Y.) 210; *Richards v. Abendroth*, 43 Barb. (N. Y.) 162; *Cady v. Potter*, 55 Barb. (N. Y.) 463; *Cutting v. Damerel*, 23 Hun (N. Y.) 339; *Shellington v. Howland*, 53 N. Y. 371; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. Rep. (Ohio) 230; *Lippett v. American Wood Paper Co.*, 15 R. I. 141; 10 Am. & Eng. Corp. Cas. 125; *Becher v. Wells Flouring Mill Co.*, 1 McCrary (U. S.) 62.

"The true view, it is submitted, is that such a transfer does not pass the legal title, but that it passes the equitable interest, coupled with irrevocable power to acquire the legal title. This view avoids the objection of disregarding the language of the statute prescribing the mode of transfer and also explains the decisions in *Redfean v. Ferrier*, 1 Dow. 50, and *Dodds v. Hills*, 2 H. & M. 424, where a purchaser for value from a trustee of stock, without notice of the trust, was allowed to retain the stock, although before registration he learned of the trust." Ames, Bills and Notes, vol. 2, p. 784.

Where the lien of execution against stock has attached before notice to the creditor of a prior unregistered transfer, the purchaser at the execution sale takes a good title, though he had actual notice of the transfer. *Jones v. Latham*, 70 Ala. 164; 3 Am. & Eng. Corp. Cas. 172. But see *Wilson v. St. Louis, etc., R. Co.* (Mo. 1891), 18 S. W. Rep. 286.

Where the transferee fails to register as required, and delays in claiming the ownership and transferer goes into insolvency, the transferee has no lien on the stock as against the trustee in insolvency. *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *In re London, etc., Tel. Co.*, L. R., 9 Eq. 653.

A partner in whose name the stock

was registered, upon inchoate transfers to the firm, is entitled to it upon the bankruptcy of the firm. *Colonial Bank v. Whinney*, 51 L. T., N. S. 354.

Unregistered transfer of stock as collateral passes no title as against a subsequent attachment, if no demand for registry is made until after the levy. *Abels v. Mobile Real Estate Co.* (Ala. 1891), 9 So. Rep. 423; *Planters, etc., Ins. Co. v. Mobile Real Estate Co.* (Ala. 1891), 9 So. Rep. 423. But an entry on the register that stock has been assigned as collateral, will protect the assignee from the claims of the assignor's judgment creditors. *Moore v. Marshalltown Opera House Co.*, 81 Iowa 45.

Where stock is transferable only on the books of the company, and the administrator of the assignor received the accrued dividends before the assignee registered the transfer, the latter cannot compel payment to him of the same dividends. *Brisbane v. Delaware, etc., R. Co.*, 25 Hun (N. Y.) 438.

A corporation which attaches stock of one of its members, which has been transferred but not registered, is not chargeable with such transfer, nor is the latter effectual against the corporation, though one of the directors who took no part in causing, and had no knowledge of the attachment knew of the transfer. *Butterick v. Nashua, etc., R. Co.*, 62 N. H. 413.

In *Maine*, under Rev. Sts., § 411, ch. 46, in force in 1860, no transfer of bank stock will secure it from attachment until entered on the corporate books; to hold the transferee liable there must be proof that the transfer was so recorded; and the verbal statement of the cashier to that effect, will not suffice. *Skowhegan Bank v. Cutler*, 49 Me. 315.

A pledgee who fails for ten years to register his transfer, cannot claim title as against the corporation and purchaser of the stock at an execution sale. *Noble v. Turner*, 69 Md. 519; 26 Am. & Eng. Corp. Cas. 438. See also *Société Générale v. Walker*, L. R., 11 App. Cas. 20; *Colonial Bank v. Hepworth*, L. R., 36 Ch. Div. 36; 19 Am. & Eng. Corp. Cas. 480; *Roots v. Williams*, L. R., 38 Ch. Div. 485; 21 Am. & Eng. Corp. Cas. 444.

1. *Notice as Affecting Validity of Transfer.*—*Otis v. Gardner*, 105 Ill.

for the benefit of the corporation alone, liable to be waived by it, and not to be invoked by third parties.<sup>1</sup> Sometimes the subject

436; 1 Am. & Eng. Corp. Cas. 643; *Atkinson v. Atkinson*, 8 Allen (Mass.) 15; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Johnson v. Laffin*, 5 Dill. (U. S.) 84; 103 U. S. 800; *Dodds v. Hills*, 2 H. & M. 424; 12 L. T. 139. Compare *Winter v. Montgomery Gas Light Co.*, 89 Ala. 544; 30 Am. & Eng. Corp. Cas. 57. See also an interesting discussion of this point in Lowell on the Transfer of Stock, § 99. *Contra*, *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 350; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; 11 Am. Rep. 253; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390.

Where the assignee gives notice of his ownership to the corporation, the purchaser from the receiver of the original holder acquires no title. *Purchase v. New York Exch. Bank*, 3 Robt. (N. Y.) 164.

A *bona fide* transferee must be a purchaser without notice and for value; merely giving security for the purchase money, or credit upon a pre-existing debt, is not sufficient to constitute one a purchaser for value. *Weaver v. Barden*, 49 N. Y. 292.

A letter from the assistant treasurer of the company, referring to another letter, wherein the receiver of the first claims ten shares of stock, is not notice to the company of an unregistered transfer. *Brisbane v. Delaware, etc., R. Co.*, 94 N. Y. 204; 5 Am. & Eng. Corp. Cas. 135.

The purchasers of stock are not bound to look beyond the certificate or to examine the books of the corporation to ascertain the validity of the transfer. *Lowry v. Commercial, etc., Bank*, Taney's Dec. (U. S.) 310.

Registration vests the legal title in the holder and clothes him with all the insignia of ownership, and the apparent right of possession; and a *bona fide* purchaser from him is not affected by an equity as to the title to the stock of which the registration holder has notice, although the transfer to the purchaser has not been registered. *Winter v. Montgomery Gas Light Co.*, 89 Ala. 544; 30 Am. & Eng. Corp. Cas. 57.

The doctrine of *lis pendens* does not apply to the transfer of stock. *Leitch v. Wells*, 48 N. Y. 585; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

The purchaser of a judgment enjoin-

ing the corporation from transferring stock, cannot recover from it, if the stock was transferred before the injunction was granted. *Hawes v. Gas Consumer's Ben. Co.*, 12 N. Y. Supp. 924.

1. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; 44 Am. Dec. 472; *Southwestern R. Co. v. Thomason*, 40 Ga. 408; *Ross v. S. W. R. Co.*, 53 Ga. 514; *Smock v. Henderson*, 1 Wills. (Ind.) 241; *Blouin v. Liquidators of Hart*, 30 La. Ann. 714; *Smith v. Crescent City Live Stock, etc., Co.*, 30 La. Ann. 1378; *Baldwin v. Canfield*, 26 Minn. 55; *Lund v. Wheaton Roller Mill Co.* (Minn. 1892), 52 N. W. Rep. 268; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Stockwell v. St. Louis Mercantile Co.*, 9 Mo. App. 133; *Mt. Holley, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; 14 Am. Dec. 526; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 627; *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 218; *National Bank v. Robinson*, 95 N. Y. 637; 6 Am. & Eng. Corp. Cas. 548. See also 1 Am. & Eng. Corp. Cas. 653; *Smith v. Nashville, etc., R. Co.* (Tenn. 1892), 18 S. W. Rep. 546. In many of these cases the discussions of the point are largely *obiter*.

In *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; 14 Am. Dec. 526, the court said: "The transfer, it is said, was not valid, because it was not registered in a book kept by the company for that purpose, the sixth section of the act providing that no transfer of stock shall be effectual until it is so registered, and all debts due from the stockholder to the company are paid, etc. This provision was intended exclusively for the benefit and protection of the bank. Their lien upon the stock for any debts due them cannot be affected by a transfer of the stock; and the only notice of a transfer which they are bound to regard, is a registry of it in their books. Payment of dividends to the original stockholder at any time before the assignment was registered would probably be good. The legislature intended by this section to afford to the bank a means of ascertaining with certainty who they were bound to consider and treat as stockholders. But if A, being a stockholder in the

is dealt with by statute,<sup>1</sup> and, where this is the case, the question is simplified and set at rest.

(2) *What Constitutes Registration.*—As a general rule courts will place a liberal construction upon requirements as to the manner in which registration is to be effected. It has been held that the term "registered" does not mean the same as "recorded;" that registration does not involve the copying of the transfer on the proper books *in haec verba*; and that a memorandum on the stub books of the corporation will suffice.<sup>2</sup> A requirement of transfer on the books of the corporation does not necessitate the keeping of a separate set of books for that exclusive purpose, but the other books of the company may be utilized.<sup>3</sup> Under a statute which requires transfer on the corporate books in such manner as the by-laws may prescribe, entries on the stubs of certificates in the stock register constitute a sufficient record of transfers, and a stockholder who has failed to adopt this method is not excluded from registry because no by-law prescribing the mode was enacted.<sup>4</sup> It is not necessary that the book be attested by

bank, and also indebted to the bank, transfer his stock to B, all his interest passes. It is a valid transfer as between A and B, but B takes it subject to the claims of the bank against A."

A provision requiring transfer in person or by attorney, is waived by permitting transfer in other ways. *American Nat. Bank v. Oriental Mills* (R. I. 1891), 23 Atl. Rep. 795.

1. As, for example, in *California, Kentucky and Montana*, in which states the statutes provide that unrecorded transfers (in *California*, of bank stock) shall be valid only as between the parties; in *Alabama, Connecticut and Massachusetts*, where registry is required; in *Colorado*, where, in the absence of registry, the transferrer is liable on unpaid subscriptions.

Where the requirement of registration exists merely in a by-law, a transfer without registration is not invalid. *Wilson v. St. Louis, etc., R. Co.*, 108 Mo. 588; 36 Am. & Eng. Corp. Cas. 290.

2. *Fisher v. Jones*, 82 Ala. 117; 19 Am. & Eng. Corp. Cas. 450. In this case the company kept only a single book of stock certificates with a stub attached to each, on which were entered the date, name, serial numbers, etc., corresponding with each certificate issued. The following memorandum was entered on the stub: "Transf. to Winston Jones, assignee, for collateral, Dec. 1, '84." The statute required transfers to be registered or made upon the book or books of the company. The court, by Somerville, J., said:

"The word 'registration' in our judgment, is used here in the sense of memorials or evidence. The purpose of the statute on this subject is so as to prevent fraudulent transfers, and to protect the corporation itself in determining the question of membership, the right to vote, the payment of dividends, the other incidents of ownership. *Scripture v. Francetown Soapstone Co.*, 50 N. H. 584; *Cheever v. Meyer*, 52 Vt. 66; *Cook, Stocks*, §§ 486-490; *Jones v. Latham*, 70 Ala. 164; 3 Am. & Eng. Corp. Cas. 172; *Black v. Zacharie*, 3 How. (U. S.) 483. A written memorandum in proper form would as well answer the purposes thus intended as a formal record." See also *Skowhegan Bank v. Cutler*, 52 Me. 509.

3. In *Cecil Nat. Bank v. Watson-town Bank*, 105 U. S. 217, the court, by Matthews, J., said: "All that is necessary, when the transfer is required by law to be made upon the books of the corporation is, that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose, the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment, or by derivation from others, is quite suitable, and fully meets the requirements of the law."

4. In *Plumb v. Bank of Enterprise*, 48 Kan. 484, the court, by Johnston, J.,

all the corporate officers; one which the cashier of the bank testifies is its stock ledger, is a proper place for entries required to be made upon the "books of the bank."<sup>1</sup> In an early *New Jersey* case,<sup>2</sup> where the charter provided for transfer on the "books of the company in such manner as the by-laws of the company shall ordain," the court considered that until the company had books, and until by-laws had ordained the manner in which shares should be transferred, no legal transfer could be made. But in a later adjudication, where no stock ledger was kept as the law required, a transfer on the subscription list, indorsed upon the old certificate, and followed by the issue of a new one to the transferee, was held to be a ratification by the company and to relieve the transferor.<sup>3</sup> So, neglect by the company to provide corporate books for registration effects a waiver of that formality,<sup>4</sup> and mere notice to the company of the transfer will suffice.<sup>5</sup> Where the registration book has been lost, it is proper to open a new one, making it, so far as possible, a copy of the old, and the former may be used to ascertain who are voters, although the latter, if again produced, will govern with regard to transfers before the loss.<sup>6</sup> Under a by-law requiring an assignment of transfers on the treasurer's book, a written assignment is necessary, and a mere entry of credit to the assignee, for the amount of the stock, will not be sufficient.<sup>7</sup> Where, however, the requirement simply is

said: "This record showed the date of issue, the number of the certificate, the number of shares included, and the name of the person to whom issued. The practice, in case of sales of stock, was to note the transfer upon the stub of the old certificate, then take up the old and issue a new certificate to the transferee. The number of the new certificate was specifically referred to on the stub of the old one; and by turning to the stub of the new certificate anyone could ascertain to whom the stock had been transferred, the time of the transfer and the form of the issue, and that the new had been issued in lieu of the old certificate. This, we think, was a sufficient record of the transfer, within the meaning of the statute. *Fisher v. Jones*, 82 Ala. 117; 19 Am. & Eng. Corp. Cas. 450. The statute does not provide the nature of the book to be kept, nor the manner in which stock shall be transferred, but provides that it shall be done in such manner as the by-laws may prescribe. The method pursued by the *Kansas Harvester Company* is the common mode of keeping a register of stockholders in a corporation; and a stockholder who knew, or must be held to have known, of this mode, is not in a

position to complain of the want of facilities to register the transfer, or that no by-law had been enacted prescribing the manner of transfer. As to a stockholder, the common usage of the corporation supplies the place of such a by-law, and a member of a corporation can hardly claim exemption from liability on account of its neglect to enact one."

1. *Skowhegan Bank v. Cutler*, 52 Me. 509.

2. *M'Courry v. Doremus*, 10 N. J. L. 245.

3. *Stewart v. Walla Walla Printing, etc., Co.*, 1 Wash. Ter. 521; 26 Am. & Eng. Corp. Cas. 229.

4. *Isham v. Buckingham*, 49 N. Y. 216; *Purchase v. New York Exch. Bank*, 3 Robt. (N. Y.) 164.

5. *Crawford v. Prov. Ins. Co.*, 8 U. C. C. P. 263.

6. *Schoharie Valley R. Case*, 12 Abb. Pr., N. S. (N. Y.) 394.

7. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579, where the court, by Swift, J., says: "Though the form of the assignment is not pointed out, yet the by-law, on its fair construction, requires that there must be a written assignment on the treasurer's book, subscribed by the assignor, or his au-

that the transfer shall be registered on the books of the company, a written assignment *in pais* is valid, though registration is not effected until afterward.<sup>1</sup> But the latter step must be taken within the statutory period, or the transfer will be void as to creditors and subsequent purchasers.<sup>2</sup> A by-law requiring the transfer to be entered and attested by the secretary is complied with substantially where the secretary is empowered to transfer certain stock and does so without signing the transfer as attorney, but by simply attaching the power.<sup>3</sup> But registration is not effected by the delivery of the certificate of transfer to a corporate officer with the request that he transfer it,<sup>4</sup> nor by the entry by the clerk on the instrument of transfer of the words "Received for record,"<sup>5</sup> nor by a letter from the transferee to the president of the company stating that the former holds the certificates and desires transfer on the books.<sup>6</sup> Registration at a branch office is not effective until entered on the books at the principal office, where such principal office is in another state.<sup>7</sup>

(3) *Application for Registry.*—The phrase "Transferable only on the books of the company," requires, when coupled with a provision for the surrender of the certificate, a transfer by the corporate officers, and not by the assignor of the stock.<sup>8</sup> In making a formal demand for registration, it is not necessary that the applicant should seek the directors and have one appointed who may comply with the demand; it is sufficient to apply at the principal office during business hours and to the officers and agents there in attendance.<sup>9</sup> An application to the president is

thorized attorney, to constitute a transfer of the stock. In this case, no assignment is made on the treasurer's book, but merely an entry of credit to the defendant of the share in question. This is no compliance with the by-law, and does not transfer the share to the defendant so as to constitute him a member of the company. Whether such acts were done by the directors as would have given the defendant a claim on the company for the dividends of the share, if the business had been profitable, is a very different question, not necessary to be decided." *Compare Union Bank v. Laird*, 2 Wheat. (U. S.) 390.

1. *Northrop v. Curtis*, 5 Conn. 246; *Northrop v. Newtown, etc., Turnpike Co.*, 3 Conn. 544.

2. *Berney Nat. Bank v. Pinchard*, 87 Ala. 577; 30 Am. & Eng. Corp. Cas. 52.

3. *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

4. *Brown v. Adams*, 5 Biss. (U. S.) 181.

5. *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 552; *Marlborough Mfg. Co.*

*v. Smith*, 2 Conn. 579; *Northrop v. Newtown, etc., Turnpike Co.*, 3 Conn. 544.

6. *Newell v. Williston*, 138 Mass. 240.

7. *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424.

8. *Green Mount, etc., Turnpike Co. v. Bulla*, 45 Ind. 1.

9. *Commercial Nat. Bank v. Kortright*, 22 Wend. (N. Y.) 348. The chancellor, in delivering the opinion of the court, further says: "In case they are not authorized to transact that particular business, they must either refer him to the proper officers in the bank, or procure the attendance of such officers, or of the board of directors, if necessary, without any unreasonable delay. The transferring the shares of the capital stock on the books of the bank is a matter of ordinary occurrence; and in the absence of any proof to the contrary, it may be fairly presumed that the principal officer or clerk in attendance at the bank, during the usual hours of business, is authorized to permit such a transfer when proper."

proper,<sup>1</sup> even though he has a personal interest to subserve in refusing registry.<sup>2</sup> So the cashier<sup>3</sup> of a bank, and the corporation secretary,<sup>4</sup> either alone or in conjunction with the treasurer,<sup>5</sup> are proper persons to make demand upon for registry. The application should be granted at the instance of either of the parties to the transfer.<sup>6</sup>

(4) *Wrongful Refusal of Registration*—(a) *What Constitutes*.—While a corporation is justified in refusing to register transfers of stock from one who is indebted to it and whose stock is subject to a lien,<sup>7</sup> or where there has been no surrender of the certificate,<sup>8</sup> and in certain other instances,<sup>9</sup> generally, the owner of the stock is entitled to registration, and a refusal to allow it may constitute conversion of the shares.<sup>10</sup> Thus, registration cannot be refused because the transfer is without consideration<sup>11</sup> or is made for the purpose of distributing shares and commanding greater influence at an approaching corporate election,<sup>12</sup> nor because of a lien conferred<sup>13</sup> or a resolution passed<sup>14</sup> since the application for registry, nor because only a portion of the stock has been paid in, no more having been called for by the directors,<sup>15</sup> nor on account of an agreement between the company and the applicant's vendor that he should not transfer his stock,<sup>16</sup> nor by reason of the fraudulent

1. *Green Mount, etc., Turnpike Co. v. Bulla*, 45 Ind. 1.

2. *Commercial Nat. Bank v. Kortright*, 22 Wend. (N. Y.) 348. In this case the president of the bank had pledged certain shares as collateral, and the pledgee had re-transferred them, and then absconded, being in debt to the bank. His transferee applied to the pledgor for registry and this was held to be sufficient.

3. *Case v. Citizens' Bank*, 100 U. S. 446.

4. *McMurrich v. Bond Head Harbour Co.*, 9 U. C. Q. B. 333.

5. *In re Goodwin v. Ottawa, etc., R. Co.*, 13 U. C. C. P. 254.

6. *Johnston v. Lafin*, 103 U. S. 804; *Webster v. Upton*, 91 U. S. 71.

7. See *infra*, this title, *Lien of the Corporation on Stock*.

8. See *supra*, this title, *Surrender of Certificate*.

9. See *supra*, this title, *Issue*.

10. In *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50; 36 Am. & Eng. Corp. Cas. 306, where the company refused either to issue a certificate or allow registration, the court said: "That these acts amount to a conversion under the law is well settled by the authorities, and that thereupon it was at the election of the plaintiff to have either sued for specific perfor-

mance or in *assumpsit* upon the case for damages, the measure of which would ordinarily be the market value of the stock converted. The plaintiff pursued practically, though not technically (being unnecessary under our system) the latter course, and recovered the value of the stock. *Mor. Priv. Corp.*, §§ 337, 338, and notes; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91; *Baker v. Wasson*, 53 Tex. 150; *Franco-Texan Land Co. v. Bousselet*, 70 Tex. 422; 21 Am. & Eng. Corp. Cas. 359. It was not alleged nor proved that the stock was liable for any debts, or, for that matter, that the company was in debt at all."

11. *Helm v. Swiggett*, 12 Ind. 194. But see *Gould v. Head*, 41 Fed. Rep. 240; 31 Am. & Eng. Corp. Cas. 331.

12. *In re Stranton Iron, etc., Co., L. R.*, 16 Eq. 559; *Moffatt v. Farquhar*, 7 Ch. Div. 591; *State v. Smith*, 48 Vt. 266; and see *supra*, this title, *Motive and Effect of Transfer*.

13. *People v. Crockett*, 9 Cal. 112. Compare *Bond v. Mount Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49.

14. *Reg. v. Hotel Co., L. J.*, Q. B. 369.

15. *Kahn v. St. Joseph Bank*, 70 Mo. 262.

16. *Gould v. Head*, 41 Fed. Rep. 240; 31 Am. & Eng. Corp. Cas. 331.

representations by such owner, made long previously, when the stock was issued to him.<sup>1</sup> And if the company has permitted the transfer on its books of a part of a bequest of shares, it cannot enforce its lien by refusing registry as to the remainder.<sup>2</sup> One who holds a certificate from the company is entitled to have his transferees registered, though his vendor previously sold the shares to another.<sup>3</sup>

(b) *Remedies*—(1) *BILL IN EQUITY*.—It is well settled that the registration of transfers may be enforced in equity<sup>4</sup> and this has been said to be the "surest, most complete, and most just remedy."<sup>5</sup> Where evidence which demonstrates the applicant's right to registry is ignored by the corporation, it will be compelled not only to register the transfer, but will be charged also with the costs of the suit.<sup>6</sup> In *California*, such an action cannot be joined with one to recover from the purchaser other stock sold under a fraudulent assessment.<sup>7</sup> In an action by a purchaser at foreclosure sale to compel the issue of a certificate, the mort-

1. *American Wire Nail Co. v. Bayless* (Ky. 1891), 15 S. W. Rep. 10.

2. *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. St. 345.

3. *Tomkinson v. Balkis Consolidated Co.* (1891), 2 Q. B. 614.

4. In *Cushman v. Thayer Mfg., etc., Co.*, 76 N. Y. 365; 32 Am. Rep. 315, Miller, J., said: "To say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which would work great injuries in many cases, and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance on a contract for the sale of real estate and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy in law is inadequate to furnish the proper relief;" citing *Middlebrook v. Merchants' Bank*, 41 Barb. (N. Y.) 481; 27 How. Pr. (N. Y.) 474; *Commercial Nat. Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Pollock v. National Bank*, 7 N. Y. 274; 57 Am. Dec. 520; *Purchase v. N. Y. Exch. Bank*, 3 Robt. (N. Y.) 164; *White v. Schuyler*, 1 Abb. Fr., N. S. (N. Y.) 300; *Buck-*

*master v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313; *Seymour v. Delaney*, 6 Johns. Ch. (N. Y.) 222; 3 Cow. (N. Y.) 445.

"Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain an action at law for refusing to open its books and permitting the transfer. Nor have the appellants shown such a claim to the stock as to authorize the court to turn the appellees round to their remedy at law, against Lynn, admitting they might have it. At all events, the remedy at law is not clear and perfect; and it is not a case for compensation in damages, but for specific performance which can only be enforced in a court of chancery." *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 305. See also *Jewett v. Bradford Sav. Bank, etc., Co.*, 45 Fed. Rep. 801; *Iasigi v. Chicago, etc., R. Co.*, 129 Mass. 46; *Archer v. American Water Works Co.* (N. J. 1892), 24 Atl. Rep. 508; *Middlebrook v. Merchants' Bank*, 3 Abb. Ct. of App. Dec. (N. Y.) 295; *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313. Compare *Birmingham v. Sheridan, etc., Ins. Co.*, 33 Beav. 660; *Eustace v. Dublin, etc., R. Co.*, L. R., 6 Eq. 182; *Wynne v. Price*, 3 De G. & S. 310; *In re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425.

5. *Cook, Stock and Stockholders* (2d ed.), § 391.

6. *Iasigi v. Chicago, etc., R. Co.*, 129 Mass. 46.

7. *Johnson v. Kirby*, 65 Cal. 482.



gagor is not a necessary party,<sup>1</sup> nor is the corporation a necessary party in a suit against the officers to enforce registration.<sup>2</sup>

(2) ACTION AT LAW.—Assumpsit, or, in states having the code practice, an action for damages will generally lie for the wrongful refusal to register transfers.<sup>3</sup> In *Pennsylvania*, however, it is held that assumpsit is not available, and that case is the proper remedy.<sup>4</sup> The measure of damages has been variously held to be

1. *Tregear v. Etiwanda Water Co.*, 76 Cal. 537; 27 Am. & Eng. Corp. Cas. 489.

2. *Gould v. Head*, 41 Fed. Rep. 240; 31 Am. & Eng. Corp. Cas. 331.

3. In *Kimball v. Union Water Co.*, 44 Cal. 175; 13 Am. Rep. 157, the court says: "It has been so frequently decided that a party entitled to stock in a private corporation has an action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company's books, that it must be considered as a settled principle of law;" citing *Rex v. Bank of England*, 2 Doug. 526; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Ex parte Fireman's Ins. Co.*, 6 Hill (N. Y.) 243; *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306.

In *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 94, the court, by Nelson, J., says: "It is contended, that the action should have been case instead of assumpsit. The former remedy, no doubt, would have been appropriate, perhaps the most appropriate, but the latter appears to be warranted by sufficient authority;" citing *Rex v. Bank of England*, 2 Doug. 523; *Parbury v. Bank of England*, Doug. 526n.; *Gray v. Portland Bank*, 3 Mass. 381; 3 Am. Dec. 156; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 98; 19 Am. Dec. 306; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299; 2 Kent's Comm. 289, 291; *Angel & Ames on Corp.* 129. See also *Hazard v. National Exch. Bank*, 26 Fed. Rep. 94; *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424; *Helm v. Swiggett*, 12 Ind. 194; *Hill v. Pine River Bank*, 45 N. H. 300; *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *Catchpole v. Ambergate R. Co.*, 1 El. & Bl. 111.

A pledgee of shares of bank stock brought suit against the bank for the value of the stock, a transfer having been refused by the bank after notice

that the pledgor had been adjudicated a bankrupt. The pledgor's assignee in bankruptcy became a party to the suit and asked for an account of the amount due the pledgee and for a sale of the stock. His petition was granted. It was held that it was error for the court to render a further judgment; that in case the proceeds of the sale should be insufficient to satisfy the pledgee's claim, the bank should pay the deficiency not exceeding the difference between the proceeds of the sale and the value of the stock at the time of the refusal to permit the transfer. *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208.

4. *Telford, etc., Turnpike Co. v. Gerhab* (Pa. 1888), 21 Am. & Eng. Corp. Cas. 471. The supreme court affirms the case on the opinion of the *nisi prius* judge who, after saying that "The refusal was a tort, the necessary remedy for which was a special action on the case," proceeds as follows: "It cannot be said that there ever was a conversion of this stock by the turnpike company, so as to raise the implied promise to pay for it. The mere marking it upon the so-called transfer books as having been transferred to the bank was no conversion for the use of the turnpike company; nor was it any conversion at all, for such marking in itself conferred no title to the real ownership of the stock, nor deprived the lawful owner of his rights. In this regard, therefore, the marking the stock as transferred to the bank was a nullity; and the refusal of the company to mark the stock as transferred to Jacobs, in accordance with the practice of the company in changes of ownership, was simply a tort, and not such an one from which an implied contract can arise. The case of *Bank of Montgomery v. Reese*, 26 Pa. St. 143, cited by plaintiffs' counsel, has no application; for there was an unlawful conversion of the stock by the bank to which the plaintiff was a stockholder ratably entitled, but from the benefit of which he was excluded.

the value of the shares at the time of the refusal,<sup>1</sup> or their highest price between such refusal and the commencement of the suit.<sup>2</sup>

(3) *MANDAMUS*.—On the question of the issue of the writ of mandamus to compel registration of transfers, there is a conflict of authority, probably a majority of the courts holding it not available, both because the applicant has an adequate remedy otherwise, and because registration is at best only a private property right of which enforcement should not be secured by the extraordinary writ.<sup>3</sup> Still there is not wanting strong authority, both in numbers and eminence, for the doctrine that rightful registry

That was a tort, therefore, from which an implied promise arose upon which assumpsit could be sustained."

1. *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306.

2. *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 90; *Clark v. Plinney*, 7 Cow. (N. Y.) 681.

3. *Authorities Holding that Mandamus Will Not Lie*.—*Shipley v. Mechanic's Bank*, 10 Johns. (N. Y.) 484, is the leading American authority on this side of the controversy. It was an application by the assignees in bankruptcy of a stockholder in the defendant, the shares having been included in the inventory. The opinion, like most of those rendered by the *New York* court of that day, is a model of brevity, and is quoted entire: "The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus, in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern as in the case of public records and documents; and there cannot be any necessity, or even a desire of possessing the identical shares in question. By recovering the market value of them, at the time of the demand, they can be replaced. This is not the case of a specific and favorite chattel, to which there might exist the *pretium affectionis*. The case of *Rex v. Bank of England*, 2 Doug. 524, is in point, and this remedy in that case was denied."

In *Murray v. Stevens*, 110 Mass. 96, the court said: "The writ of mandamus is not a writ of right, and is only to be granted at the discretion of the court. The question must always be, not merely

whether it is within the power of the court to grant it, but whether, as a matter of sound judicial discretion, upon the special circumstances of the case under consideration, it ought to be granted. Without undertaking to lay down an invariable rule on the subject, we think it must be said that this process was not intended, and is not well adapted for the trial of mere questions of property. Where the relator merely seeks to be put in possession of corporate shares which have an ascertainable market value, or which can be bought in the market; and where the incidental rights of ownership (such as eligibility to corporate offices, or the right to vote at corporation meetings) do not depend upon the ownership of the specific shares which are in dispute, but could be as well and fully enjoyed by virtue of the ownership of an equal number of other shares, there would seem to be no occasion to resort to the extraordinary remedy of mandamus. The damages which the relator might recover in an action at common law for the violation of his rights would be exactly measured by the sum of money which it had cost him, or would have cost him, to obtain the same right in another way, namely by purchase. That is to say, with the amount in money of the market value of the shares in dispute they could be replaced."

*Townes v. Nichols*, 73 Me. 515, where it is said: "All the authorities declare that the remedy by mandamus cannot be resorted to in a case like this, unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, mandamus must be withheld. Mandamus is the right arm of

may be compelled by mandamus.<sup>1</sup> Where this is the rule, a demand by letter is sufficient, and the writ may issue upon non-compliance therewith.<sup>2</sup> But mandamus will not be granted where the relator is guilty of bad faith,<sup>3</sup> nor where the certificates have been issued to another whose rights would be prejudiced,<sup>4</sup> unless indeed the applicant shows a better title,<sup>5</sup> nor even where the duty to register is prescribed by statute, unless the applicant's right to possession is clear and unquestionable.<sup>6</sup>

(5) *Liability of the Corporation for Allowing Wrongful Registry*—(a) *Forged Transfers*.—"Forgery can confer no power nor

the law. Its principal office is not to inquire and investigate but to command and execute. It is not designed to assume a part in ordinary law suits or equitable proceedings. It is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise. Its very nature implies that the law, although plain and clear, fails to be enforced and needs assistance."

In *Freon v. Carriage Co.*, 42 Ohio St. 40; 51 Am. Rep. 794, Johnson C. J., says: "Under our statute now in force, there is no such specific duty imposed as to transfers of shares in this corporation, but a general authority is given to manage the corporate business in the interest of all the stockholders? This power imposes a corresponding duty to make such by-laws and to keep such accounts and books as are necessary to the discharge of the duties imposed. If transfer books and registers of stock are necessary for this purpose, the law implies a duty to keep them, but we cannot say, that it is a duty specially enjoined by law, but rather an implied duty growing out of the trust relation, which the officers bear to the stockholders. We annex some of the many decisions in support of our conclusion: *Rex v. Bank of England*, 2 Doug. 524; *Reg. v. Mid. Co.*, etc., R. Co., 9 L. T. R., N. S. 151; *Stackpole v. Seymour*, 127 Mass. 104; *Birmingham Fire Ins. Co. v. Com.*, 92 Pa. St. 72; *Rex v. London Assurance Co.*, 5 B. & Ald. 899; 7 E. C. L. 295; *State v. Peoples Bldg.*, etc., Assoc., 43 N. J. L. 389; *State v. Warren Foundry, etc., Co.*, 32 N. J. L. 439." See also *Kimball v. Union Water Co.*, 44 Cal. 173; 13 Am. Rep. 157; *Tobey v. Hakes*, 54 Conn. 274; *Bank of Georgia v. Harrison*, 66 Ga. 696; *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec.

156; *Stackpole v. Seymour*, 127 Mass. 104; *Baker v. Marshall*, 15 Minn. 177; *State v. Rombauer*, 46 Mo. 155; *State v. St. Louis Paint Mfg. Co.*, 21 Mo. App. 526; *State v. Guerrero*, 12 Nev. 105; *Ex parte Fireman's Ins. Co.*, 6 Hill (N. Y.) 243; *People v. Parker Vein Coal Co.*, 10 How. Pr. (N. Y.) 543; *People v. Miller*, 39 Hun (N. Y.) 557; *Curry v. Scott*, 54 Pa. St. 276; *Birmingham F. Ins. Co. v. Com.*, 92 Pa. St. 72; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Rex v. Bank of England*, 2 Doug. 524; *Rex v. London Assurance Co.*, 1 D. & R. 510. Also *Burnsville Turnpike Co. v. State*, 119 Ind. 382.

1. *Contrary Authorities*.—*People v. Goss, etc., Mfg. Co.*, 99 Ill. 355; *Green Mount, etc., Turnpike Co. v. Bulla*, 45 Ind. 1; *State v. First Nat. Bank*, 89 Ind. 302; *State v. Cherau, etc., R. Co.*, 16 S. Car. 524; *Crawford v. Provincial Ins. Co.*, 8 U. C. C. P. 263; *Goodwin v. Ottawa R. Co.*, 13 U. C. C. P. 254; *Reg. v. Carnatic R. Co.*, L. R., 8 Q. B. 299; *Norris v. Irish Land Co.*, 8 El. & Bl. 512; 92 E. C. L. 511; *Ward v. South Eastern R. Co.*, 2 El. & El. 812; *Ex parte Sargent, L. R.*, 17 Eq. 273.

In *People v. Crockett*, 9 Cal. 112, the supreme court affirms a *nisi prius* order granting the writ, apparently as a matter of course, and without discussing the general right to do so.

2. *State v. McIver*, 2 S. Car. 25.

3. *Reg. v. Liverpool, etc., R. Co.*, 21 L. J., Q. B. 284.

4. *Bailey v. Strohecker*, 38 Ga. 259; 95 Am. Dec. 88; *State v. First Nat. Bank*, 89 Ind. 302; *Durham v. Monumental Silver Min. Co.*, 9 Oregon 41.

5. *Reg. v. Charwood Forest R. Co.*, 1 C. & E. 419.

6. *Slemmons v. Thompson* (Oregon, 1892), 31 Pac. Rep. 514. Compare *Bangor Electric Light, etc., Co. v. Robinson*, 52 Fed. Rep. 520.

transfer any rights,"<sup>1</sup> and where a corporation has permitted the registry of a forged transfer, it must make reparation to the real owner.<sup>2</sup> This reparation may consist either in restoring the wronged party to the position of the registered stockholder and paying him accrued dividends,<sup>3</sup> or in requiring the corporation to procure and transfer to plaintiff the equivalent of his shares,<sup>4</sup> or in rendering an alternative decree for the value of the stock.<sup>5</sup> This right to relief is not forfeited by negligence unless it be such as will amount to an estoppel.<sup>6</sup> Thus, the owner's remedy is not barred by the negligence of his guardian,<sup>7</sup> nor by the fact that

1. Field, J., in *Western Union Tel. Co. v. Davenport*, 97 U. S. 369.

2. "The officers of the company are the custodians of the stock books, and it is their duty to see that all transfers of shares are promptly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied with the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the process of the law, requires in the case mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can fall, in case of unlawful appropriation of property, upon those who have been misled or defrauded." *Western Union Tel. Co. v. Davenport*, 97 U. S. 371.

3. Gray, C. J., in *Pratt v. Taunton Copper Co.*, 123 Mass. 112; 25 Am. Rep. 37, says: "It is quite clear that the plaintiff could not be deprived of her stock without consent or negligence on her part, and that the power of attorney in her name being forged, she may maintain each of these bills to compel the corporation to issue a certificate to her for her shares, and to pay her the dividends thereon. *Ashby v. Blackwell*, 2 Eden 299; *Ambl.* 503; *Sloman v. Bank of England*, 14 Sim. 475; *Midland R. Co. v. Taylor*, 8 H. L. Cas. 751; *Pollock v. National Bank*, 7 N. Y. 274; 57 Am. Dec. 520; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277; 81 Am. Dec. 701." See also *Pratt v. Boston, etc., R. Co.*, 126 Mass. 443; *Johnston v. Renton, L. R.*, 9 Eq. 181; *Cottam v. Eastern Counties R. Co.*, 1 J. & H. 243; *Davis v. Bank of England*, 2 Bing. 203; 9 E. C. L. 444; *Swan v. North British Australasian Co.*, 7 H. & N. 603; *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct. 128; *Dalton v. Midland R. Co.*, 12 C. B. 458; 74 E. C. L. 457; *Baltimore v. Ketchum*, 57 Md. 23; *Coates v. S. W., etc., R. Co.*, 41 L. T., N. S. 553; *Blaisdell v. Bohr*, 68 Ga. 56; *Western Union Tel. Co. v. Davenport*, 97 U. S. 369.

4. *Pratt v. Boston, etc., R. Co.*, 126 Mass. 443.

5. *Western Union Telegraph Co. v. Davenport*, 97 U. S. 369; *Pollock v. Nat. Bank*, 7 N. Y. 274; 57 Am. Dec. 520.

6. *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389.

7. *Western Union Telegraph Co. v. Davenport*, 97 U. S. 369, where the court says, speaking of the guardian: "The negligence alleged consisted in the fact that she intrusted her brother with the key to the box in which they were deposited, when she knew that he was insolvent, and that he had used,

some only of the shares specified in the certificate were indorsed on the back,<sup>1</sup> or that the owner delayed sufficiently long to permit the escape of the forger,<sup>2</sup> or that by his giving a wrong address, a letter of inquiry failed to reach him,<sup>3</sup> or, that the owner, a corporation, intrusted its seal to the secretary who was responsible for the transfer.<sup>4</sup> The transferee of a forged certificate, requiring on its face the surrender of the certificate, cannot recover from the corporation, if no such surrender has been made.<sup>5</sup> The corporation only, but not the transferee of the forged certificate, is a necessary party,<sup>6</sup> though it has been held that the latter may be joined.<sup>7</sup> The corporation cannot maintain an independent suit and enjoin the stockholder's action,<sup>8</sup> nor in *England* can it take advantage of the interpleader act.<sup>9</sup> Equity has concurrent jurisdiction with law in granting the relief,<sup>10</sup> and the Statute of Limitations runs only from the denial of liability by the corporation.<sup>11</sup>

(b) *Transfers in Breach of Trust.*—Where transfers are required to be made upon the corporate books, the company may be liable for allowing registration of sales in violation of a trust of which the company is chargeable with notice, express or implied.<sup>12</sup> Thus,

without her authority, funds received by him on a previous sale of a portion of her property; and the further fact, that when, in the summer of 1871, before leaving for Europe, she sent for the box, she returned it to the bank without examining its contents. . . . There is no circumstance here upon which an estoppel against the plaintiffs can be raised. To create an estoppel against them, there must have been some act or declaration indicating an authorization of the use of their names, by which the company was misled, or a subsequent approval of their use by acceptance of the moneys received, with knowledge of the transfer."

1. *Sewall v. Boston WaterPower Co.*, 4 Allen (Mass.) 277; 81 Am. Dec. 701.

2. *Davis v. Bank of England*, 2 Bing. 393; 9 E. C. L. 444.

3. *Johnston v. Renton, L. R.*, 9 Eq. 181, where, however, costs were adjudged against the stockholder.

4. *Merchants', etc. v. Bank of England*, 56 L. T. 665.

5. *Moore v. Citizens' Nat. Bank*, 111 U. S. 156.

6. *Pratt v. Boston, etc., R. Co.*, 126 Mass. 443, citing *Pratt v. Taunton Copper Co.*, 123 Mass. 110; 25 Am. Rep. 37; *Machinists' Bank v. Field*, 126 Mass. 345; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Loring v. Salisbury Mills*, 125 Mass. 138; *West-*

*ern Union Telegraph Co. v. Davenport*, 97 U. S. 369; *Dalton v. Midland R. Co.*, 12 C. B. 458; 74 E. C. L. 457; *Duncan v. Luntley*, 2 M. & G. 30, 2 H. & T. 78; *Taylor v. Midland R. Co.*, 28 Beav. 287; 8 H. L. Cas. 751. See also *Baltimore v. Ketchum*, 57 Md. 23; *Barton v. London, etc., R. Co.*, 59 L. T. Rep. 122.

7. *Blaisdell v. Bohr*, 68 Ga. 56.

8. *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct. 28.

9. *Dalton v. Midland R. Co.*, 12 C. B. 458; 74 E. C. L. 457.

10. *Blaisdell v. Bohr*, 68 Ga. 56.

11. *Barton v. North, etc., R. Co.*, 58 L. T. Rep. 549.

12. *Taft v. Presidio, etc., R. Co.*, 84 Cal. 131; 30 Am. & Eng. Corp. Cas. 625; *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238; *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407; *Farmers', etc., Bank v. Wayman*, 5 Gill. (Md.) 336; *Stewart v. Firemen's Ins. Co.*, 53 Md. 564; *Marbury v. Ehlen* (Md. 1890), 30 Am. & Eng. Corp. Cas. 1; *Atkinson v. Atkinson*, 8 Allen (Mass.) 15; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *Loring v. Salisbury Mills*, 125 Mass. 138; *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235; *Holden v. New York, etc., Bank*, 72 N. Y. 286; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232; *Bohlen's Estate*, 75 Pa. St. 312; *Peck v. Bank of America*, 16 R. I. 710; 30 Am. & Eng. Corp.

Cas. 90; *Magwood v. Railroad Bank*, 5 S. Car. 379; *Chapman v. Charleston*, 28 S. Car. 373; 19 Am. & Eng. Corp. Cas. 396; *Covington v. Anderson*, 16 Lea (Tenn.) 310; *Caulkins v. Memphis Gas Light Co.*, 85 Tenn. 683; 19 Am. & Eng. Corp. Cas. 400; *Porter v. Bank of Rutland*, 19 Vt. 410; *Lowry v. Commercial, etc., Bank*, Taney's Dec. (U. S.) 310; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299; *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Barton v. London, etc., R. Co.*, 24 Q. B. Div. 77; 30 Am. & Eng. Corp. Cas. 14; *Hill v. Simpson*, 7 Ves. 166.

"Corporations stand upon the footing of trustees, in relation to their stockholders, for the protection of their interests. Being custodians of the primary evidence of title to the stock, they are held to the exercise of reasonable care and diligence in its preservation. Their safety, therefore, requires them, before permitting a transfer, to be satisfied of the authority of the person to make it. Hence they are entitled to require the production of satisfactory evidence of such authority, and though, generally, the possession of the legal title is sufficient evidence thereof, it is not always so, since the real equitable ownership may be in some other than the holder of the legal right; and this is especially true of an executor, for it not infrequently happens that, under the provisions of the will, others are equitably interested in the stock. An unauthorized transfer, therefore, may work a serious wrong to the equitable owner; and if the corporation allows it to be made with notice of the want of authority, or if put upon inquiry, without proper investigation into the authority, it becomes a party to the wrong." *Peck v. Bank of America*, 16 R. I. 710; 30 Am. & Eng. Corp. Cas. 12.

"That a bank or other corporation, and also these defendants, are trustees to a certain extent for stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they may rightfully demand evidence of authority to make a transfer before they permit it to be made. Their own safety requires that they be satisfied of the right of the person proposing to

make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal title to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and a transfer may be a gross wrong to such an equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done." *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 235.

In *Taft v. Presidio, etc., R. Co.*, 84 Cal. 131; 30 Am. & Eng. Corp. Cas. 625, plaintiff had executed a very comprehensive power of attorney, authorizing another to dispose of and deal in shares of stock in the defendant company. The party to whom the power was given secured from the secretary a transfer of the stock to himself in his own name. The court held that the company was liable to the real owner for conversion of the shares, saying: "After a careful inspection of the power of attorney we are unable to discover any clause which even constructively authorized Bowman to convert the shares of his principal into shares of his own. And that is precisely what he did by the assistance of the appellant, without which he could not have converted them. Appellant invokes the familiar rule 'that where one of two innocent persons must suffer, the loss shall fall on him who has afforded the opportunity for the same.' But it was the appellant in this case who afforded the agent an opportunity to inflict loss upon his principal, and also aided him in inflicting it. As was said in *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 235: 'With them (the corporation) was the registry, and transfers could be made only with their consent, by the surrender of the certificates and the issue of new ones.' We think it clear that a transfer not made by the party transferring, or some agent duly authorized, can have no effect. And we think in this case the transfer was not made by the owner of the stock, or by an agent duly authorized to make it as it was made, and, as respondent was divested of her property by the unauthorized act of appellant, it must be held responsible to her for the damage she has suffered in consequence of such wrongful act."

the registration of a transfer by only one of two trustees, though that one has a power of attorney from the other,<sup>1</sup> or of stock held in trust for a *feme sole*, to take effect upon her marriage,<sup>2</sup> will be sufficient to incur the liability. But a corporation is not liable for a transfer in breach of trust by the apparent and registered owner, unless it has notice thereof and its act directly contributes to loss of the stock by the *cestui que trust*.<sup>3</sup> The remedy in states retaining the old procedure is in equity,<sup>4</sup> and the court may decree a purchase by the corporation for the beneficiary of an amount of stock equivalent to that wrongfully transferred.<sup>5</sup> A *cestui que trust* does not lose his right to present relief by having waived former breaches of trust,<sup>6</sup> but he must show diligence in seeking his remedy.<sup>7</sup> The action may be brought against the corporation alone without joining the purchaser or his transferees.<sup>8</sup>

(c) **Transfers Without Surrender of Certificate.**—The American authorities hold it to be the duty of the corporation to require the surrender of the transferee's certificates before permitting registry, and that a failure to insist upon this requirement will render the company liable to a *bona fide* purchaser of the outstanding certificate.<sup>9</sup> This rule imposes no real hardship on the corporation,

1. Bohlen's Estate, 75 Pa. St. 304, decided on the principle that the trustee's power could not be delegated.

2. Magwood v. Railroad Bank, 5 S. Car. 379.

3. Smith v. Nashville, etc., R. Co., 91 Tenn. 221; citing Lowell, Transfer of Stock, § 153.

4. Loring v. Salisbury Mills, 125 Mass. 138.

5. Bohlen's Estate, 75 Pa. St. 318.

6. Loring v. Salisbury Mills, 125 Mass. 138; holding also that a judgment against the trustee will not bar a suit against the company, except in so far as satisfaction has been obtained.

7. Albert v. Baltimore Sav. Bank, 1 Md. Ch. 407; 2 Md. 158.

8. St. Romes v. Levee Colton Press Co., 127 U. S. 614; 21 Am. & Eng. Corp. Cas. 507, where Bradley, J., says: "If a corporation has by negligence cancelled a person's stock, and issued certificates therefor to a third party who has purchased it from one not authorized to sell it, is the true owner bound to pursue such purchaser, or may he directly call upon the corporation to do him right and justice by replacing his stock, or paying him for its value? The weight of authority would seem to favor the latter alternative. See Western Union Tel. Co. v. Davenport, 97 U. S. 369; Loring v. Salisbury Mills, 125 Mass. 138; Pratt v. Taunton

Copper Co., 123 Mass. 110; 25 Am. Rep. 37; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Loring v. Frue, 104 U. S. 223; Salisbury Mills v. Townsend, 109 Mass. 115."

9. "We think, that by thus making stocks transferable by mere delivery of the certificate, the law has intended to interdict corporations from transferring stocks on their books except upon surrender of the certificate, or upon proof of its loss or destruction. These certificates of stock have become such important factors in trade and credit that the law has intended to surround those who take them with the safeguards it accords to the holders of the other great agencies of commerce—bills, notes, bills of lading, etc." Factors, etc., Ins. Co. v. Marine, etc., Co., 31 La. Ann. 149.

"In this state of the case Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the directions given in the certificates. They were not told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in

since it may protect itself by refusing registry without the production of certificates.<sup>1</sup> Even where the new certificates are issued upon apparently satisfactory evidence of loss of the originals, the corporation is not relieved from liability,<sup>2</sup> though it will not be compelled to pay accrued dividends to the plaintiff.<sup>3</sup>

their possession. It is therefore clear, in making their purchase of Culver, that they had a right to rely on the certificates as securing to them the stock which they represented. And it is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bona fide* holders, was guilty of a breach of corporate duty, and as its conduct operated to the injury of Lanier and Handy, an action will lie in their behalf to obtain satisfaction for the injury." *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 378.

"The meaning of the certificate was, that the company gave to some one an assurance—1st, that the person named in it as a stockholder, was such; 2d, that on the surrender of the certificate the stock mentioned in it was transferable on their books; 3d, that no transfer would be allowed without the surrender of the certificate—in effect that the party named in the certificate, or the holder of it under authority from such party, had the possession and control of the stock therein expressed. The issuing of such assurances was a lawful and proper exercise of the powers given by the charter; it was beneficial to the stockholders, not as giving them proof of title (which would always appear on the corporation books), but as giving proof to others of their title, of the transferability of the stock, and of the control which the possession of the certificate conferred." *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 246.

"It cannot now be denied, that if a corporation having power to issue stock certificates does in fact issue such certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate, that he is an owner and has capacity to transfer the shares. This proposition does not rest on any view of the negotiability of stock but on general principles appertaining to the law of estoppel." *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 622.

In *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 371; 32 Am. Rep. 315, it is said: "Any act suffered by the corporation that invested a third party with the ownership of the shares, without due production and surrender of the certificate, rendered it liable to the owner; and it was its duty to resist any transfer in the books without such production and surrender;" citing *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 83. See also *Strange v. Houston, etc., R. Co.*, 53 Tex. 162; *Smith v. Crescent City, etc., Co.*, 30 La. Ann. 1378. Compare *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 218.

The holder of the outstanding certificate may compel a cancellation of the registry. *Lee v. Citizens' Nat. Bank*, 2 Cin. Super. Ct. 298.

The rule stated in the text seems never to have been declared in *England*. In *Shropshire Union R. Co., etc., Co. v. Reg., L. R.*, 7 H. L. 496, the court says *obiter*, that the question of permitting transfers without the surrender of the certificates is "entirely within the discretion of the directors. They were not bound to permit a transfer, without the production of the certificate; but though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares." But see *Hart v. Frontino, etc., Gold Min. Co., L. R.*, 5 Ex. 111; *Société Générale v. Tramways Union Co.*, 14 Q. B. Div. 424.

1. *State v. New Orleans, etc., R. Co.*, 30 La. Ann. 308; *National Bank v. Lake Shore, etc., R. Co.*, 21 Ohio St. 221; and see generally cases in preceding note.

2. *Brisbane v. Delaware, etc., R. Co.*, 94 N. Y. 204; *Cleveland, etc., R. Co. v. Robbins*, 35 Ohio St. 483. In the latter case there was even a by-law providing for the issue of new certificates upon proving loss of the old ones and indemnifying the company.

3. *Brisbane v. Delaware, etc., R. Co.*, 94 N. Y. 204; *Cleveland, etc., R. Co. v. Robbins*, 35 Ohio St. 483.



The rule does not obtain where no certificates have been issued,<sup>1</sup> and in the absence of fraud or collusion, the corporation, by merely permitting registry, does not guarantee the vendor's title.<sup>2</sup> Permitting registry in other than the prescribed modes is a breach of contract and not a tort.<sup>3</sup>

**4. Particular Forms of Transfer**—*a. SALES*—(1) *Form and Validity of the Contract of Sale*.—(See also FRAUDULENT SALES, vol. 8, p. 786; GAMBLING CONTRACTS, vol. 8, p. 992; ILLEGAL CONTRACTS, vol. 9, p. 879; ILLEGAL SALES, vol. 9, p. 923; STOCK BROKERS, vol. 23, p. 699.)

The general operation of the Statute of Frauds, as relating to stock, has been discussed above.<sup>4</sup> An oral contract for the sale of shares, if part payment is made subsequently,<sup>5</sup> is not avoided by the statute. A contract to purchase stock in a company not yet formed, is not within the provisions of the statute,<sup>6</sup> nor is an agreement by the seller to repurchase.<sup>7</sup> Neither an immediate delivery of certificates, nor a stipulated time therefor is essential.<sup>8</sup> The *lex loci* of the sale has been held to be that of the state

1. First Nat. Bank v. Gifford, 47 Iowa 575.

2. Central R., etc., Co. v. Ward, 37 Ga. 515. See also Bishop v. Balkis Consolidated Co., 25 Q. B. Div. 77; 30 Am. & Eng. Corp. Cas. 38.

3. Chapman v. Charleston, 28 S. Car. 373; 19 Am. & Eng. Corp. Cas. 396.

4. See *supra*, this title, *Statute of Frauds as Pertaining to Shares*.

5. Thompson v. Alger, 12 Met. (Mass.) 428.

6. Gadsden v. Lance, 1 McMull. Eq. (S. Car.) 87; 37 Am. Dec. 548.

"We think the agreement thus set forth in the declaration, by which Green was to find a man to take stock to be thereafter created in a company thereafter to be organized through the means contemplated, and which stock as it originated should stand in the name of Brookins, was not an agreement on the part of Green to buy goods, wares and merchandise, within the meaning of the statute in question. This arrangement did not in strictness provide for a sale of the anticipated stock. In substance it was an arrangement by which, if Brookins would embark in the enterprise, Green undertook to procure someone to be substituted in Brookins' place as a shareholder and member of the company, if Brookins so desired." Green v. Brookins, 23 Mich. 54; 9 Am. Rep. 74.

But in Boardman v. Cutter, 128 Mass. 388, the court, in construing a contingent contract to purchase stock

in a corporation about to be formed, said: "It has been decided by this court that shares in a corporation are 'goods, wares and merchandise,' within the Statute of Frauds. Tisdale v. Harris, 20 Pick. (Mass.) 9; Baldwin v. Williams, 3 Met. (Mass.) 365. There is some conflict in the decisions of other courts upon this point (see Somerby v. Buntin, 118 Mass. 279), but we do not feel called upon to overrule the two decisions above cited. As the defendant's contract in this case was not in writing, we see no ground upon which any action can be maintained upon it, without violating the Statute of Frauds. Gen. Sts., ch. 105, § 5. The fact that the plaintiff was induced to become one of the stockholders by the defendant's promise that he would at some future time buy the stock of the plaintiff at a specific price, does not change the essential character of the transaction."

7. Thorndike v. Locke, 98 Mass. 340; Fitzpatrick v. Woodruff, 96 N. Y. 561; Meyer v. Blair, 109 N. Y. 600; Bank of Lyons v. Demmon, Hill & D. Supp. (N. Y.) 398; Fay v. Wheeler, 44 Vt. 292; Morgan v. Struthers, 131 U. S. 246.

8. Bruce v. Smith, 44 Ind. 1, where the court says: "The performance of a contract, or the tender of performance, is no part of the contract. The making of a contract is one thing, but the performance thereof, or the tender of performance, is another and quite different thing. The contract set up

where the certificates are delivered and not that where the contract is formed.<sup>1</sup> In the notes will be found various other instances illustrating the principles which govern the validity and enforcement of sales of stock.<sup>2</sup>

in the paragraph in question is an extraordinary one, by which the plaintiff agreed to sell to the defendant the shares of stock, and the defendant agreed to pay him therefor the sum of \$2,500. No time was fixed for the performance; the law will imply, therefore, that it was to be performed immediately, or perhaps within a reasonable time. Had a future day been agreed upon for the performance of the contract on each side, there could have been no doubt as to its validity, or the right of either party to enforce it, he having done all he was required to do on his part. The fact that no time was agreed upon for performance does not change the character of the contract. The contract did not pass any title to the stock, but it was, nevertheless, a valid contract and one which either party can enforce, he having been in no default himself." *Compare Kerchuer v. Gettys*, 18 S. Car. 521; *Cheale v. Kenward*, 3 De G. & J. 27.

A contract for the sale of stock "payable and deliverable at seller's option, in this year, with interest at the rate of six per cent. *per annum*" effects a sale *in presenti*, the vendor becoming a *quasi* trustee for the purchaser, who is entitled to all dividends thereafter accruing. *Currie v. White*, 45 N. Y. 822. But see *Kelley v. Upton*, 5 Duer (N. Y.) 336.

An option to purchase stock within three years is enforceable. *Seddon v. Rosenbaum*, 85 Va. 928. See *Park v. Whitney*, 148 Mass. 278.

1. *Don v. Gould, etc., Silver Min. Co.*, 31 Cal. 629, where the court says: "The legality and sufficiency of the sale and assignment of the stock to the purchaser must also be ascertained by the provisions of the laws of this state, for the sale was not complete as between the parties until the certificates were delivered to the purchaser, and that act was performed in this state. There is a further reason for interpreting the contract by the *lex rei sitæ* already alluded to in discussing questions relating to the gift. Contracts respecting public funds or stock, bank stock and other property of that incorporeal character which owes its ex-

istence to, or is regulated by peculiar local laws, must be made and carried into execution according to those laws. They constitute exceptions to the rule requiring the validity of contracts respecting most sorts of personal property to be determined by the *lex domicilii* or the *lex loci contractus*, as the case may require. (Story, *Conflict of Laws*, § 383.) It is obvious that there may be peculiar reasons, and to which the law will give heed, why the stock of a mining corporation should be assigned in a certain mode, as by an instrument in writing, or by transfer upon the books of the corporation, or in any other mode prescribed by the local law."

2. **Sales—Validity, etc.—Instances.**—A sale, where the consideration was to be paid out of the net earnings of the stock, and a note was given in payment, conditioned that the principal should become due if the installments were not regularly paid, held to be valid. *Dean v. Nelson*, 10 Wall. (U. S.) 158.

A contract to furnish another with money to buy stock in a corporation formed to monopolize trade, is void. *Richardson v. Buhl*, 77 Mich. 632; 27 Am. & Eng. Corp. Cas. 256.

The right of a stockholder to sell and pass the legal title ceases upon dissolution; if sold thereafter, purchaser takes it subject to all claims against the original stockholder in favor of the corporation. *James v. Woodruff*, 10 Paige (N. Y.) 541; *affirmed*, 2 Den. (N. Y.) 574.

Where the price was par value with a *pro rata* proportion of an anticipated dividend, it was held that the purchaser could recover back that portion of the price paid in anticipation of the dividend, upon the event proving that no dividend had been earned. *Riggs v. Tayloe*, 2 Cranch (C. C.) 687.

Where permission is given by an agent to enter upon the corporate books a transfer of reputed stock, no new certificate being given, does not amount to a representation by him that the person making the entry owned any genuine stock. *Henning v. New York, etc., R. Co.*, 9 Bosw. (N. Y.) 283.

Where there is neither fraud nor warranty in the sale of stock, which, at the time, is apparently paid up, but is found to be in arrears, owing to a subsequent resolution of the directors, the transferee cannot recover from the seller the unpaid amount. *Cunningham v. Spier*, 13 Johns. (N. Y.) 392.

No such confidential or fiduciary relation exists between the officers of a corporation and the stockholders, as will enable a stockholder to rescind a sale of his stock to the secretary where the latter, at the time of his purchase, discloses all the information he has, and conceals nothing concerning the condition of the corporation or the value of its stock. *Krumbhaar v. Griffiths* (Pa. 1892), 25 Atl. Rep. 64.

Where the seller is ready to transfer and comply with the rule requiring payment of calls before sale, he may recover from the purchaser refusing to accept. *Shaw v. Rowley*, 16 M. & W. 810.

Stock received and transferred on the same day, is in equity to be considered as received before it was transferred, although the numbers of the transfers may be such as to make the transfer by the assignor appear prior to that to him; unless it be proven that such transfer was made prior to the one by which the stock was assigned to the transferrer. *New York, etc., R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534.

Where the vendee gives in payment a draft on a third party to whom the vendor surrenders it upon receipt of a check, and the latter being dishonored, refuses to transfer, but does not tender back the check until trial, an action may be maintained for non-delivery. *Sears v. Ames*, 117 Mass. 413.

A purchase of all the corporate stock by two persons jointly, does not render them joint tenants, tenants in common, or partners, nor are they so rendered by the circumstance that the corporation has been without officers for more than two years. *Russell v. McLellan*, 14 Pick. (Mass.) 63.

Where the purchaser of shares of stock to be issued by a mining corporation pays the purchase price, and the corporation is prevented by an injunction from issuing the stock so that the vendor cannot perform his contract, the purchaser, after waiting a reasonable time and making demand for the repayment of the purchase money, may maintain an action there-

for against the vendor's administrator. *Rose v. Foord*, 96 Cal. 152.

A signed and delivered to B a paper reciting that A held certain stock sold to B, and which, though standing in A's name belonged to B, subject to a payment of \$8,000 with interest at same rate, and from same date as interest on A's purchase of C's stock. It was held, that this was an executed contract, by which the ownership of the stock passed to B, with a reservation of title, simply as security for the purchase money. *Beardsley v. Beardsley*, 138 U. S. 262.

The sale of all the stock of a corporation by the shareholders to the president of the corporation is not void as a withdrawal from the corporation, in violation of a statute requiring the capital stock of a corporation to "be paid into the treasury," where the stock has been paid in and transfer is made in accordance with the by-laws of the corporation. *Parke County Coal Co. v. Terre Haute Paper Co.*, 129 Ind. 73.

A complaint alleged that the plaintiff exchanged land with the defendant for shares of the capital stock of a corporation of which the defendant was president; that the defendant knew the financial condition of the corporation and the value of its capital stock; that for the purpose of defrauding the plaintiff and to induce him to accept the stock, the defendant represented that the financial condition of the corporation was good and its capital stock was of par value; that for the purpose of preventing the plaintiff from ascertaining the condition of the corporation and the value of its capital stock, the defendant fraudulently requested the plaintiff not to make any inquiries as to the financial condition of the company, or as to the value of its capital stock, for the reason that he did not want other stockholders to know that he was selling his stock; that the plaintiff relying upon the representations of the defendant, exchanged his land for the stock; that the defendant knew at the time of making the representations, that the corporation was insolvent and its capital stock worthless. It was held, that the complaint stated a cause of action for damages caused by fraudulent representations, and was good against demurrer. *Nysegander v. Lowman*, 124 Ind. 584.

Parties who are interested in opposi-

(2) *Parties to the Sale*—(a) *Corporation as Purchaser of Its Own Stock*—

(1) **LEGALITY.**—In the *United States* the weight of authority supports the view that corporations have the implied power to acquire in good faith shares of their own capital stock.<sup>1</sup> In any event the transaction is valid as between the corporation and the seller.<sup>2</sup>

tion to the business of the corporation, have a right to purchase shares of its stock in order to defeat a contract which it is about to make. *Carson v. Iowa City Gas Light Co.*, 80 Iowa 638.

In *Perry v. Pearson*, 135 Ill. 218, it was held that a contract between the directors and a stockholder of a corporation, regarding the sale of stock by the latter to the former, is not voidable by the latter on the ground of the trust relation between the parties, it appearing that the stockholder was also a director, and had taken charge of the business of the corporation.

A contract to sell stock to one forbidden by law to hold it, is unenforceable. *State v. Ohio, etc.*, R. Co., 6 Ohio Cir. Ct. Rep. 415.

A purchase of shares by two of the three stockholders in a corporation, under an agreement to "share and share alike," carries title in that proportion irrespective of the amount of stock owned at the time by the purchasers. *Schilling, etc., Brewing Co. v. Schneider*, 110 Mo. 83.

1. **American Rule.**—*Cooper v. Fredericks*, 9 Ala. 738; *Robinson v. Beale*, 26 Ga. 17; *Chicago, etc., R. Co. v. Marseilles*, 84 Ill. 145; *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *Clapp v. Peterson*, 104 Ill. 26; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150; 32 Am. & Eng. Corp. Cas. 555; *Fraser v. Ritchie*, 8 Ill. App. 554; *Iowa Lumber Co. v. Foster*, 49 Iowa 26; 21 Am. Rep. 140; *Rollins v. Shaver Wagon, etc., Co.*, 80 Iowa 380; 33 Am. & Eng. Corp. Cas. 291; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 451; *Leland v. Hayden*, 102 Mass. 542; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Crease v. Babcock*, 10 Met. (Mass.) 525; *City Bank v. Bruce*, 17 N. Y. 510; *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 247; *East New York, etc., R. Co. v. Lighthall*, 36 How. Pr. (N. Y.) 481; *Verplank v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 54; *Vail v. Hamilton*, 85 N. Y. 453; *Blalock v. Kernersville Mfg. Co.*, 110 N. Car. 99; 36 Am. & Eng. Corp. Cas. 84; *Taylor v. Miami Exporting Co.*, 6 Ohio 176; *State v. Franklin Bank*, 10 Ohio 91;

*Coleman v. Columbia Oil Co.*, 51 Pa. St. 74; *Early's Appeal*, 89 Pa. St. 411; *Eby v. Guest*, 94 Pa. St. 160; *Rivanna Nav. Co. v. Dawson*, 3 Gratt. (Va.) 19; 48 Am. Dec. 183; *State Bank v. Fox*, 3 Blachf. (U. S.) 431; *Johnson County v. Thayer*, 94 U. S. 631. See also an article by E. C. Moore, 8 So. Law Rev., N. S. 369. In one of the earliest of these numerous cases the rule is thus stated: "If, from the course of business or the state of things the capital of the bank cannot be usually employed in loans, there can, I think, be no objection against the purchase of its own stock. In such purchases a part of the capital stock is withdrawn, but it is represented by the stock purchased; when dividends are declared, the profits of so much of the stock as may have been purchased belong to the remaining stockholders, and are nothing more than the profit to which they would have been entitled if, instead of appropriating so much of the capital to the purchase of stock, it had been used for making loans. But when a different state of things occurs, it may be deemed more profitable to invest again the amount appropriated for the purchase of stock in cash to be used for making loans. . . . In purchasing and again selling a portion of the stock, the directors neither extend nor curtail those limits (*i. e.* the limits prescribed by charter), because the capital stock remains the same, neither diminished nor increased, since the stock represents so much of the capital as was invested in its purchase, and when sold the money then stands in the place of stock." Per Davis, J., in *Hartridge v. Rockwell, R. M. Charl.* (Ga.) 260.

In *Ex parte Holmes*, 5 Cow. (N. Y.) 426, the court said: "No doubt, the company may, from necessity, as in this case, take their own stock in pledge or payment, and keep it outstanding in trustees to prevent its merger, and convert it to their security; but it is not stock to be voted on within the meaning of the charter."

2. Thus, a resolution authorizing subscribers to surrender unpaid shares

A foreign corporation will be presumed to have authority to purchase its own stock,<sup>1</sup> and stock so purchased may be sold by the company even though the original transaction was unauthorized.<sup>2</sup> But the rule above stated is not universal,<sup>3</sup> and a company cannot traffic in its own shares to the prejudice of its creditors,<sup>4</sup> or stockholders.<sup>5</sup> In *England*, corporations cannot purchase their own stock without express authority from the statute.<sup>6</sup>

is valid as between the company and the subscribers. *Glenn v. Hatchett*, 91 Ala. 316; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150; 32 Am. & Eng. Corp. Cas. 555. And the assignee of the company cannot sue for the face value of the shares until the surrender has been set aside in a direct proceeding. *Glenn v. Hatchett* (Ala. 1890), 8 So. Rep. 656. Compare *Cooper v. Frederick*, 9 Ala. 738; *Johnson v. Lafflin*, 5 Dill. (U. S.) 65; 103 U. S. 800; *First National Bank v. Stewart*, 107 U. S. 676; *Case of Reciprocity Bank*, 22 N. Y. 9; *U. S. Trust Co. v. Harris*, 2 Bosw. (N. Y.) 91; *Gold Min. Co. v. National Bank*, 96 U. S. 640; *Shoemakers v. National Mech. Bank*, 31 Md. 396; *O'Hare v. Second Nat. Bank*, 77 Pa. St. 96; *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424.

1. *Yeaton v. Eagle Oil, etc., Co.*, 4 Wash. 183.

2. *Jefferson v. Burford* (Ky. 1891), 17 S. W. Rep. 855.

3. In *Kansas*, banks organized under the state law cannot acquire their own stock except in some cases to secure a pre-existing debt. *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60.

In *New York* (Rev. Sts., ch. 18, p. 201, § 1) and *Colorado* (Gen. Sts. 1883, p. 189, § 35; p. 183, § 10) such purchases are forbidden by statute, and the same prohibition is imposed upon national banks by U. S. Rev. Stat., § 5201.

*Columbian Bank's Estate*, 147 Pa. St. 422, was a case where a bank president, as one of the executors of an estate, and without authority, invested some of the trust funds in the shares of his own bank, and caused the same to be re-sold to the bank at par a few days before the suspension of the institution. It was held that the estate acquired no greater rights in the liquidation of the bank's affairs than any other stockholder, and could not recover as against the creditors the price agreed to be paid.

4. *Heggie v. People's Building, etc., Assoc.*, 107 N. Car. 581; 32 Am. & Eng. Corp. Cas. 605. Compare *Clapp v.*

*Peterson*, 104 Ill. 26; *Commercial Nat. Bank v. Burch*, 40 Ill. App. 505; *Peterson v. Illinois Land, etc., Co.*, 6 Ill. App. 257; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Fraser v. Ritchie*, 8 Ill. App. 454; *Johnson v. Lafflin*, 5 Dill. (U. S.) 65; *Gillet v. Moody*, 3 N. Y. 479; *Crandall v. Lincoln*, 52 Conn. 73; 52 Am. Rep. 560; *Blalock v. Kernersville Mfg. Co.*, 110 N. Car. 99; 36 Am. & Eng. Corp. Cas. 84.

5. *Gill v. Balis*, 72 Mo. 424; *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

6. *Hope v. International Financial Soc.*, 4 Ch. Div. 327; *Zulueta's Claim*, L. R., 5 Ch. 444; *Cree v. Somervail*, L. R., 4 App. Cas. 648; *Eyre's Case*, 31 Beav. 177; *Morgan's Case*, 1 De G. & S. 750; *In re Marseilles Extension R., etc., Co.*, 7 Ch. Div. 161; *Ex parte Morgan*, 1 M. & G. 225; *Evans v. Coventry*, 25 L. J. Ch. 489; *Cross' Case*, 38 L. J. Ch. 583; *Ward's Case*, 29 W. R. 768; *Cockburn's Case*, 4 De G. & S. 177; *Trevor v. Whitworth*, L. R., 12 App. Cas. 409; *In re Walker*, W. N. (1887) 202; nor can the power be delegated to a manager, *Cartmell's Case*, L. R., 9 Ch. 691. The object of the rule is to preserve the rights of creditors and to restrict the company to the exercise of express powers, and those necessary to the transaction of its business. *Zulueta's Claim*, L. R., 5 Ch. 444; *In re Dronfield, etc., Coal Co.*, 17 Ch. Div. 76. An exception to the rule appears to be allowed where the purchase is made for the benefit of the whole company and not for profit.

The difference between the English and American doctrine is largely due to the fact that in *England* corporate creditors have no greater rights than the corporation has, and hence would be liable to an unreasonable risk if the corporation could purchase shares of its own capital stock. In this country the familiar principle that the capital stock is a trust fund for the benefit of creditors obviates this objection to a purchase by a corporation of its own stock. *Cook on Stock and Stockholders*, § 312.

(2) **EFFECT.**—It is not entirely clear from the authorities as to whether the purchase by a corporation of shares of its own stock will operate as a merger thereof. On the one hand it is said that the question is one of intent,<sup>1</sup> and that the transaction will have the effect of merger in the absence of contrary charter provisions;<sup>2</sup> but other authorities hold that the purchased shares are not extinguished.<sup>3</sup> The corporation may re-sell the shares,<sup>4</sup> even where the original purchase was without authority,<sup>5</sup> but it is not entitled through its officer to vote on them.<sup>6</sup>

(b) **Other Corporations as Purchasers.**—See *MANUFACTURING CORPORATIONS*, vol. 14, pp. 275, 277; *NATIONAL BANKS*, vol. 16, p. 167; *RAILROADS*, vol. 19, p. 810; *STOCKHOLDERS*, vol. 23, p. 776.

(c) **Agents**—(See also *AGENCY*, vol. 1, p. 331; *BROKERS*, vol. 2, p. 591; *STOCK BROKERS*, vol. 23; *STOCK EXCHANGE*, vol. 23).—The powers of one who sells and purchases stock for another are subject usually to strict limitations. Authority to sell stock does not include power to pledge it,<sup>7</sup> and one who buys stock for another will not be permitted to reap a secret profit from the transaction.<sup>8</sup> A party, who, in pursuance of parol authority, purchases in his own name for himself and another, becomes part owner of the stock.<sup>9</sup> A broker as agent of both parties to the

In *Ontario, Canada*, a company cannot cancel or accept the surrender of stock in compromising a claim against it by the shareholders, where the validity of the shares or the member's right to them is not in dispute. *Livingston v. Temperance Colonization Soc.*, 17 Ont. App. 371; 37 Am. & Eng. Corp. Cas. 541.

1. *State v. Smith*, 48 Vt. 266; *City Bank v. Bruce*, 17 N. Y. 507; *American Railway Frog Co. v. Haven*, 101 Mass. 402; 3 Am. Rep. 377.

2. *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418; *State v. Smith*, 48 Vt. 266.

3. "The stock was not extinguished or destroyed by the purchase thereof by the corporation." *State Bank v. Fox*, 3 Blatchf. (U. S.) 431. See also *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *Com. v. Boston, etc., R. Co.*, 142 Mass. 146; *Vail v. Hamilton*, 85 N. Y. 453. Compare *Percy v. Millaudon*, 3 La. 568.

4. *State Bank v. Fox*, 3 Blatchf. (U. S.) 431; *State v. Smith*, 48 Vt. 266. Compare *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 247.

5. *Jefferson v. Burford* (Ky. 1891), 17 S. W. Rep. 855.

6. "It is not to be tolerated that a company should procure stock, in any shape, which its officers may wield to

the purposes of an election, thus securing themselves against the possibility of removal." *Ex parte Holmes*, 5 Cow. (N. Y.) 426.

7. *Merchants' Bank v. Livingstone*, 74 N. Y. 223.

8. *Kimber v. Barber*, L. R., 8 Ch. 56. In this case Barber, who knew that Kimber was anxious to acquire stock in a certain company, represented to the latter that he could procure a certain number of shares at £3 each. Kimber agreed to purchase at that price and the shares were transferred in accordance with the agreement. It was subsequently discovered that Barber had, just before the transfer, purchased the stock himself for £2 per share, and Kimber brought suit for the difference between the price paid by Barber and that received by him. The master of the rolls dismissed the action without costs, but Lord Selborne, on appeal, said: "To my mind, with the greatest deference to the master of the rolls, . . . this is a very clearly established case of agency; that being so, I see no difficulty in the relief which is asked," citing *Hichens v. Congreave*, 4 Russ. 567; *Bank of London v. Tyrrell*, 10 H. L. Cas. 26.

9. *Stover v. Flack*, 41 Barb. (N. Y.) 162; *aff'd*, 30 N. Y. 64.

transaction may sign a memorandum required by the statute of frauds.<sup>1</sup>

(a) **Trustees**—(See, generally, TRUSTS)—(1) **POWER OF TRUSTEE TO BUY AND SELL STOCK**.—There are numerous American cases which assert the rule that the investment of funds held in a fiduciary capacity is at the peril of the trustee.<sup>2</sup> There are, however, some well considered adjudications to the contrary,<sup>3</sup> and in *England* such investments are now generally approved.<sup>4</sup> Trustees have no implied power to sell stock held in trust.<sup>5</sup> Where they sell in breach of their trust the beneficiary may elect either to have the shares replaced or to demand the entire proceeds thereof with the highest interest.<sup>6</sup> But sales by trustees even without express authority are sanctioned where depreciation is threatened,<sup>7</sup> and where there is good reason to believe that the estate will be benefited thereby.<sup>8</sup> A trustee cannot delegate his power to sell stock, even to a co-trustee.<sup>9</sup>

1. *Colvin v. Williams*, 3 Har. & J. (Md.) 38; 5 Am. Dec. 417.

2. *Kind v. Talbott*, 40 N. Y. 76, where the court states the reason for the rule. In the following cases the doctrine is affirmed: *Kimball v. Redding*, 31 N. H. 352; 64 Am. Dec. 333; *French v. Currier*, 47 N. H. 99; *Gray v. Fox*, 1 N. J. Eq. 259; 22 Am. Dec. 508; *Halstead v. Meeker*, 18 N. J. Eq. 136; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Adair v. Brimmer*, 74 N. Y. 551; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Berry v. Yates*, 24 Barb. (N. Y.) 210; *Brown v. Campbell*, Hopk. Ch. (N. Y.) 265; *Leitch v. Wells*, 48 N. Y. 585; *Nyce's Appeal*, 5 W. & S. (Pa.) 254; 40 Am. Dec. 498; *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642; *Worrell's Appeal*, 9 Pa. St. 508; *Rush's Estate*, 12 Pa. St. 375; *Hemphill's Appeal*, 18 Pa. St. 303; *Pray's Appeal*, 34 Pa. St. 100; *Ihmsen's Appeal*, 43 Pa. St. 431.

3. *Gray v. Lynch*, 8 Gill. (Md.) 403; *Smyth v. Burns*, 25 Miss. 422; *Washington v. Emery*, 4 Jones Eq. (N. Car.) 32; *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408. In *Massachusetts* the tendency seems to be to sanction investments in stock: *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Lovell v. Minot*, 20 Pick. (Mass.) 116; 32 Am. Dec. 206; *Brown v. French*, 125 Mass. 410; 28 Am. Rep. 254; and the same is true in *Georgia*, though the decisions there are partially determined by statute: *Brown v. Wright*, 39 Ga. 96; so in *Alabama*: *Bryant v. Craig*, 12 Ala. 359; *Foscoe v. Lyon*, 55 Ala. 452. The sub-

ject is extensively discussed in note to 40 Am. Dec. 515. See also *Lamar v. Micou*, 112 U. S. 452, where the authorities are exhaustively reviewed by Judge Gray.

4. *Speight v. Gaunt*, 22 Ch. Div. 727; 9 App. Cas. 19; *Knight v. Plymouth*, 1 Dick. 120; 3 Atk. 480; *Ex parte Belchier*, Amb. 219. In *Traford v. Boehm*, 3 Atk. 440, Lord Hardwicke held that a trustee was liable for loss occasioned by the investment of trust funds in South Sea stock. But in another case he had previously held that, "To compel trustees to make up a deficiency not owing to their willful fault is the harshest demand that can be made in a court of equity." *Jackson v. Jackson*, 1 Atk. 514.

5. "A trustee presumptively holds his trust property for administration and not for sale." *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430; 15 Wall. (U. S.) 165; *Murray v. Feinour*, 2 Md. Ch. 418; *Bayard v. Farmer's, etc., Bank*, 52 Pa. St. 232; *Bohlen's Estate*, 75 Pa. St. 312; *Waite v. Whorwood*, 2 Atk. 159; *Ward v. Kitchen*, 30 N. J. Eq. 31.

6. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 117; *Murray v. Feinour*, 2 Md. Ch. 418; *Earl Powlet v. Herbert*, 1 Ves. 297; *Pinkett v. Wright*, 2 Hare 120.

7. *Ward v. Kitchen*, 30 N. J. Eq. 36. But one who in good faith retains an investment is not liable for depreciation. *Bowker v. Pierce*, 130 Mass. 262.

8. *Washington v. Emery*, 4 Jones Eq. (N. Car.) 32.

9. *Bohlen's Estate*, 75 Pa. St. 304.

(2) RIGHTS OF PURCHASERS FROM TRUSTEES—(See also PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 620).—Purchasers from one who sells stock in breach of trust acquire no title as against the real owner if they have notice, even constructively, of the trust.<sup>1</sup> But a *bona fide* purchaser will be protected even though it afterwards transpires that the transferrer has violated his trust.<sup>2</sup> The question of the purchaser's title depends upon the further one of what constitutes notice.

(3) WHAT CONSTITUTES NOTICE.<sup>3</sup>—The decisions are somewhat conflicting as to what facts will charge the corporation itself, and purchasers from a trustee, with notice that the stock is held in trust. By one line of cases the addition of the word "trustee" to the signature of the transferrer will constitute notice;<sup>4</sup> while

1. *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430; *aff'd*, 15 Wall. (U. S.) 165; *Shaw v. Spencer*, 100 Mass. 382, 389; 1 Am. Rep. 115; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; 11 Am. Dec. 441; *White v. Price*, 39 Hun (N. Y.) 394; *Baker v. Bliss*, 39 N. Y. 70; *Walsh v. Stille*, 2 Pars. Sel. Cas. (Pa.) 17; *Simons v. Southwestern Railroad Bank*, 5 Rich. Eq. (S. Car.) 279; *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Lowry v. Commercial, etc., Bank, Taney Dec.* (U. S.) 310; *Bayard v. Farmers, etc., Bank*, 52 Pa. St. 232; *Carr v. Hilton*, 1 Curt. (U. S.) 390; *McLeod v. Drummond*, 17 Ves. 152; *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183; 34 Am. & Eng. Corp. Cas. 662.

2. *Bayard v. Farmers, etc., Bank*, 52 Pa. St. 232; *Nutting v. Thomason*, 46 Ga. 34; *Stinson v. Thornton*, 56 Ga. 377; *Cohen v. Gwynn*, 4 Md. Ch. 357; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Caulkins v. Memphis Gas Light Co.*, 85 Tenn. 683; 19 Am. & Eng. Corp. Cas. 400; *Briggs v. Massey*, 42 L. T. 49.

3. See generally, NOTICE, vol. 16, p. 787.

4. *Loring v. Salisbury Mills*, 125 Mass. 138; *Loring v. Brodie*, 134 Mass. 453; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Simons v. South Western Railroad Bank*, 5 Rich. Eq. (S. Car.) 270; *Walsh v. Stille*, 2 Pars. Sel. Cas. (Pa.) 17; *Sweeny v. Bank of Montreal*, 12 Can. Sup. Ct. 661; *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183; 34 Am. & Eng. Corp. Cas. 662; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115. In this last case the court says: "The appropriation of corporate stock, held in trust as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond

the ordinary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A B, trustee for C D.' But the effect of the word 'trustee,' alone, is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust* than the property of one whose name is known."

**Maryland Rule.**—In *Maryland*, the decisions on this question have fluctuated considerably. But the rule stated in the text seems to have been finally adopted. In *Farmer's, etc., Bank v. Weyman*, 5 Gill (Md.) 337, the entry on the transfer book of the bank explained the character of the trust and gave the names of the beneficiaries, and the court held as follows: "The bank by this transfer had notice of the trust with which the stock was clothed, and that the complainants were the legal proprietors of the stock and its officers, or the trustees of the stockholders, could not, without making the bank responsible, by any negligence or mistake, allow the title to pass to the stock by a transfer by any other persons than the trustees, without involving the bank in responsibility."

In the later case of *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407; 2 Md. 159, the entry on the corporate books showed only that the stock was in the name of certain parties as trustees and did not show who were the *cestuis que trustent* or what was the character of the trust, and it was held there was



other authorities decline to regard that circumstance as sufficient.<sup>1</sup> A similar conflict exists on the question whether the corporation is charged with notice of the contents of a will.<sup>2</sup> A notice to a

not sufficient in this entry to place the corporation upon inquiry and make it liable for negligent transfer.

In the recent case of *Marbury v. Ehlen* (Md. 1890), 30 Am. & Eng. Corp. Cas. 1, it is held that where the trustee in executing the transfer, adds the word "trustee" to his signature, the corporation is charged with notice of his trust and is bound to satisfy itself that he has authority to make the transfer. Commenting on the case of *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407; 2 Md. 159, the court says: "In that case the stock involved never stood on the books of the company as the property of the testator in his lifetime. Here it was the testator's property, and stood in his name, at his death, on the books of the company. When the transfer made by the executors in *Albert's Case* was made, the assignment by the executor might be presumed to be rightful by reason of his general power over the estate; for the act of 1843, chap. 304, had not been passed. That act declared that no title should pass where the executor disposed of property without an order of the orphans' court first had and obtained. Section 274, art. 93, of the code of 1860, makes that provision, and was the law when the transfers here involved were made, and the law still is, under section 276, art. 93, of the present code, that such sale, without the previous order of the orphans' court is void. Judge Taney, in *Lowry's Case*, already cited, which grew out of the same will as did *Albert's Case*, adverts to the fact that the act of 1843, chap. 304, had not then been passed, so as to make the act of the executor subject to suspicion and question. If the authority of *Albert's Case* is to be regarded as still binding, and unshaken by subsequent decisions in the state, still we think the distinctions we have noticed are sufficient to withdraw this case from its control. The modern doctrine in respect to what constitutes notice in such cases, and that which obtains everywhere, is so much broader in its reach than that which is found in *Albert's Case* that, to keep in harmony with the decisions and law as received elsewhere, we do not think the *Case*

of *Albert*, in 2 Md., should be followed in any case which is not precisely analogous in all its facts." See also *Third Nat. Bank v. Lange*, 51 Md. 144; 34 Am. Rep. 304; *Swift v. Williams*, 68 Md. 255.

1. In *Brewster v. Sine*, 42 Cal. 139, the court said: "It is a common practice to transfer stocks into the name of some person as 'trustee,' for the sole purpose of concealing the name of the real owner, whose transactions in buying or selling a particular stock, if his name were known, might operate to enhance or depress its market value. . . . In view of the general prevalence of this practice, what effect in law should be given to the fact that there is appended to the name of the person to whom the certificate is issued the word 'trustee?' Shall this be held to operate as constructive notice to all persons dealing with the so-called 'trustee' that he is not the owner? Must they deal with him at arm's length, and if they shall purchase the stock, or loan him money upon it, do they take the hazard that on the next day, or the next month, the secret owner may disclose himself and repudiate the transaction and demand the stock? In my opinion, considerations of public policy and common justice demand that, when stock is placed in the name of a 'trustee' under these circumstances, the secret owner shall be bound by the acts of his 'trustee' dealing with persons who have no actual notice of the relations between the parties. If nothing more appear on the books of the corporation, or on the face of the certificate, to indicate the trust and its nature, than the mere addition to the name of the word 'trustee,' the owner, who has clothed his agent with the legal title, one of the highest *indicia* of ownership, should bear the consequences resulting from the acts of the agent, rather than an innocent person who advances his money on the faith that the agent is the real owner, or at least has authority, to sell or hypothecate the stock." See also *Thompson v. Toland*, 48 Cal. 99; *Stockdale v. South Sea Co.*, *Barnardiston's Ch.* 363.

2. In *Hutchins v. State Bank*, 12 Met. (Mass.) 423, Shaw, C. J., says:

board of directors is notice to the bank whose affairs they manage and to all successors of such board.<sup>1</sup> Purchasers are charged with notice of statutes requiring sales by executors to be made at public auction, and will not be protected if they buy at private sale.<sup>2</sup> And in general "whatever puts upon inquiry is notice of what inquiry would disclose."<sup>3</sup>

(e) **Executors, Administrators, and Guardians.**—While the general principles apply to both classes, there is at least one important difference between executors, administrators, and guardians on the one hand, and the class technically known as trustees<sup>4</sup> on the other. The function of the latter is custody or management, while the duties of the former include also the power of administration and sale.<sup>5</sup> Hence, purchasers from executors, administrators, and guardians are not bound to see that the proceeds of the sale are faithfully applied by the transferrer.<sup>6</sup> But transferees

"The bank must be presumed to know what are the legal powers of an executor; but they cannot be presumed to know the particular provisions of each will." But in *Stewart v. Firemen's Ins. Co.*, 53 Md. 564, the court said: "We have said that when the parties making the transfers proposed to do so, and professed to act as executors, that fact of itself gave the company notice of the will and made it chargeable to the same extent as if it had actually read it; and in our judgment this imputation of knowledge is not affected by the fact that the parties thus declaring themselves to the company, and holding themselves out and professing to act as executors, might at the time, by operation of law, have held title to the stock as trustees. No actual transfer on the books of the company by the executors to themselves as trustees had ever been made. Having then this notice of the will, the company had notice of the trusts it contained, including the names of the trustees, of the *cestuis que trust* for life, and of the provisions in favor of children thereafter to be born." And this decision is supported by the later cases. *Caulkins v. Memphis Gas Light Co.*, 85 Tenn. 683; 19 Am. & Eng. Corp. Cas. 400; *Chapman v. Charleston*, 30 S. Car. 549; 26 Am. & Eng. Corp. Cas. 538. Compare *Peck v. Bank of America*, 16 R. I. 710; 30 Am. & Eng. Corp. Cas. 9.

1. *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299. So a pledge of stock to a bank by a trustee who is also a director in that institution vests no title in the bank where it is forbidden to make loans to the directors, though it is with-

out notice of the trust. *Albert v. Baltimore Sav. Bank*, 2 Md. 171.

2. *Nutting v. Thomason*, 57 Ga. 418; *Nutting v. Boardman*, 43 Ga. 599; *Weyer v. Second Nat. Bank*, 57 Ind. 198. Compare *Nutting v. Thomason*, 46 Ga. 34.

3. *Peck v. Bank of America*, 16 R. I. 710; 30 Am. & Eng. Corp. Cas. 9; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 232. In the former case, a transfer of stock was made by an executrix nearly nine years after testator's death and nearly six years after the time limited by law for the settlement of estates. The transfer was made to the executrix herself individually, not for the purpose of raising funds for the benefit of the estate, but to afford security for her indorsement on the note of a third person to the corporation, and these circumstances were held sufficient to place the company upon inquiry as to her powers.

4. See *supra*, this title, *Trustees*. See also *Prall v. Tilt*, 27 N. J. Eq. 393; *White v. Price*, 39 Hun (N. Y.) 394.

5. *Wood's Appeal*, 92 Pa. St. 379; 37 Am. Rep. 694; *Prall v. Hamil*, 28 N. J. Eq. 66. Compare *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; 11 Am. Dec. 441; *Lamar v. Micou*, 112 U. S. 475; *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399.

6. *Leitch v. Wells*, 48 N. Y. 585. In *Keeney v. Globe Mill Co.*, 39 Conn. 145, the administrator of one who had bequeathed certain shares of stock to his wife, remainder over to his children, made by mistake an absolute

from executors who have actual notice that the latter are committing a breach of trust are not protected,<sup>1</sup> nor are pledgees from a guardian who is authorized simply to sell the stock.<sup>2</sup> Executors appointed in one state may transfer shares in a corporation domiciled in another,<sup>3</sup> but the power does not extend to those appointed in foreign countries.<sup>4</sup> In *Georgia*, a foreign guardian may, if authorized by the law of the state where he is appointed, pass title to stock without applying to the *Georgia* courts.<sup>5</sup>

(1) *Miscellaneous Parties*—(See also INFANTS, vol. 10, p. 634; MARRIED WOMEN, vol. 14, pp. 589–680; OFFICERS, vol. 17, p. 39).—Sales by intoxicated persons<sup>6</sup> and those *non compos mentis*<sup>7</sup> may be set aside. One partner may sell firm stock,<sup>8</sup> but the rule does not apply to one of two joint owners.<sup>9</sup>

(3) *Sales as Affected by Forgery*—(a) *What Constitutes*—(See also FORGERY, vol. 8, p. 452).—The most common instance of forgery in connection with sale of stock, is that of the owner's name on the back of the certificate.<sup>10</sup> But the question sometimes arises in other ways. Thus, a change in the name of the corporation in which stock is sought to be transferred,<sup>11</sup> and in the number of shares as stated in the certificate,<sup>12</sup> are examples of forgery in

tribution of the same to the widow. Subsequently they were levied upon by a judgment creditor of the latter and sold at execution sale to a purchaser in good faith. One of the testator's children, who was a minor when these proceedings took place, brought suit on coming of age to set aside the transfer, though the execution purchaser obtained title. But the court said: "To dispossess him of his property in the face of these facts, or to interfere at all with the proper enjoyment and disposition of it, would be an act of arbitrary power. None of the incidents of a perfect title are wanting. What stockholder in this company, what owner of any property, could be considered safe, if such a title as this is not to be recognized and protected? That the petitioner, Helen, was a minor while these proceedings were had in the court of probate; that an appeal has been taken by her from some of these orders and decrees since she became of age, and a reversal of the same obtained, cannot affect this question. If she has been wronged in the distribution of this estate she can have redress against the administrator on his probate bond. *Hough v. Bailey*, 32 Conn. 290."

1. *Prall v. Hamil*, 28 N. J. Eq. 66; *White v. Price*, 39 Hun (N. Y.) 394; *Keane v. Robarts*, 4 Madd. Ch. 332;

*Odd Fellows', etc., Bank's Appeal*, 123 Pa. St. 356.

2. *Webb v. Graniteville Mfg. Co.*, 11 S. Car. 396.

3. *Middlebrook v. Merchants' Bank*, 3 Keyes (N. Y.) 135; *Luce v. Manchester, etc., R. Co.*, 63 N. H. 588; *Hobbs v. Western Nat. Bank*, 8 Weekly Notes 131; *In re Cape May, etc., Co.* (N. J. 1888), 16 Atl. Rep. 191.

4. *Alfonso's Appeal*, 70 Pa. St. 347.

5. *Ross v. Southwestern R. Co.*, 53 Ga. 514.

6. *Thackrah v. Haas*, 119 U. S. 499.

7. *Chew v. Bank of Baltimore*, 14 Md. 299.

8. *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476. Compare *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306.

9. *Standing v. Bowring*, 27 Ch. Div. 341; *Comstock v. Buchanan*, 57 Barb. (N. Y.) 127.

The surviving owner acquires title to the whole. *Hill's Case*, L. R., 20 Eq. 585; *Garrick v. Taylor*, 3 L. T., N. S. 460. And a previous transfer by him conveys the whole. *Slaymaker v. Bank*, 10 Pa. St. 373.

10. See cases cited in following notes.

11. *Swan v. North British Australasian Co.*, 7 H. & N. 603.

12. *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (U. S.) 396; *Sewall v.*

sales of stock. So, a transfer is forged if, without authority, the names of several co-trustees are signed to it by one of them,<sup>1</sup> and the rule applies to similar signatures by one of two partners in whose joint names the stock stands,<sup>2</sup> or by the secretary of the corporation who signs his own and the names of other officers.<sup>3</sup>

(b) *Status of Transferees.*—While *bona fide* transferees, without notice, of certificates which have been forged, are sometimes protected as against the real owner,<sup>4</sup> they will not be thus protected unless the latter has been guilty of negligence constituting an estoppel.<sup>5</sup> Even where the original purchase was *bona fide*, it has been held that a re-sale by such purchaser after a demand made upon him by the real owner, would make the former liable in trover for the stock.<sup>6</sup> Transferees claiming through a forger can neither compel registry, nor prevent a cancellation thereof when once permitted.<sup>7</sup> One whose stock has been sold without his knowledge under a forged power of attorney, may sustain an action for money had and received against the party who holds the proceeds of the sale.<sup>8</sup> So a corporation may recover from a transferee for damages sustained by it for registering his forged

Boston Water Power Co., 4 Allen (Mass.) 277; 81 Am. Dec 701.

1. Cottam v. Eastern Counties R. Co., 1 J. & H. 243; Sloman v. Bank of England, 14 Sim. 475.

2. Midland R. Co. v. Taylor, 8 H. L. Cas. 751, affirming 29 L. J. Ch. 731.

3. Shaw v. Port Philip Gold Min. Co., 13 Q. B. Div. 103. Compare Duncan v. Luntley, 2 McN. & G. 30.

4. Machinist's Nat. Bank v. Field, 126 Mass. 345; *In re Bahia*, etc., R. Co., L. R., 3 Q. B. 584. An extreme instance of the protection afforded to the purchaser, is the case of *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (U. S.) 396, where a bank which had accepted stock as collateral, the certificates of which had been fraudulently altered by the owner who pledged them, was held liable to a subsequent purchaser from the forger, to whom the bank had indorsed and retransferred the certificates.

5. Swan v. North British Australasian Co., 7 H. & N. 603. In this case the owner of certain shares in one company employed a broker to sell shares in another company. The broker represented that it was necessary for him to sign ten blank forms of transfer, which were accordingly signed, sealed and delivered by the owner to the broker. The latter used but eight of the blank forms, and having stolen the

certificates from a box deposited at the bank for safe keeping, filled out the two remaining certificates with transfers of shares in the company whose stock he was employed to sell, and after forging attestations, delivered the certificates to *bona fide* purchasers. It was held that the latter acquired no title, and that the owner's conduct in thus intrusting the matter to his broker did not constitute such negligence as would estop him. The principle agreed upon by all the judges was that the negligence, to operate as an estoppel, must be the approximate cause of the loss. So in *Johnston v. Renton*, L. R., 9 Eq. 181, the fact that the owner intrusted his certificates to a bank whose manager committed the forgery, was held to constitute negligence.

6. Monk v. Graham, 8 Mod. 9.

7. Simm v. Anglo-American Tel. Co., 5 Q. B. Div. 188; *Whitewright v. American Tel., etc., Co.*, N. Y. Daily Reg., Aug. 6, 1886; *Waterhouse v. London, etc., R. Co.*, 41 L. T., N. S. 553; *Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Brown v. Howard F. Ins. Co.*, 42 Md. 384; *Hildyard v. South Sea Co.*, 2 P. Wms. 76; *Ashby v. Blackwell*, 2 Eden 299. But see *Metropolitan Sav. Bank v. Baltimore*, 63 Md. 6.

8. Marsh v. Keating, 1 Bing. N. Cas. 198; 27 E. C. L. 354.

transfer,<sup>1</sup> but it cannot recover from the broker or auctioneer who sold the stock for the forger.<sup>2</sup>

(4) *Stolen and Lost Certificates*.—See *supra*, this title, *Negotiability*. See also LOST PAPERS, vol. 13, p. 1059.

(5) *Effect of Lis Pendens Upon Sales of Stock*.—See LIS PENDENS, vol. 13, p. 873.

(6) *Performance and Tender*.—An executory contract for the sale of stock is sufficiently performed by a delivery of the certificates.<sup>3</sup> In *England* it is even held that one who contracts to "deliver" performs when he places the other party in the position of legal owner.<sup>4</sup> The purchaser may refuse a tender of the

1. Boston, etc., R. Co. v. Richardson, 135 Mass. 473, where the court says: "If one buys stock and takes a transfer, and presents the certificate to the corporation and demands a new one, he thereby impliedly represents that he is entitled to the new certificate. He demands it as his right. This implies that he is the owner and has a right to it. The corporation has the right to understand him as asserting this. It is not bound to question or investigate the genuineness of the transfer, and see if the purchaser has not been defrauded. When the purchaser presents his transfer and certificate, the transfer officer naturally understands that he claims the transfer to be valid, and to have a right to a certificate; he has a right to act as if this had been said in terms. And if, relying upon such tacit and implied representations, the corporation suffers a loss, the purchaser who misled it is liable."

2. Machinists' Nat. Bank v. Field, 126 Mass. 345.

3. The delivery of certificates of shares to a purchaser, is analogous to the delivery of chattels upon a sale thereof—and the assignment of it is a symbolical delivery of the shares themselves. Howe v. Starkweather, 17 Mass. 243; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 98; 19 Am. Dec. 306. This being as complete a delivery as the subject matter admits of, a title to the stock passes by the tender of the certificate, and the purchaser's refusal to receive it leaves the certificate in the hands of the seller as the trustee or bailee of the purchaser. 2 Kent Com. 741, note b; Noyes v. Spaulding, 27 Vt. 427; Bruce v. Smith, 44 Ind. 1; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Eastman v. Fiske, 9 N.

H. 182; Munn v. Barnum, 24 Barb. (N. Y.) 283.

4. Hunt v. Gunn, 13 C. B., N. S. 226; 106 E. C. L. 226. In this case the purchaser had executed the company's "Deed of Settlement," which resembles in part the American charter, but is signed by the original members. The court held in the above case that when the purchaser signed this instrument, he became the owner of the shares, and hence that a delivery of the scrip certificates by the seller was unnecessary. In the opinion, Byles, J., says: "When this agreement was entered into, there were two modes by which the plaintiff might become a shareholder in the company; by executing the deed, and so becoming an original shareholder, or by becoming a transferee of the shares. He executed the deed as a holder of sixty shares and so became an original shareholder; and he was afterwards registered as such. The condition of the contract, therefore, has been satisfied. The only person who could in any way deal with the shares after the execution of the deed of settlement and the complete registration of the company, is the plaintiff who now sues for the non-performance of the agreement to deliver the shares to him. In the events which have happened, it seems to me, that, upon the strict construction of the document, as well as according to the manifest justice of the case, the defendant is entitled to a verdict on the second plea. And, if there be any technical difficulty in the way, it would be the duty of the court to amend, in order to advance the real justice of the case." And Erle, C. J., says in the same case: "I am clearly of opinion that the shares were delivered, if they vested in the plaintiff. To a person who understands anything

certificates unless accompanied by a registration of the transfer,<sup>1</sup> or if they are indorsed in blank by some previous owner and not by the seller;<sup>2</sup> or, if the stock has been attached;<sup>3</sup> but not on the ground that the company has, since the formation of the contract, issued other shares at a discount.<sup>4</sup> So the party who contracts to sell need not tender the identical shares owned by him when the agreement was made.<sup>5</sup> Where the contract provides that the certificates and the purchase-money are to be left with a trust company, tender is unnecessary.<sup>6</sup> The duty of furnishing the deed by which a transfer of shares is effected in *England* is controlled by the usage of the market.<sup>7</sup>

(7) *Enforcement*—(a) *Specific Performance*.<sup>8</sup>—Where the contract for sale is clear and the value of the stock is uncertain,<sup>9</sup> or where the remedy in damages is inadequate,<sup>10</sup> or some other valid ground is shown,<sup>11</sup> specific performance may be awarded. But

of the subject the scrip certificate is something totally distinct from the shares. The certificate may be delivered though the shares are not, and *vice versa*. Upon the facts proved here, the shares were clearly vested in Hunt from the moment the company became a completely registered company; and that was a delivery within the meaning of this contract."

1. *White v. Salisbury*, 33 Mo. 150. *Compare* *Wilkinson v. Lloyd*, 7 Q. B. 27.

2. *Hare v. Waring*, 3 M. & W. 362, where Baron Parke says: "These certificates would be *prima facie* evidence of somebody else, not the assignees, being entitled to the shares, and there is no proof of the assignees deriving the title from that party by assignment, even assuming that to be sufficient. We are satisfied that the true meaning of the contract is, that the party is to convey and deliver certificates, showing, either on the face of them or from the indorsements, that the title is in the person conveying."

3. *Eastman v. Fiske*, 9 N. H. 182.

4. *Noyes v. Spaulding*, 27 Vt. 427.

5. *Noyes v. Spaulding*, 27 Vt. 427; *Frost v. Clarkson*, 7 Cow. (N. Y.) 24; *Shales v. Signoret*, 1 Ld. Raym. 440.

6. *Reed v. Hayt*, 109 N. Y. 659; 21 Am. & Eng. Corp. Cas. 295.

7. *Shaw v. Rowley*, 16 M. & W. 810; *Stephens v. DeMedina*, 4 Q. B. 422.

8. See generally, *SPECIFIC PERFORMANCE*, vol. 22, p. 908.

9. *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390; *White v. Schuyler*, 1 Abb. Pr., N. S. (N. Y.) 300; 31 How. Pr. (N. Y.) 38; *Sank v. Union Steamship Co.*, 5 Phila. (Pa.) 499;

*Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. St. 514; *Cheale v. Kenward*, 3 De G. & J. 27; *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 844.

10. *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365; 32 Am. Rep. 315, where the court says: "A recovery of damages would furnish inadequate compensation; the remedy by mandamus cannot be invoked as the authorities hold, and there can be no question that, in a case of this kind, a court of equity alone can grant the proper relief." See also *Johnson v. Brooks*, 93 N. Y. 343; *Tobey v. Hakes*, 54 Conn. 276; *Walker v. Detroit Transit R. Co.*, 47 Mich. 342; *Freon v. Carriage Co.*, 42 Ohio St. 41; 51 Am. Rep. 794; *Phillips v. Berger*, 2 Barb. (N. Y.) 608; 1 Story, Eq. Jur., § 717.

11. *Duncuft v. Albrecht*, 12 Sim. 189; *Parish v. Parish*, 32 Beav. 207; *Poole v. Middleton*, 29 Beav. 646; *Turner v. May*, 32 L. T., N. S. 56; *Beckitt v. Billsborough*, 8 Hare 188; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390; *Frue v. Houghton*, 6 Colo. 318; *Chater v. San Francisco Sugar Refinery Co.*, 19 Cal. 219; *White v. Schuyler*, 1 Abb. Pr. N. S. (N. Y.) 300; *Price v. Minot*, 107 Mass. 49; *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313. *Compare* *Austin v. Gillaspie*, 1 Jones Eq. (N. Car.) 261; *Nutbrown v. Thornton*, 10 Ves. 160; *Shaw v. Fisher*, 5 De G. M. & G. 596; *Wynne v. Price*, 3 De G. & S. 310; *Wilson v. Keating*, 7 W. R. 484; *Oriental Co. v. Briggs*, 2 J. & H. 625; *Paine v. Hutchinson*, L. R., 3 Eq. 257; *Shepherd v. Gillespie*, L. R., 5 Eq. 293; *Birmingham v. Sheridan, etc., Ins. Co.*, 33 Beav. 660; *Stras-*

the purpose of the contract must not be contrary to public policy,<sup>1</sup> nor detrimental to the interests of the corporation.<sup>2</sup> So specific performance will not be granted, if the defendant is no longer in possession of the stock,<sup>3</sup> or if the delivery forms but one of several parts of the contract,<sup>4</sup> or if the default is capable of exact compensation in damages.<sup>5</sup> A contract to transfer stock at any time will not be enforced against the insolvent estate of a stockholder since deceased,<sup>6</sup> and, in general, the plaintiff must be diligent in seeking his remedy. A delay of seven,<sup>7</sup> and even of five<sup>8</sup> years has been held sufficient to constitute a bar to specific performance. But where that remedy is denied, equity will sometimes award damages without sending the plaintiff to a court of law.<sup>9</sup> The contract, like others, will be enforced, if at all, so as to promote the apparent intention of the parties.<sup>10</sup>

(b) **Damages.**—See DAMAGES, vol. 5, p. 29; TROVER.

(c) **Defenses.**—It is no defense to an action upon a contract for the purchase of stock that the company was at the time insolvent,<sup>11</sup> or has suffered a loss of its property,<sup>12</sup> or is being wound up,<sup>13</sup> or is only proven to be a *de facto* corporation,<sup>14</sup> or has since effected an *ultra vires* issue of stock at a discount.<sup>15</sup> One who contracts to sell stock is bound to execute the transfer though the directors refuse to allow it.<sup>16</sup> So a director who agrees to

burg R. Co. v. Echternacht, 21 Pa. St. 121; 60 Am. Dec. 49; Ferguson v. Paschall, 11 Mo. 267; Cowles v. Whitman, 10 Conn. 121; 25 Am. Dec. 60; Clark v. Flint, 22 Pick. (Mass.) 231; 33 Am. Dec. 733; Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299; Cruse v. Paine, L. R., 6 Eq. 641.

1. Tobey v. Robinson, 99 Ill. 222; Noyes v. Marsh, 123 Mass. 286.

2. Foll's Appeal, 91 Pa. St. 434; 36 Am. Rep. 671.

3. Columbine v. Chichester, 2 Ph. 27. But where he has retained a part, the contract will be specifically enforced as to it. Turner v. May, 32 L. T., N. S. 56.

4. Ross v. Union Pac. R. Co., Woolw. (U. S.) 26.

5. Eckstein v. Downing, 64 N. H. 248; Noyes v. Marsh, 123 Mass. 286; Thorndike v. Locke, 98 Mass. 340; Jones v. Newhall, 115 Mass. 244; 15 Am. Rep. 97; Somerby v. Buntin, 118 Mass. 287; 19 Am. Rep. 459.

6. Chafee v. Sprague, 16 R. I. 189.

7. York v. Passaic Rolling Mill Co., 30 Fed. Rep. 471.

8. Diamond State Iron Co. v. Todd (Del. 1888), 14 Atl. Rep. 27, where there was also uncertainty and misrepresentation.

9. Wonson v. Fenno, 129 Mass. 405;

Austin v. Gillaspie, 1 Jones Eq. (N. Car.) 261.

10. Cook, Stock and Stockholders (2d ed.), p. 374. See also Central, etc., Assoc. v. James, 81 Ga. 762; Donahue v. M'Cosh, 70 Iowa 733; Kernochan v. Murray, 111 N. Y. 306; Hill v. Smith, 21 How. (U. S.) 283; Eagan v. Clasby, 5 Utah 154; Reynolds v. Myers, 51 Vt. 444.

11. Rudge v. Bowman, L. R., 3 Q. B. 689; Gordon v. Parker, 10 La. 56. A contract to deliver stock free from incumbrances is not broken by the existence of liens against the corporation. Williams v. Hanna, 40 Ind. 535.

12. Kerchne v. Gettys, 18 S. Car. 521. Compare Donahue v. M'Cosh, 70 Iowa 733.

13. Crubb v. Miller, 19 W. R. 519.

14. Reynolds v. Myers, 51 Vt. 444.

15. Faulkner v. Hebard, 26 Vt. 452. But the fact that shares are issued at less than the charter price is a good defense to an action for the purchase thereof, though the corporation is also liable to the holder. Sturges v. Stetson, 1 Biss. (U. S.) 246.

16. Poole v. Middleton, 29 Beav. 646. But see London Founders' Assoc. v. Clarke, 20 Q. B. Div. 576; 21 Am. & Eng. Corp. Cas. 428, where it is held that a contract for sale on the stock

transfer shares to an employe of the corporation, unless he should leave its employ, is not released by a dismissal of the employe.<sup>1</sup> A transferee from one who is entitled to receive stock from a corporation, upon the performance of certain acts, cannot plead their non-performance as a ground of forfeiture, if the corporation does not.<sup>2</sup> The Statute of Limitations is, of course, available as a defense.<sup>3</sup>

*b. GIFTS—(1) Validity.*—Gifts of stock once made cannot be revoked by the donor.<sup>4</sup> But the intent to vest title in the donee must be clear.<sup>5</sup> In the case of an infant donee, acceptance will be inferred from the beneficial nature of the grant.<sup>6</sup> Delivery may be effected so as to consummate the gift by transfer on the corporate books, even though the donor retains possession of the certificates.<sup>7</sup> So parol evidence has been held admissible, as against the creditors of the donor, to show that he intended a purchase in the donee's name, as a gift.<sup>8</sup> But it has been held that there was no valid delivery to one claiming as donee where

exchange does not import an understanding that the company will register the transfer.

1. *Price v. Minot*, 107 Mass. 49. There was also a by-law that no shares could be transferred without first being offered to the corporation.

2. *Bradley v. Chase*, 22 Me. 511.

3. *Williams v. Meyer*, 41 Hun (N. Y.) 545.

4. *Francis v. New York, etc., R. Co.*, 17 Abb. N. Cas. (N. Y.) 1; *Standing v. Bowring*, 27 Ch. Div. 341; *Delamater's Estate*, 1 Whart. (Pa.) 362; *Dummer v. Pitcher*, 5 Sim. 35.

5. *Jackson v. Twenty-third St. R. Co.*, 88 N. Y. 521.

A woman at the time of her marriage owned thirty-six shares of bank stock standing in her name. Some time after the marriage her husband transferred it to himself for the purpose of pledging it to the bank for a loan, and after the loan was repaid, retransferred it to her, stating that it was hers and that he wished it to stand in her name as before. The husband afterwards purchased fourteen other shares of the stock of the same bank and had them transferred to his wife. The transfers were made in good faith and there were no creditors to be injured. *Held*, that in equity the husband had made a valid gift of the whole fifty shares to the wife, and that she took a sole and separate estate therein. *Deming v. Williams*, 26 Conn. 226.

6. *Francis v. New York, etc., R. Co.*, 17 Abb. N. Cas. (N. Y.) 1; *Spencer v.*

*Carr*, 45 N. Y. 406; 6 Am. Rep. 112; *Jackson v. Bodle*, 20 Johns. (N. Y.) 184.

7. *Robert's Appeal*, 85 Pa. St. 84, where the donor, since deceased, had effected such a transfer to his niece. The court said: "The gift is complete by the delivery of the thing itself, for transferring the shares to her upon the books of the company is putting her in complete possession of the thing assigned, and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no clearer evidence of a design to part with the right of property in favor of another than an absolute transfer of the legal title to her for her own use. Retaining in his possession the certificates which are in her name, and which he could not use without her consent, cannot undo or qualify the decisive ownership with which he had invested her by the actual delivery to her on the books of the company. The best evidence of her ownership is the transfer on the books of the company. The certificates were but secondary evidence of her ownership, and only useful for purposes of transfer. They were nothing more than the official declaration by the company of what already appeared on their books. There was here no *locus penitentiae*."

8. *Rider v. Kidder*, 10 Ves. 361.



the latter never received the certificates and his alleged donor notified the company that he would give further orders as to the disposition of the shares; though the shares had been set aside in the claimant's name and the dividends paid to him at the donor's direction.<sup>1</sup> A gift of certain original shares, together with "the dividends and income thereof," does not pass new shares issued subsequently and apportioned among the holders of the original shares,<sup>2</sup> but a gift of dividends has been held to pass the stock.<sup>3</sup>

(2) *Formalities*.—In most cases a gift may be complete and effectual without registration on the corporate books.<sup>4</sup> As between donor and donee the gift may be valid without registration, notwithstanding a requirement of such formality; so it may be valid without a written assignment of the certificate.<sup>5</sup> In *England*, a gift of railroad stock requires a deed,<sup>6</sup> and a decedent's memorandum that he makes a gift of certain stock, but retains it during life in order to draw dividends, passes no title.<sup>7</sup>

c. LEGACIES.—See LEGACIES AND DEVICES, vol. 13, p. 19; REMAINDERS, vol. 20, p. 828; WILLS.

**VIII. LIEN OF THE CORPORATION ON STOCK**—(See also NATIONAL BANKS, vol. 16, p. 201)—1. **Origin and Creation of Lien**—a. **RULE AT COMMON LAW**.—At common law a corporation has no lien on shares of stock belonging to a member indebted to the corporation.<sup>8</sup> Authority for such a lien must be founded on charter or statute, or, in some instances, on by-law or custom.

1. *Jackson v. Twenty-third St. R. Co.*, 88 N. Y. 520.

2. *Spooner v. Phillips* (Conn. 1892), 24 Atl. Rep. 524.

3. *Delamater's Estate*, 1 Whart. (Pa.) 362.

4. See *supra*, this title, *Registration*. See also *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313; *De Caumont v. Bogert* 36 Hun (N. Y.) 382; *Jackson v. Twenty-third St. R. Co.*, 88 N. Y. 520.

In *Maryland*, under the statute the rule is otherwise. *Baltimore Retort*, etc., Co. v. *Mali*, 65 Md. 93; 13 Am. & Eng. Corp. Cas. 49; 57 Am. Rep. 304; *Pennington v. Gittings*, 2 Gill & J. (Md.) 208.

5. *Walsh v. Saxton*, 55 Barb. (N. Y.) 251. In *Allerton v. Lang*, 10 Bosw. (N. Y.) 362, the delivery by the stockholder of a hand-bag containing a certificate of stock, with the statement, "I make you a present of it," was held sufficient to constitute a gift of the stock.

6. *Moore v. Moore*, 43 L. J. Ch. 617.

7. *In re Shield*, 53 L. T., N. S. 5.

8. *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *People v. Crockett*, 9 Cal. 112; *Vansands v. Middlesex Co. Bank*,

26 Conn. 154; *Farmers', etc., Bank v. Wasson*, 48 Iowa 336; 30 Am. Rep. 395; *Dana v. Brown*, 1 J. J. Marsh. (Ky.) 304; *Fitzhugh v. Bank of Shepherdsville*, 3 T. B. Mon. (Ky.) 126; 16 Am. Dec. 90; *Byrne v. Union Bank*, 9 Rob. (La.) 433; *Bryon v. Carter*, 22 La. Ann. 98; *Hagar v. Union Nat. Bank*, 63 Me. 509; *Gemmell v. Davis* (Md.), 23 Atl. Rep. 1032; *Crease v. Babcock*, 10 Met. (Mass.) 525; *Grew v. Breed*, 10 Met. (Mass.) 569; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 99; 19 Am. Dec. 316; *Massachusetts Iron Co. v. Hooper*, 7 Cush. (Mass.) 183; *Holly Springs Bank v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Williams v. Lowe*, 4 Neb. 382; *Bates v. New York Ins. Co.*, 3 Johns. Cas. (N. Y.) 238; *Bank of Attica v. Manufacturers', etc., Bank*, 20 N. Y. 501; *Driscoll v. West Bradley, etc., Mfg. Co.*, 59 N. Y. 96; *Heart v. State Bank*, 2 Dev. Eq. (N. Car.) 111; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280; *Merchant's Bank v. Shouse*, 102 Pa. St. 488; *Nealey v. Janney*, 2 Cranch (C. C.) 108; *Case v. Bank*, 100 U. S. 446.

b. STATUTES AND CHARTERS.—Legislatures, however, frequently provide for the lien by general law or by charter.<sup>1</sup>

c. BY-LAWS.—Whether, in the absence of authority conferred by statute or charter, a corporation by a by-law can create a lien on the stock, is a question upon which the authorities are not harmonious. The weight of authority, however, at least at the present day, appears to assert the existence of the right.<sup>2</sup> The

1. *Liens By Statute and Charter.*—Allen v. Montgomery R. Co., 11 Ala. 437; First Nat. Bank v. Hartford L., etc., Ins. Co., 45 Conn. 22; Ryder v. Alton, etc., R. Co., 13 Ill. 516; German Security Bank v. Jefferson, 10 Bush (Ky.) 326; Merrill v. Call, 15 Me. 428; Farmers' Bank v. Iglehart, 6 Gill (Md.) 50; Hodges v. Planters' Bank, 7 Gill & J. (Md.) 306; Reese v. Bank of Commerce, 14 Md. 271; 74 Am. Dec. 536; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770; 14 Am. Dec. 526; Leggett v. Bank of Sing Sing, 24 N. Y. 383; Stebbins v. Phoenix F. Ins. Co., 3 Paige (N. Y.) 350; Arnold v. Suffolk Bank, 27 Barb. (N. Y.) 424; Gaff v. Flesher, 33 Ohio St. 107; Rogers v. Huntington Bank, 12 S. & R. (Pa.) 77; Presbyterian Congregation v. Carlisle Bank, 5 Pa. St. 345; Everhart v. West Chester, etc., R. Co., 28 Pa. St. 339; Pittsburgh, etc., R. Co. v. Clarke, 29 Pa. St. 146; Cross v. Phenix Bank, 1 R. I. 39; Bohmer v. City Bank, 77 Va. 445; 1 Am. & Eng. Corp. Cas. 36; Sabin v. Bank of Woodstock, 21 Vt. 353; Union Bank v. Laird, 2 Wheat. (U. S.) 390; Brent v. Bank of Washington, 10 Pet. (U. S.) 596; Cecil Nat. Bank v. Watson-town Bank, 105 U. S. 217; Hammond v. Hastings, 134 U. S. 401; McMurrich v. Bond Head Harbor Co., 9 U. C. Q. B. 333; Pinkett v. Wright, 2 Hare 120; Weston's Case, L. R., 4 Ch. 20.

In Stebbins v. Phoenix F. Ins. Co., 3 Paige (N. Y.) 350, Chancellor Walworth says: "I have no doubt that in equity the lien given by this charter upon the stock belonging to debtors of the company, and upon the dividends thereon, extends to all stock actually owned by such debtors, whether standing in their own names or in the names of other persons as their trustees. But the defendants could not be permitted to enforce that lien against bona fide purchasers of the stock who had no notice of such equitable lien."

So the lien may be conferred by articles of association. Bradford Banking Co. v. Briggs, L. R., 12 App. Cas.

29; Bank v. Saulsbury, etc., Co., L. R., H. L. (1892) 281.

See the statutes of Alabama, Arkansas, Colorado, Connecticut, Michigan, Minnesota, Montana, Pennsylvania, South Carolina, Utah, and Wisconsin for instances of general statutes conferring the lien.

A statute authorizing the sale of stock for unpaid installments, relates entirely to the remedy and applies to corporations organized under a former statute authorizing a lien, but providing a definite method of enforcing it. Tutweiler v. Tuscaloosa Coal, etc., Co., 89 Ala. 391; 31 Am. & Eng. Corp. Cas. 445.

2. This is the view reached by recent text-book writers. Beach on Corporations, § 644; Spelling on Corporations, §§ 477, 478; Morawetz on Corporations, § 201; Cook on Stock and Stockholders, § 522. The subject is discussed in NATIONAL BANKS, vol. 16, p. 163. The writer of that article, after examining and comparing the cases, thinks that the weight of authority is otherwise.

In Cunningham v. Alabama L. Ins. Co., 4 Ala. 652, decided in 1843, it was held that under a charter which enacted that stock should be assignable on the books of the corporation under such regulations as the board of trustees should establish, it was competent for the trustees to declare by a by-law that no stockholder should be permitted to transfer his stock for the company while he was in default.

In Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585, the right of an incorporated savings bank to make such a by-law seems to have been conceded, the point of contention being whether the by-law as passed was or was not the equivalent of an immediate and clear reservation by the bank of a lien for other debts and liabilities than on account of the unpaid stock.

In People v. Crockett, 9 Cal. 113, a by-law was refused a retroactive operation.

In Tuthill v. Walton, 1 Ga. 43, a

chief difficulty arises where a *bona fide* purchaser denies notice of the lien.<sup>1</sup>

*d. CONTRACT AND USAGE.*—Independent of other authority, the lien may be created by contract, and the acceptance by the stockholder of a certificate containing a provision for a lien, is a ratification of such a contract.<sup>2</sup> The lien may also arise from

by-law asserting a lien was held valid as between the corporators themselves.

The recent case of *Farmers', etc., Bank v. Haney* (Iowa, 1893), 54 N. W. Rep. 61, recognized the validity of a lien created by a by-law.

In *Holly Springs Bank v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330, the bank charter authorized the board of directors to make "all needful rules and by-laws for the management of the business of said company, and the mode and manner of transferring its stock." It was held that a by-law giving a lien was valid.

In *St. Louis, etc., Ins. Co. v. Goodfellow*, 9 Mo. 149, the facts and the decision were similar to those of the *Mississippi* case last cited.

In *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388, the court founded its decision upon the *Missouri* case last cited, and held in effect that the by-law of a bank forbidding the transfer of stock where the owner was indebted to the bank, was valid, though inconsistent with the general law of the state governing the transfer of property.

*Spurlock v. Pacific R. Co.*, 61 Mo. 319, is in line with the earlier *Missouri* cases.

In *Young v. Bough*, 23 N. J. Eq. 325, the chancellor said, that "A by-law of a money corporation declaring that the debts of a stockholder should be a lien on his stock and that he was not to transfer it until such debt was paid, was reasonable and legal."

In *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; 11 Am. Rep. 258, it was held that a power to make by-laws to justify the management of the business of an association was sufficient to justify a by-law creating a lien on the stock. In this case the subject underwent long and critical discussion. See in this connection, *McDowell v. Wilmington Bank*, 1 Harr. (Del.) 27; *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596; *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429; *In re Dunkerson*, 4

*Biss*. (U. S.) 227; *Pendergast v. Bank of Stockton*, 2 Sawy. (U. S.) 108; *In re Bachman*, 2 Cent. L. J. 119; 12 Nat. Bank Reg. 223; *Child v. Hudson's Bay Co.*, 2 P. Wms. 207.

The early *Massachusetts* cases of *Plymouth Bank v. Norfolk Bank*, 10 Pick. (Mass.) 454, and *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, questioned the validity of a by-law giving a corporation such a lien.

1. In *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359, the court said that the bank might make by-laws regulating the transfer of stock, but could not under that power create a secret lien upon stock which would attach to it in the hands of a *bona fide* purchaser without notice. In line with this decision are the cases of *Driscoll v. West Bradley, etc., Co.*, 59 N. Y. 96; *Attica Bank v. Manufacturers' Bank*, 20 N. Y. 501; *Leggett v. Sing Sing Bank*, 24 N. Y. 283; *Conklin v. Second Nat. Bank*, 45 N. Y. 655; *Arnold v. Suffolk Bank*, 52 Barb. (N. Y.) 424; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. (N. Y.) 495; *Byron v. Carter*, 22 La. Ann. 98; *Petot v. Johnson*, 33 La. Ann. 1268; *New Orleans Banking Assoc. v. Wiltz*, 4 Woods (U. S.) 43; *Steamship Dock Co. v. Henon*, 52 Pa. St. 280; *Mechanics' Bank v. Shouse*, 102 Pa. St. 488; *Fechheimer v. Exchange Bank*, 79 Va. 80; 5 Am. & Eng. Corp. Cas. 156. See also *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Evansville Bank v. Metropolitan Bank*, 2 Biss. (U. S.) 527; *Lee v. Citizens' Bank*, 2 Cin. Super. Ct. 298. Compare also *Neal v. Janney*, 2 Cranch (C. C.) 188.

2. *Liens by Contract.*—*Jennings v. Bank of California*, 79 Cal. 323; 26 Am. & Eng. Corp. Cas. 145; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; *Farmers', etc., Bank v. Haney* (Iowa, 1893), 54 N. W. Rep. 61. In the first case the court, by Hayne, C., said: "It is argued that the terms upon which shares of stock may be transferred are prescribed by the statute, and that the corporation had no power to annex other conditions. So far

usage,<sup>1</sup> but the absence of usage does not affect the validity of a lien created by contract.<sup>2</sup>

c. **INFERENCE AND CONSTRUCTION.**—Where the lien is not otherwise expressly created, a general statutory provision prohibiting or restricting an indebted stockholder from transferring his shares or receiving dividends, will authorize the lien.<sup>3</sup> So a general authority to regulate transfers,<sup>4</sup> or even to regulate the cor-

as the power of corporate legislation is concerned, this may be conceded, and it may be assumed for the purpose of the case that a corporation could not make a by-law which would operate in and of itself to create a lien upon the stock for the indebtedness of the stockholder. But the power to legislate is one thing, and the power to contract is quite another."

1. **Liens by Usage.**—*Wain v. Bank of N. A.*, 8 S. & R. (Pa.) 73. But such usage has been held not binding as against judgment creditors. *Bryon v. Carter*, 22 La. Ann. 98.

In *Driscoll v. West Bradley, etc., Mfg. Co.*, 59 N. Y. 96, the court says: "A further point is made by the defendant that the by-law was, in this case, adopted with the assent and vote of Bradley, as one of the trustees of the defendant. There are cases in which it has been held that a holder of stock is bound by a usage of the company, or by an informal regulation, made known at the time of taking his certificate, that the company may have a lien thereon for an indebtedness; and it has been held that assignees in insolvency of such a stockholder are also bound. *Morgan v. Bank of N. A.*, 8 S. & R. (Pa.) 73; *Vansands v. Middlesex Co. Bank.*, 26 Conn. 144. But no authority is cited for the further position that a *bona fide* purchaser of stock, without notice or knowledge of such usage or regulation derived from the contents of the certificate, or otherwise, is bound thereby."

In the recent case of *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282, a by-law provided that the shares of an indebted stockholder might be applied in payment if the latter were not made within a given time. The corporation, instead of declaring dividends, allowed annual credits, and one of the stockholders had drawn in excess of his allowance. The court said: "This indebtedness was a lien on his stock by virtue of the by-laws he assisted in making. The stock was

pledged for its payment. *Morgan v. Bank of N. A.*, 8 S. & R. (Pa.) 73; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Grant v. Mechanics' Bank*, 15 S. & R. (Pa.) 140; *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285."

2. *Jennings v. Bank of California*, 79 Cal. 323; 26 Am. & Eng. Corp. Cas. 145.

3. **Liens by Construction.**—*Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; 15 Am. & Eng. Corp. Cas. 578; *Farmers' Bank Case*, 2 Bland (Md.) 394; *Mechanics Bank v. Seton*, 1 Pet. (U. S.) 309; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 614; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Pierson v. Bank of Washington*, 3 Cranch (C. C.) 363; *In re Dunkerson*, 4 Biss. (U. S.) 227; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 220.

4. *Cunningham v. Alabama L. Ins., etc., Co.*, 4 Ala. 652; *Bryon v. Carter*, 22 La. Ann. 97; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Spurlock v. Pacific R. Co.*, 61 Mo. 319; *Lockwood v. Mechanics Nat. Bank*, 9 R. I. 308; 11 Am. Rep. 253; *Pendergast v. Bank of Stockton*, 2 Sawy. (U. S.) 108; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596.

An act prohibiting banks from making loans or discounts on the security of their shares, will also prevent them from acquiring liens for debts so created, though such liens are authorized by a prior by-law. *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; 21 Am. & Eng. Corp. Cas. 423. But see *Vansands v. Middlesex Co. Bank*, 26 Conn. 144. An option to prohibit transfers by an indebted stockholder must be exercised by the corporation before a lien arising therefrom will attach. *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575. And the lien does not attach to shares issued with powers of attorney to enable non-resident allottees to deal with them as negotiable securities, or as money pay-

porate management, has been held to confer the power to create a lien.<sup>1</sup>

**2. Nature and Extent—*a.* TO WHAT IT ATTACHES.**—When the lien does exist, its operation is very comprehensive. It attaches to all the shares of the debtor, though spurious and obtained by fraud,<sup>2</sup> though the corporation has been dissolved,<sup>3</sup> sometimes where a portion of the stock is paid up,<sup>4</sup> and whether the debtor holds the legal<sup>5</sup> or equitable<sup>6</sup> title. But the lien cannot be enforced against an unregistered transferee by retaining dividends as a set-off to debts due from the assignor where the corporation has knowledge of the assignment.<sup>7</sup> It attaches also to dividends,<sup>8</sup> unless they are declared after the stockholder's death.<sup>9</sup>

***b.* FOR WHAT DEBTS.**—The lien is a general one and secures all debts<sup>10</sup> due from the stockholder or firm of which he is a mem-

ments. *Hunter v. Stewart*, 4 De G. F. & J. 168.

1. *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388; *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429. *Contra*, *Bank of Attica v. Manufacturers, etc., Bank*, 20 N. Y. 501; *Driscoll v. West Bradley, etc., Mfg. Co.*, 59 N. Y. 96.

2. *Mount Holley Paper Co.'s Appeal*, 99 Pa. St. 513.

3. *In re General Exchange Bank*, L. R., 6 Ch. 818.

4. *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 350. *Contra*, *Petersburg Sav., etc., Co. v. Lumsden*, 75 Va. 327; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; 13 Am. & Eng. R. Cas. 120; *Hubbersty v. Manchester, etc., R. Co.*, L. R., 2 Q. B. 471.

5. *New London, etc., Bank v. Brocklebank*, L. R., 21 Ch. Div. 302; 51 L. J. Ch. 711; *Burns v. Laurie*, 2 Court of Session Cas. (Scotland) 2d series, 1340. *Compare* *Young v. Vough*, 23 N. J. Eq. 325.

Unless the corporation has notice that the registered stockholder is a mere trustee. *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299.

6. *Planters, etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Stebbins v. Phoenix F. Ins. Co.* 3 Paige (N. Y.) 350.

7. *Gemmell v. Davis* (Md. 1892), 23 Atl. Rep. 1032; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299.

8. *Hagar v. Union Nat. Bank*, 63 Me. 509; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; 19 Am. Dec. 306; *Bates v. New York Ins. Co.*, 3 Johns. Cas. (N. Y.) 238; *Hague v.*

*Dandeson*, 2 Exch. 741. But see *Attorney Gen'l v. State Bank*, 1 Dev. & B. Eq. (N. Car.) 545.

9. *Brent v. Bank of Washington*, 2 Cranch (C. C.) 517; *Merchants Bank v. Shouse*, 102 Pa. St. 488.

10. The lien attaches for unpaid subscriptions for which calls have been made. *Spurlock v. Pacific R. Co.*, 61 Mo. 319; *McCready v. Rumsey*, 6 Duer (N. Y.) 574; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Pittsburgh, etc., R. Co. v. Clarke*, 29 Pa. St. 146; *Petersburg Sav., etc., Co. v. Lumsden*, 75 Va. 325; *In re Bachman*, 12 Nat. Bankr. Reg. 223; *Great North of Eng. R. Co. v. Bidulph*, 7 M. & W. 243; *Reg. v. Wing*, 33 Eng. L. & Eq. 80; *Shaw v. Rowley*, 16 M. & W. 810; 5 Railw. Cas. 47; *En parte Littledale*, L. R., 9 Ch. 257; *Hubbersty v. Manchester, etc., R. Co.*, L. R., 2 Q. B. 471.

**Contra.**—If installments have not been called in. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484. The lien attaches for debts accruing either before or after the stock was acquired. *Schmidt v. Hennepin, etc., Co.*, 35 Minn. 511; 15 Am. & Eng. Corp. Cas. 576.

But the debt must be due to the company, and not to a mere trustee of it. *Child v. Hudson's Bay Co.*, 3 P. Wms. 207; and the debt must be *bona fide*; one assigned to the corporation for the express purpose of enforcing its lien will not suffice. *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601. The lien is good against the registered holders only. *Helm v. Swiggett*, 12 Ind. 194; *In re Ystalyfera Gas Co.*, W. N. (1887) 30.

ber,<sup>1</sup> even where they arise out of transactions not connected with his shares,<sup>2</sup> and though the stockholder is but a surety for the debt,<sup>3</sup> and though it is contracted after the transfer without notice to the corporation.<sup>4</sup>

c. TIME.—The lien attaches though the debt is not due and payable at the time,<sup>5</sup> and may continue after an action upon

In *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77, the act of incorporation provided that "no stockholder indebted to the institution shall be authorized to make a transfer or receive a dividend, till such debts have been discharged," etc. Plaintiffs' vendor was "indebted to the bank for money borrowed on discount, in the usual manner." Chief Justice Tilghman says: "It was contended on the part of the plaintiffs that the words indebted to the institution should be restrained to debts on account of the original subscription to the capital of the bank. But I can perceive no ground for such restriction. The words embrace all debts, and there is good reason for their extending to all. When the directors discount the note of a stockholder, they know that his stock is liable, and therefore may be less attentive to the sufficiency of the indorsers. The indorsers, too, have an interest in the lien of the bank, and it may be presumed that many persons have been induced to indorse on the strength of this lien. We must not reject the plain meaning of words and resort to probable conjectures."

1. *Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384; *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 241; *In re Bigelow*, 2 Ben. (U. S.) 471.

2. *Cunningham v. Alabama L. Ins., etc., Co.*, 4 Ala. 652; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Jennings v. Bank of California*, 79 Cal. 323; 26 Am. & Eng. Corp. Cas. 145 (indebtedness from overdrafts); *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 334; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Burford v. Crandell*, 2 Cranch (C. C.) 86; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Ex parte Stringer*, L. R., 9 Q. B. Div. 436.

3. *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283.

4. *Platt v. Birmingham Axle Co.*, 41 Conn. 255; *First Nat. Bank v. Hart-*

*ford L., etc., Ins. Co.*, 45 Conn. 22; *Sabin v. Bank of Woodstock*, 21 Vt. 353. Otherwise if the corporation has notice of the transfer. *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Conant v. Reed*, 1 Ohio St. 298. But not so where the corporation has knowledge of the transfer, though it be unrecorded. *Gemmell v. Davis* (Md.), 23 Atl. Rep. 1032.

5. *Cunningham v. Alabama L. Ins., etc., Co.*, 4 Ala. 652; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *McCready v. Rumsey*, 6 Duer (N. Y.) 574; *Downer v. Zanesville Bank*, Wright (Ohio) 477; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Grant v. Mechanics Bank*, 15 S. & R. (Pa.) 140; *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285; *Pittsburg, etc., R. Co. v. Clarke*, 29 Pa. St. 146; *In re Bachman*, 12 Nat. Bank Reg. 223; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596; *In re London, etc., Banking Co.*, 34 Beav. 332. *Contra*, where the limitation "actually due and payable" is provided. *Reese v. Bank of Commerce*, 14 Md. 271; 74 Am. Dec. 536; and see *In re Stockton Malleable Iron Co.*, L. R., 2 Ch. Div. 101; 45 L. J. Ch. 168.

In construing the meaning of "indebted" in the act forbidding transfers by indebted stockholders, Tilghman, C. J., says in *Grant v. Mechanics' Bank*, 15 S. & R. (Pa.) 143: "It is said by the counsel for the plaintiffs, that it would be extremely inconvenient and hard on stockholders if they were to lose the right of making transfers or receiving dividends merely because they happened to draw or indorse a note which was discounted in a bank, perhaps without their knowledge. That an inconvenience might sometimes happen in this way, is true; but it is believed not often, because the directors would not be apt to refuse permission to transfer, or withhold dividends in stock, unless there was danger of loss; besides the stockholders derive no small advantage from

it would be barred by the Statute of Limitations.<sup>1</sup> The lien dates from the time when a call is made,<sup>2</sup> and its existence should be ascertained immediately after an application for a transfer.<sup>3</sup>

**3. Priorities and Notice.**—The lien of the corporation is generally superior to any rights acquired by transferees;<sup>4</sup> and all per-

the facility with which they obtained discounts on the faith of a lien on their stock. The question is, however, not whether stockholders might be put to inconvenience, but what was the intent of the law. Now, no doubt, this restraint on the transfer of the stock was intended for the benefit of the bank, but of what benefit would it be if the stockholder had the unrestrained right of transfer at any time before this note fell due? The time of making this loan is that at which the directors must look out for security. If the stock was pledged by law, they might be easy as to other security, but if, trusting to this pledge, they discounted a stockholder's note, who had the right to withdraw his stock at pleasure, then the security in fact amounted to nothing. To be sure, if it were clearly ascertained that by indebteding the law meant nothing but a debt actually due, the bank directors would have no right to complain; because they would know that the stock was no security, and therefore they must look well to the character and property (other than stock) of the drawers and indorsers before a note was discounted, or demand an actual pledge of the stock."

1. *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50; *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596.

A by-law providing that if any debt to the corporation is not paid by a certain time the debtor's stock may be applied to its payment, authorizes a lien for advances from the company to the stockholder in excess of his profits, and the Statute of Limitations does not run against such lien when the debt is not paid. *Reading Trust Co. v. Reading Iron works*, 137 Pa. St. 282.

In *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596, Judge Baldwin says: "In *Bank of U. S. v. Donnelly*, 8 Pet. (U. S.) 361, this court laid it down as an established principle that the act of limitations operated only to bar the remedy, not to extinguish the right or cause of action; and that a judgment on a plea of the statute was only to

bar the remedy on a contract, when sued for in *Virginia*, as the limitation act of that state embraced the one declared on; but did not operate to extinguish the contract when sued on elsewhere, or in *Kentucky*, where by the *lex loci* it was not affected by any limitation. *Ib.* 370. We cannot take this case out of this established rule; the legal remedy is barred, but the debt remains as an unextinguished right; and the bank, when called into a court of equity, may hold to an equitable lien, or other means in their hands, till it is discharged."

2. *Reg. v. Londonderry, etc.*, R. Co., L. R., 13 Q. B. 998.

3. *In re Cawley*, L. R., 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425.

Under the *Connecticut* statute, giving the corporation a lien on stock for debts due the corporation, it is held that such act, immediately upon going into effect, created a lien in favor of the corporation for old indebtedness. *First Nat. Bank v. Hartford L., etc.*, Ins. Co., 45 Conn. 22.

4. *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Conant v. Reed*, 1 Ohio St. 298; *Petersburg Sav., etc., Co. v. Lumsden*, 75 Va. 327; *Bohmer v. City Bank*, 77 Va. 445; 1 Am. & Eng. Corp. Cas. 36; *New Orleans Nat. Banking Assoc. v. Wiltz*, 4 Woods (U. S.) 43; *Watson v. Eales*, 23 Beav. 294.

Where the amount of the lien exceeds the value of the stock, the purchaser acquires nothing except on payment of the former. *Newberry v. Detroit, etc., Iron Co.*, 17 Mich. 141.

A purchaser under execution of stock, with notice of the corporation's lien for indebtedness, the latter being older than the judgment, takes it subject to such lien. *Tuttle v. Walton*, 1 Ga. 43.

But where the lien is acquired subsequently to an attachment, the rights of the attaching creditor are superior. *Geyer v. Western Ins. Co.*, 3 Pittsb. (Pa.) 41; and where stock stands in a fictitious name, a *bona fide* purchaser will be protected against a lien for debts of the real owner. *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 350.

sons are charged with notice of a statute or charter authorizing the lien,<sup>1</sup> though not of a by-law.<sup>2</sup>

Where no lien is authorized, either by statute or by-law, the purchaser of stock, who died insolvent and indebted to the corporation, is entitled to transfer though the directors, without notice to him pass a by-law after his death prohibiting such transfer. *Steamship Dock Co. v. Heron*, 52 Pa. St. 280. See also *Crease v. Babcock*, 10 Met. (Mass.) 525; *Grew v. Breed*, 10 Met. (Mass.) 569.

The lien does not overreach a prior assignment of stock, so as to preclude its transfer, where the corporation before obtaining its charter had no lien on the stock. *Neale v. Janney*, 2 Cranch (C. C.) 188.

Where the holder of a certificate of withdrawn stock issued by a bank, assigns the same, and afterwards, in ignorance of it the bank discounts a note for the assignor believing him to be still the owner of such claim against it, the bank acquires no lien upon the certificate and no equity as against the real owner. *Callanan v. Edwards*, 32 N. Y. 483.

In *England* the recent decision of the House of Lords, in *Bradford Banking Co. v. Briggs*, L. R., 12 App. Cas. 28, would seem to settle at last the priorities in favor of a pledgee of shares as against the company for advances to the shareholder, after notice to the company of the pledge. The case is a striking instance of fluctuating litigation, as the final holding reverses L. R., 31 Ch. Div. 19, and restores L. R., 29 Ch. Div. 19, changing the rule as announced in *Cook on Stock and Stockholders* (2d. ed.), § 533, note. See also *Miles v. New Zealand, etc., Estate Co.*, L. R., 32 Ch. Div. 266.

**1. Statutes and Charters as Notice.**—*First Nat. Bank v. Hartford L. Ins. Co.*, 45 Conn. 22; *Reese v. Bank of Commerce*, 14 Md. 271; 74 Am. Dec. 536; *Bishop v. Globe Co.*, 135 Mass. 132; 5 Am. & Eng. Corp. Cas. 161; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; 14 Am. Dec. 526; *McCready v. Rumsey*, 6 Duer (N. Y.) 574; *Downer v. Zanesville Bank*, *Wright (Ohio)* 477; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Grant v. Mechanics' Bank*, 15 S. & R. (Pa.) 140; *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 285; *Bohmer v.*

*City Bank*, 77 Va. 445; 1 Am. & Eng. Corp. Cas. 36; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 616; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217; *Hammond v. Hastings*, 134 U. S. 401; 31 Am. & Eng. Corp. Cas. 431.

In the recent case of *Hammond v. Hastings*, 134 U. S. 401, the controversy was between one who had purchased from a pledgee ignorant of the lien and the corporation. Mr. Justice Brewer said: "The law in terms provides for a lien, and that being a public law, all are charged with knowledge of its provisions. Generally, wherever paper of a similar nature to this is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute. And this is true whether the party lives in or out of the state by which the law was enacted."

**2. By-Law Not Constructive Notice Per Se.**—*Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Anglo-Californian Bank v. Grangers Bank*, 63 Cal. 359; 6 Am. & Eng. Corp. Cas. 543; where the purchasing bank had a similar by-law. *Holly Springs Bank v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *Driscoll v. West Bradley, etc., Mfg. Co.*, 59 N. Y. 109. Otherwise of a stockholder of a bank who borrows money from it. *Tete v. Farmers, etc., Bank*, 4 Brews. (Pa.) 308; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596.

"By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporation for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct corporate business in a particular way. They are not intended to interfere in the least with the rights and privileges of others who do not subject themselves to their influence. It may be said with truth therefore that no person not a member of the corporation can be affected in any of his rights by a corporate by-law of which he has no notice." *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 333.



4. **Waiver**—*a.* HOW EFFECTED.—The lien of a corporation may be waived by it,<sup>1</sup> but waiver is not to be inferred without proof.<sup>2</sup> Thus, the acceptance of other security, though permissible,<sup>3</sup> is not necessarily a waiver,<sup>4</sup> nor is consent to the transfer of a portion of the stock a waiver as to the remainder.<sup>5</sup>

*b.* BY WHOM EFFECTED.—Representations of corporate officers that the stock is unincumbered may estop the company from claiming a lien.<sup>6</sup> So waiver may be effected by representations of the general manager of the corporation;<sup>7</sup> by the cashier of a bank,<sup>8</sup> or by the secretary of an insurance company;<sup>9</sup> but one in the employ of the corporation, known to have no power to transact its general business, cannot waive the lien.<sup>10</sup>

5. **Enforcement**.—The lien is most frequently enforced by the refusal of the corporation to register transfers from an indebted member.<sup>11</sup> Other methods of enforcement are foreclosure and

In *Bishop v. Globe Co.*, 135 Mass. 132, plaintiff, a citizen of *Massachusetts*, was the assignee of one Wilkins, an indebted stockholder. The other facts and judgment are thus stated by the court: "The defendant had a statutory lien upon the stock to the full amount of Wilkins' indebtedness, and the plaintiff took the stock subject to that lien. He must be presumed to have known the public laws of *Connecticut* under which the corporation existed and the stock was held." *First Nat. Bank v. Hartford L., etc., Ins. Co.*, 45 Conn. 22.

1. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484; *Hodges v. Planters' Bank*, 7 Gill & J. (Md.) 306; *Cross v. Phenix Bank*, 1 R. I. 39; *Cecil Nat. Bank v. Watson-town Bank*, 105 U. S. 217; *Hammond v. Hastings*, 134 U. S. 401; *In re Hoylake R. Co.*, L. R., 9 Ch. 259; *Bank v. Salisbury Gold Mining Co.*, L. R., H. L. (1892) 281. Intervening equities of creditors may restrict the right of waiver. *In re Bachman*, 12 Nat. Bankr. Reg. 223.

Where a bank issues new certificates to an assignee of one of its stockholders, making his shares "transferable after the holder pays all his liabilities to said bank," it thereby waives its lien upon such shares for payments due from the stockholder. *Hill v. Pine River Bank*, 45 N. H. 300.

2. *First Nat. Bank v. Hartford L., etc., Ins. Co.*, 45 Conn. 22. The corporation, by assenting to an assignment by stockholders for creditors, "with no other preference than is or may be authorized by law," does not lose its lien on the stock for debts due

from the assignor. *Dobbins v. Walton*, 37 Ga. 614; 95 Am. Dec. 37. See also *Higgs v. Northern Assam Tea Co.*, L. R., 4 Exch. 387; *In re Northern Assam Tea Co.*, L. R., 10 Eq. 458.

Waiver cannot be inferred from testimony that the right of a stockholder in good standing to transfer was not questioned or that one stockholder was allowed a large overdraft, nor is the lien lost by reorganization of the corporation and the adoption of a by-law removing restrictions. *Jennings v. Bank of California*, 79 Cal. 323; 26 Am. & Eng. Corp. Cas. 145.

3. *Dunlop v. Dunlop*, L. R., 21 Ch. Div. 583.

4. *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; 15 Am. & Eng. Corp. Cas. 578; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *In re Peebles*, 2 Hughes (U. S.) 394.

5. *First Nat. Bank v. Hartford L., etc., Ins. Co.*, 45 Conn. 22. But see *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. St. 345. A temporary suspension of the lien may constitute a waiver. *Bank of America v. McNeil*, 10 Bush (Ky.) 54.

6. *Moore v. Bank of Commerce*, 52 Mo. 377, an officer in charge of the bank.

7. *Bishop v. Globe Co.*, 135 Mass. 132; 5 Am. & Eng. Corp. Cas. 161; *Young v. Vough*, 23 N. J. Eq. 325.

8. *Cecil Nat. Bank v. Watson-town Bank*, 105 U. S. 217.

9. *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

10. *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; 15 Am. & Eng. Corp. Cas. 578.

11. *Vansands v. Middlesex Co. Bank*,

sale<sup>1</sup> and attachment.<sup>2</sup> Enforcement is a right belonging exclusively to the corporation, and is to be exercised for its benefit alone.<sup>3</sup>

**IX. LIFE ESTATES AND REMAINDERS.**—See DIVIDENDS, vol. 5, p. 736; LEGACIES AND DEVICES, vol. 13, p. 220; REMAINDERS, vol. 20, p. 828; WILLS.

**STOCK (LIVE)**—(See also LIVE, vol. 13, p. 928).—The word stock used in connection with farm or land has a settled meaning whereby it is restricted to the animals which are used with, supported by, or reared upon it.<sup>4</sup>

26 Conn. 144; First Nat. Bank v. Hartford L., etc., Ins. Co., 45 Conn. 22; Farmers Bank v. Iglehart, 6 Gill (Md.) 56; Reese v. Bank of Commerce, 14 Md. 271; 74 Am. Dec. 536; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; 100 Am. Dec. 388; McCready v. Rumsey, 6 Duer (N. Y.) 574; Geyer v. Western Ins. Co., 3 Pittsb. (Pa.) 41; Klopp v. Lebanon Bank, 46 Pa. St. 88; Mount Holly Paper Co.'s Appeal, 99 Pa. St. 514; Bohmer v. City Bank, 77 Va. 445; 1 Am. & Eng. Corp. Cas. 36.

If the corporation claims more than is due, the stockholder must tender what he admits to be due, in order to put the bank in the wrong for refusing to transfer. Peirson v. Bank of Washington, 3 Cranch (C. C.) 363. See also *Ex parte* Stringer, L. R., 9 Q. B. Div. 436; Gustard's Case, L. R., 8 Eq. 438.

1. Sabin v. Bank of Woodstock, 21 Vt. 353.

2. Farmers Bank Case, 2 Bland (Md.) 394; *In re* Morrison, 10 Nat. Bankr. Reg. 105; Brent v. Bank of Washington, 10 Pet. (U. S.) 596.

3. Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770; 14 Am. Dec. 526. See also Planters, etc., Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359; 6 Am. & Eng. Corp. Cas. 543; Bishop v. Globe Co., 135 Mass. 132; 5 Am. & Eng. Corp. Cas. 161; Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513.

**Bibliography.**—The literature of the law of stock is to be sought, not only in the works treating specially on that subject, but also in the general treatises on corporation law. American authorities used in the preparation of this article: Abbott's Digest of the Law of Corporations, 1879; Potter, Corporations, 1879; Angell & Ames, Corporations, 1882; Boone, Corporations, 1882; Morawetz, Corporations, 1882; Lowell,

Transfer of Stock, 1884; Taylor, Corporations, 1888; Waterman, Corporations, 1888; Wait, Insolvent Corporations, 1888; Cook, Stock and Stockholders, 1889; Kerr, Business Corporations, 1890; Beach, Corporations, 1891; Spelling, Corporations, 1892; Reno, Non-Residents and Foreign Corporations, 1892; Boisot, By-Laws, 1892; Thompson, Corporations, 1894; American and English Corporation Cases, vols. 1-38; American and English Railroad Cases, vols. 1-50. English authorities used are: Kyd, Corporations, 1793-4; George, Joint Stock Companies, 1825; Grant, Corporations, 1854; Wordsworth, Companies, 1865; Digby, Sale and Transfer of Shares, 1868; Shellford, Companies, 1870; Healey, Companies, 1875; Thring, Companies, 1880; Lumley, By-Laws, 1877; Buckley, Companies, 1887; Lindley, Companies, 1892; Manson, Trading and other Companies, 1892.

For the periodical literature of the subject, see Nature and Transfer of Stock, 7 Southern Law Review (N. S.) 430 (Henry Budd, Jr.); Preferred Stock, 16 American Law Review 460; Fraudulent Transfers, 20 Albany Law Journal 344 (Irving Browne); Transfer of Title, 10 American Law Review 276 (B. B. Boone); Railway and Corporation Law Journal. And see generally, Jones' Index to Legal Periodicals.

4. Graham v. Davidson, 2 Dev. & B. Eq. (N. Car.) 155.

The word "stock" in agriculture means domestic animals collected, raised, or used on a farm. Webster's Dict. *followed* in State v. Clark, 65 Iowa 336; Inman v. Chicago, etc., R. Co., 60 Iowa 461; Baker v. Baker, 51 Wis. 546.

In State v. Clark, 65 Iowa 336, it was held that the word "stock," as used in a statute making it a misde-

**STOCK-BROKERS.**—(See also AGENCY, vol. 1, p. 331; BROKERS, vol. 2, p. 577; GAMBLING CONTRACTS, vol. 8, p. 992; STOCK, vol. 23, p. 582; STOCK EXCHANGE, vol. 23, p. 748; STOCKHOLDERS, vol. 23, p. 777; USAGES AND CUSTOMS.)

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meanor to release distrained stock, had its ordinary meaning and included swine.

The term in its primary sense includes the domestic animals generally; all the animals used by man for labor or food. Thus, a statute which punishes driving any stock or cattle to feed upon lands without the consent of the landowner, includes sheep. *U. S. v. Mattock*, 2 Sawy. (U. S.) 148.

In *Inman v. Chicago, etc., R. Co.*, 60 Iowa 459, a team of horses harnessed to a wagon, which had escaped from the control of the owner, was held to be "live stock running at large," within a statute allowing damages against a railroad company for stock killed or injured.

A testator devised and bequeathed a

certain farm and "all the stock, grain, and farming utensils." It was held, in accordance with the definition above, that "stock" did not include wool. *Baker v. Baker*, 51 Wis. 538.

In *England* it has been held that the terms "stock of my farm" and "farming stock" include all the movable property upon or belonging to the farm, and even the growing crops. *Harvey v. Harvey*, 32 Beav. 441; *Evans v. Williamson*, 17 Ch. Div. 666 and cases cited. In *Howze v. Howze*, 19 Tex. 553, however, this English construction of "farm stock" was particularly noticed, and was held not applicable to this country, a bequest of stock in that case being held not to include a wagon.

In *Dudley v. Deming*, 34 Conn. 173,

**I. DEFINITIONS.**—A stock-broker is a broker who, for a commission, attends to the purchase and sale of stocks or shares, and of government and other securities, in behalf and for the account of clients.<sup>1</sup>

Stock-brokers as a class made their appearance in the latter part of the seventeenth century.<sup>2</sup>

The functions of the stock-broker are broader than those of the ordinary broker who, as a rule, acts as a mere negotiator, and is not intrusted with the possession of the property concerning which he acts,<sup>3</sup> while the stock-broker frequently is intrusted with the possession of the securities, and may even take and transfer them without the name of his principal appearing in the transaction, and often pays or advances the price and receives payment.<sup>4</sup> For a better understanding of the subject a list of definitions of various terms employed in stock transactions is subjoined.<sup>5</sup>

it was said "that the term stock as used in the finding, uniformly imports cattle and not horses, and such is its popular meaning when used in respect to a farm." This, however, does not conform with the definitions given *supra*.

"Live and Dead Stock" as used in a will, see *DEAD*, vol. 5, p. 114.

**Ordinary Stock.**—See *ORDINARY*, vol. 17, p. 273.

Dogs are not "stock," within the meaning of Rev. Sts. of *Texas*, art. 4245, requiring railroads to fence against "stock." *Texas*, etc., R. Co. v. Scott (Tex. App.), 17 S. W. Rep. 116.

1. Century Dict.

2. In *Gibbons v. Rule*, 12 Moore 539; 4 Bing. 301; 13 E. C. L. 444. Best, C. J., said: "The statute 8 & 9 Wm. III., ch. 20, by which the first government loan was raised, speaks of a new description of brokers, persons employed in buying and selling tallies, the government securities of those days. These have since been called stock-brokers."

3. *Fowler v. Hollins*, L. R., 7 Q. B. 616; *Pott v. Turner*, 6 Bing. 702; 19 E. C. L. 211; *Coddington v. Goddard*, 16 Gray (Mass.) 436; *Hinckley v. Arey*, 27 Me. 362; *Northrup v. Shook*, 10 Blatchf. (U. S.) 242. See *BROKERS*, vol. 2, p. 571, *et seq.*

4. In *Markham v. Jaudon*, 41 N. Y. 235. *Woodruff, J.*, thus defined the distinction between the stock-broker and the ordinary broker: "In the first place, the stock dealer who is employed, though called a stock-broker, does not act as broker in this transac-

tion. It is no part of the office or duty of a broker to pay the price. It is no part of the office or right of a broker to receive the property, still less to take the title to his own name. In this transaction he acts in a peculiar business, in his own name and on his own responsibility, protected against loss by the indemnity furnished, or by the agreement to be furnished to him. The idea of mere agency, ordinarily suggested by the name 'broker,' does not, therefore, arise out of the fact that the dealers in stocks for account of others, as to profit and loss, are called stock-brokers. In the next place, the transaction, according to the intent and purpose of the employment of the broker, does not contemplate that the customer will ever receive the stock or own it. It may be that if the broker desires to close his connection with the transaction, the customer, if he pays the cost, interest, and all commissions which the broker has earned, or is entitled to earn, will receive the stock, whether he may so insist or not, is a collateral question; and if he be so entitled, it will nevertheless be true, that this is not in pursuance of the arrangement, but a departure from it, for the intent is that the stock shall be carried by the broker until directed to be sold, the customer never having the title to the stock at all." See also *Northrup v. Shook*, 10 Blatchf. (U. S.) 243, where the same judge referred with approval to the language just quoted.

5. A "bear" is one who sells stocks for future delivery which he does not

own or possess, hoping to make a profit by reason of the decline of prices before the day named for delivery. Such operations are called "selling short." *Knowlton v. Fitch*, 52 N. Y. 289; *White v. Smith*, 54 N. Y. 522.

A "bull" is one who buys stocks with the expectation of making a profit through a rise of prices. Such person is said to be "long of stocks."

"**Carry.**"—Where a broker advances the money, or the principal part of it, to buy stocks, and holds them subject to the orders of his client, he is said to "carry" the stocks. *Price v. Gover*, 40 Md. 102; *Salters v. Genin*, 3 Bosw. (N. Y.) 250.

"**Call.**"—A "call" is a contract by which the holder, for a consideration paid to the maker, has the option to claim the delivery of securities therein named on a certain day for a price named.

"**Put.**"—A "put" is the opposite of a "call." The holder has the option to deliver certain securities or not to the maker on a certain day for a certain price.

"**Straddle.**"—A "straddle," sometimes called a "put and call," gives the holder a right to either claim or deliver the specified stocks at a certain day and price. "The word, if not elegant, is at least expressive. It means the double privilege of a put and call, and secures to the holder the right to demand of the seller at a certain price within a certain time a certain number of shares of a specified stock, or to require him to take at the same price within the same time the same shares of stock." *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398.

"**Spread Eagle.**"—A "spread eagle" is the operation of a broker who sells a large quantity of stock; for example, sixty days' buyer's option, and buys the same quantity at a lower price on the same time, seller's option. If both contracts run their full time he makes his differences, but if a buyer or seller calls for a settlement before the time, he may be seriously embarrassed." *Lewis, Stocks, Bonds and Securities*, pp. 16, 17.

"**Shave.**"—"Shave" is a premium paid for an extension of the time of delivery, or time of payment, or for the right to vary a stock contract in any particular. *Biddle, Stock Exchange*, p. 74.

"**Wash Sales.**"—"Wash sales" are not real sales, but are made by persons interested to each other for the pur-

pose of giving a fictitious value to the stock." *Dos Passos*, p. 117.

"Where a broker receives an order to buy and also an order to sell the same number of shares of the same stock, he is bound to execute both orders separately to the best advantage of each principal. Where, however, he simply transfers the stock from one to the other and retains the difference, the operation is said to be a 'wash,' which is invalid." *Biddle, Stock-brokers*, p. 74.

"**Corner.**"—"A 'corner' in stocks is where the owners or holders (i. e., bulls) refuse to lend stocks to the bears with which to carry out their short contracts, in which event the bears, being unable to deliver, are compelled to go into the market or Exchange and buy the stocks at any price at which they can obtain them" *Dos Passos, Stock-brokers, etc.*, pp. 116, 117.

In *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327, the process of cornering stocks is described as follows: "To buy up a large quantity of a certain stock and control it in such a manner as to make a large demand for it, so that parties selling on time will be compelled to pay large differences; then to receive and make proposals and agreements for the purchase of stock to be delivered at a future date; the parties agreeing to sell not then having the stock in possession or owning it, and then the sellers, when the day for delivery arrives, will be compelled to pay such prices or differences as the parties to this combination may ask."

The following definitions are taken from *Biddle*, p. 70, *et seq.*, and are of terms used principally on the London Stock Exchange:

"**Backwardation.**"—This is the seller's postponement to deliver shares with the consent of the buyer upon payment of a premium to the latter.

"**Contango.**" is the postponement of payment by the buyer of stock on the payment of a premium to the seller.

"**Contango Day**" is the day to which the contracts for "contango" are postponed.

"**Continuation**" is the agreement to postpone the settlement until the next settling day.

"**Settling Day**" is the day on which the accounts are settled up and the contracts completed.

"**Name Day**" is the day preceding settling day.

**II. RELATION TO CLIENT.**—It seems never to have been seriously questioned that a stock-broker, in executing the instructions of his client, acts as an agent;<sup>1</sup> but, as we have seen, the stock-broker assumes duties and obligations which are not incident to his calling as a mere broker, and this fact has given rise to considerable discussion as to the nature of the fiduciary relation he sustains toward his client in those transactions where he furnishes the whole or a portion of the money to buy stock and carries it for the client for purposes of speculation. In the absence of a special agreement, it seems that in such transactions the relation of pledgor and pledgee exists between the client and broker, and that the latter holds the stock so purchased as security for his commissions and the portion of the purchase price thereof which has not been furnished by the former,<sup>2</sup> although the rights of the

The "regular way" (in the United States) is a sale with delivery and payment on the following day.

A "lame duck" is one who is unable to meet his contracts in the Exchange—an insolvent.

"**Making a Price**" is the jobber's naming two prices to the broker, at one of which he binds himself to sell, and at the other to buy.

"**Jobber**" is the intermediary acting between brokers on the Stock Exchange. The term is probably peculiar to the London Stock Exchange.

"**Option Account Day**" is the day before account day or name day.

1. In cases involving a broker's rights and liabilities, the courts assume that he is an agent.

In *Galigher v. Jones*, 129 U. S. 193, Justice Bradley said, *arguendo*: "A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. In the absence of a special agreement to the contrary, it is the principal's judgment, and not his, that is to control in the purchase and sale of stocks." See *Thacker v. Hardy*, 4 Q. B. Div. 685.

2. *Markham v. Jaudon*, 41 N. Y. 235, is the leading case on this subject. Hunt, C. J., analyzes the contract between the parties as follows: "The broker undertakes and agrees—1. At once to buy for the customer the stocks indicated. 2. To advance all the money required for the purchase beyond the ten per cent. furnished by the customer. 3. To carry or hold such stocks for the benefit of the customer so long as a margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed.

An appreciation in the value of the stocks is the gain of the customer and not of the broker. 4. At all times to have in his name or under his control ready for delivery the shares purchased, or an equal amount of other shares of the same stock. 5. To deliver such shares to the customer when required by him upon a receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares upon the order of the customer upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes—1. To pay a margin of ten per cent. on the current market value of the shares. 2. To keep good such margin according to the fluctuations of the market. 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker." It was contended by the plaintiff that in addition to the relation of agency, the broker was also a pledgee of the shares after they were bought. The defendants, on the other hand, contended that the relation of the parties was wholly by force of a mutual and dependent contract, and that defendant's agreement to hold or carry the stock was dependent on the plaintiff's furnishing them with the means to do so, and that when the plaintiff failed in that respect, the obligation to hold the stock ceased and the right to sell it was complete. The chief justice, continuing, said: "A pledge is a delivery of goods by a debtor to his creditor to be kept till the debt is discharged; or, again, it is a bailment of personal

parties have sometimes been determined by considering this as a conditional contract between the broker and client.<sup>1</sup>

**III. THE ORDER TO PURCHASE — 1. Execution of Order.**—A broker, who receives instructions from his client to buy stock at a fixed price, must buy at or below that price.<sup>2</sup> If he is ordered to buy a certain number of shares, and undertakes not to deliver the whole absolutely but to buy as many as he can, and there is nothing to show that the client regards the purchase of the whole

property as security for some debt or engagement. 2 Kent's Com. 577. Story on Bailments, § 286. . . . So if the pledgee has the thing already in his possession, as by deposit or loan, the very contract transfers to him by operation of law a virtual possession thereof, as a pledge, the moment the contract is completed. (Story on Bailments, § 297.) . . . While it is true that the dealer in the present case never had actual possession of the property which he claims to have pledged, he had it sufficiently to bring his case within the principles of the law of pledge. . . . To have delivered the certificates to the plaintiff, and that the plaintiff should then have returned them to the defendants, to be held by them as security for the advance in their purchase, would leave the parties in precisely the same situation as if the defendants had retained them for that purpose; the form of a delivery to the plaintiff, and a redelivery by him to the defendants, being waived by agreement of the parties. It comes fully within the principle that I have already quoted from Story on Bailments, that where the pledgee has the thing in his possession, the contract of pledge operates as a delivery the moment the contract is completed. The certificates are appropriated as security for an engagement—to-wit, the payment of the advance with interest and commissions. The possession and the delivery are complete in the abbreviated manner I have described. . . . In my judgment the contract between the parties to this action was in spirit and in effect, if not technically and in form, a contract of pledge." This case was followed in *Stenton v. Jerome*, 54 N. Y. 480; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25, and *Gillett v. Whiting*, 120 N. Y. 402, and overrules *Sterling v. Jaudon*, 48 Barb. (N. Y.) 459, and *Hanks v. Drake*, 49 Barb. (N. Y.) 186.

1. In *Wood v. Hayes*, 15 Gray (Mass.) 375, Shaw, C. J., in considering such a transaction, said: "Lobdell advanced the money to buy the shares for account of Wood, and held the shares in his own name. It stood on the footing of contract. The contract was strictly conditional, to deliver so many shares on payment of so much money. The money was never paid, and the title to have performance never accrued." And in *Covell v. Loud*, 135 Mass. 41; 46 Am. Rep. 446, the court again held that the relation of the parties under such circumstances existed by force of a mutual and dependent contract; but remarked that if the transaction was treated as creating a pledge, a similar result would be reached.

2. An order to purchase at  $57\frac{1}{8}$  is not fulfilled by a purchase at  $57\frac{3}{8}$  or 58. *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 213.

In *Day v. Holmes*, 103 Mass. 306, it appeared that on August 30, 1866, the defendant gave to the plaintiffs, who were stock-brokers, an order to buy for Holmes 500 shares of Pontiac mining stock, deliverable at any time at buyer's option, in sixty days and three days grace, with interest, at a price not exceeding \$2 per share, the order to stand open for two weeks. On September 6, 1866, the plaintiffs exchanged with defendant bought-and-sold contracts, upon which the said 500 shares of Pontiac stock were stated as bought at \$1.75 per share, deliverable in sixty days at buyer's option, and the words "and brokerage" added at the foot. At the expiration of sixty days and three days' grace, the plaintiffs rendered a written account to defendant, and thereupon their bought-and-sold contracts were mutually surrendered, and the defendant gave the plaintiffs his note for \$916.61. The plaintiffs were unable at the time when the order was given to buy the stock in question on sixty days, but

number of shares as essential to the value of a part, the contract is not necessarily entire, and is performed by the purchase of all the shares to be had.<sup>1</sup> It has been held that in contracts to buy and carry stock on a margin, subject to the orders of the client, for purposes of speculation, the broker is not bound to make an actual purchase of stock, and that it is a sufficient performance of the contract if he is ready and able to deliver it on demand at the price of the day of the contract.<sup>2</sup> The broker is not a guarantor of the genuineness of the securities he purchases for his client. If he exercises the care and diligence which a reasonably prudent purchaser himself would exercise, he will not be liable if the stock proves worthless.<sup>3</sup> But where a broker, who has

they did buy it from other brokers on thirty days at \$1.62½ per share and not at \$1.75, as charged in their written statement. At the end of the thirty days and grace, the plaintiffs paid for the stock at \$1.62½ per share, with interest and commissions, and the certificate was issued in their name, they holding the same as collateral to cover this contract of defendant, and defendant had no knowledge of the manner in which the plaintiffs procured this stock or of the amounts paid therefor. The court said: "Upon these facts, we are of opinion that the defendant is not liable upon the note in question. The course of the plaintiffs in buying the 500 shares of stock, as above stated, was not an execution of the order of the defendant and was unauthorized by him. It was a departure from the instructions of their principal, and he was not bound to take and pay for the stock thus purchased."

1. In *Marye v. Strouse*, 5 Fed. Rep. 483, it appeared that brokers had received an order to buy 500 shares of stock at \$3 per share. They were able to purchase only 125 shares at that figure, and in passing upon this as a performance of the contract, the court said: "It was suggested, however, that the order for 500 shares might and ought to be regarded as an entire contract, and that the defendant was not bound to take less than the whole 500 shares. A sufficient answer to this position is that upon receiving the defendant's order to buy 500 shares at a limit of \$3, the undertaking of Frankel & Block, as brokers, was not to deliver the whole absolutely, but to buy so much as could be bought in the regular way below or at the limit. Moreover, there are no circumstances in this case showing or tending to

show that the defendant regarded the purchase of the whole number of shares as essential to the value of a part. An ordinary broker's contract for the buying of stock, each share of which has a distinct and independent value, cannot be regarded as entire."

2. In *Ingraham v. Taylor*, 58 Conn. 503, the court said: "Inasmuch as each share is the equal of any other in the same corporation, and the shares of the corporation specified were in the market on every day, the possession of a certificate bearing a particular date is not required; only that they should be able to deliver it upon demand, at the price of the day of the contract. The contract required the plaintiff to put his margin money at the hazard of their ability to respond in the event of a rise in the price of shares; required him to furnish all capital necessary for the speculation; secured to him all profits, and denied to them any advantage other than the customary commission."

The same question was before the court of appeals of New York in *Caswell v. Putnam*, 120 N. Y. 153, and the court held that the broker fulfills his duties if he keeps in his possession ready to deliver to his principal on demand, an amount of stock equal to that purchased by him, *citing*, in support of this proposition, *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311; *Stewart v. Drake*, 46 N. Y. 449; *Taussig v. Hart*, 58 N. Y. 425; *Levy v. Loeb*, 85 N. Y. 365; *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490; 13 Am. Dec. 606; 7 Johns. Ch. (N. Y.) 69; 11 Am. Dec. 403.

3. In *Lamert v. Heath*, 15 M. & W. 486, a broker was instructed to purchase Kentish Coast Railway Scrip, and he bought what was known as



bought stock and is carrying it on a margin for his client, receives instructions from the latter to sell the stock so carried and invest the proceeds in other stocks, he will be liable for any damages that may result from his failure to make the conversion promptly and in good faith.<sup>1</sup>

An order from a customer to a broker to buy stock for delivery within a specified time at "buyer's option," does not authorize the broker to buy the stock and "carry" it on the customer's account.<sup>2</sup> But where the order for the purchase is in general terms, the broker may execute it in the customary way, and may, if necessary, purchase the stock at the market price through sub-agents residing and doing business in a distant city.<sup>3</sup> The authority to purchase may be revoked at any time before the broker

such and paid for it. It was held that he was not liable to refund the money he had received from his client, although it turned out that he had bought scrip issued without due authority, and, in fact, utterly worthless.

In *Peckham v. Ketchum*, 5 Bosw. (N. Y.) 506, it appears that brokers were instructed to purchase a specified number of shares of stock of a corporation named. They accordingly bought them and received a certificate of stock, regular in form and issued by the proper officer of the corporation, and received payment therefor from their principal, and made payment to the vendor. The certificate proved to be valueless and not to represent actual stock. Hoffman, J., said: "I do not think that the employment of the defendants in this case can justly be treated as an employment to purchase genuine stock to the extent and import of making them guarantors of the validity of that which they should purchase. It was rather to purchase what in the market was passing as stock of this description (*Lamert v. Heath*, 15 M. & W. 486). Then the rule of indemnity to the agent when the principal is a seller, involves the exemption of the agent from responsibility when under similar circumstances the principal is the purchaser. Again, an agent employed to purchase and control stock of a particular character or quality is only bound to use all the circumspection and diligence which a prudent purchaser himself would exercise. The nature of the article, the opportunity of detecting the defect or inferiority with proper diligence are elements in every case of this description. *Mainwaring v. Brandon*, 8 Taunt. 202; 4 E. C. L. 71; *Van Alen v. Vanderpool*, 6 Johns.

(N. Y.) 69; 5 Am. Dec. 192; *Liottard v. Graves*, 3 Cal. (N. Y.) 226. The defendants could not be held responsible under this rule." See also *Mitchell v. Newhall*, 15 M. & W. 308.

1. *Galigher v. Jones*, 129 U. S. 193.

2. In *Pickering v. Demerritt*, 100 Mass. 416, it appeared that in February, 1867, the defendant employed one G. as his agent to buy for him 100 shares of the stock of the H. Company on a sixty days' buyer's option; that G. gave the order to the plaintiff, who was a stock-broker and member of the Brokers' Board in Boston; and that the plaintiff afterwards on the same day, for the purpose of fulfilling this order at the regular meeting of the board, bought from H. & Co., brokers, 100 shares of said stock for cash. The court said: "The declaration alleges that the defendant employed the plaintiff to purchase for him certain shares of stock, the same to be delivered to him in sixty days from the time of the purchase. Assuming this to import, as the plaintiff claims, an order to buy the stock and carry it on the defendant's account for sixty days, we find no evidence of any such employment. The evidence was merely of an order to buy the stock 'on a sixty days' buyer's option,' that is, with a right on the part of the purchaser to take and pay for it at any time within sixty days he might choose. If the course pursued by the plaintiff amounted to a purchase and 'carrying' of stock, then it was an unauthorized proceeding, one which the order given to the plaintiff did not warrant him in pursuing."

3. In *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125, a broker in Baltimore was ordered to buy 100 shares

has acted upon it;<sup>1</sup> but not after he has so far executed the order as to render himself personally liable.<sup>2</sup> And when the broker has made the purchase as directed, it is his duty to send a notice to his client containing the price of the stock purchased and the name of the broker from whom it is purchased.<sup>3</sup>

## 2. Title to and Custody and Disposition of Stock Purchased.—

A broker who buys stock on a margin to carry for his client, has a right to take the title in his own name or to have it transferred to some third person, provided it remains under the broker's control.<sup>4</sup> And the broker is not bound to keep the identical shares purchased for his customer separate and apart from other shares of the same company in his possession; but may sell them, pledge them, or use them as the necessities of his business may demand, provided always that he keeps on hand or under his control a sufficient quantity of stock of the description ordered to be purchased ready for delivery to his customer upon the latter's paying for the same and requesting that the delivery be made. In such case, the law will presume that the stock thus

of railroad stock. According to the custom of the trade, he wrote to his New York correspondents directing them to purchase, and they accordingly bought the stock and the Baltimore broker paid for the same. His customers failed to pay for the stock, and he, after notice to them, and in accordance with the custom of the business, directed his New York correspondents to make a sale of it, which was done. He then sued his customers in Baltimore for the difference between the amount paid in the purchase and that realized from the sale. It was held that he had a right to make the purchase in the above-described manner, and that it was sufficient if he notified his customers of the fact of the purchase and had certificates of the stock or other usual evidences of title thereto in his own hands or in those of his New York agents ready to be delivered or transferred to the defendants upon their tender of payment therefor.

1. *Fletcher v. Marshall*, 15 M. & W. 755.

2. *McEwen v. Woods*, 12 Q. B. 13; 63 E. C. L. 12; *Sutton v. Tathan*, 10 Ad. & El. 27; 37 E. C. L. 25; *Remfry v. Butler*, 1 E. B. & E. 887; 96 E. C. L. 887.

3. In *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552, it was held that the failure to give such notice was such negligence on the part of the broker as precluded him from recover-

ing his commissions. See also *Finney v. Gallaudet*, 15 Daly (N. Y.) 66.

4. *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311; *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 213. See also *Worthington v. Tormey*, 34 Md. 182; *Price v. Gover*, 40 Md. 102, and cases cited in next note.

In *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311, the court said: "The practice at the stock board, by which the brokers only, and not their customers, are known in their dealings with each other, was not unreasonable, and the plaintiff, by directing this purchase to be made, must be understood as consenting that it should be done in the usual manner. No breach of duty was committed by the defendant, therefore, in making a purchase in his own name. As he was to hold the shares as security for the balance of the purchase money which he had advanced, it was proper and entirely consistent with the nature of the transaction that he should take the title in his own name. This was necessary, moreover, for his safety, for if default should be made he would have a right to sell it to reimburse himself, and he would be obliged in that event to give a title to the purchaser from him; and we do not see anything unlawful in his transferring it to his clerks, if it remained under his control and if he was ready, when called on by the plaintiff, to transfer it to him upon the advance being paid."

on hand and ready for delivery is the property of the customer.<sup>1</sup> And where the broker wrongfully disposes of stock which he is carrying for his customer and puts it out of his power to deliver the same, it seems that the customer is nevertheless bound to pay for it, if the broker has complied substantially with the contract of purchase; the broker, in such case, being liable to his customer for such damages as may have resulted from the broker's

1. *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490; 13 Am. Dec. 606; 7 Johns. Ch. (N. Y.) 69; 11 Am. Dec. 403; *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311. See also *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 213; *Salters v. Genin*, 7 Abb. Pr. (N. Y.) 193; 3 Bosw. (N. Y.) 250; *Stewart v. Drake*, 46 N. Y. 449; *Lawrence v. Maxwell*, 58 Barb. (N. Y.) 511; 6 Lans. (N. Y.) 469; 53 N. Y. 19; *Taussig v. Hart*, 58 N. Y. 425; *Rogers v. Gould*, 6 Hun (N. Y.) 229; *Marston v. Gould*, 69 N. Y. 226; *Chamberlain v. Greenleaf*, 4 Abb. N. Cas. (N. Y.) 178; *Clarke v. Meigs*, 13 Abb. Pr. (N. Y.) 467; 22 How. Pr. (N. Y.) 340; *reversing* 12 Abb. Pr. (N. Y.) 267; 21 How. Pr. (N. Y.) 187; *Boylan v. Huguet*, 8 Nev. 345; *Worthington v. Tormey*, 34 Md. 193; *Price v. Gover*, 40 Md. 102; *Gilpin v. Howell*, 5 Pa. St. 41; 45 Am. Dec. 720; *Wynkoop v. Seal*, 64 Pa. St. 361; *Wood v. Hayes*, 15 Gray (Mass.) 375; *Atkins v. Gamble*, 42 Cal. 86; *Hawley v. Brumagim*, 33 Cal. 394; *Thompson v. Toland*, 48 Cal. 100; *Berlin v. Eddy*, 33 Mo. 426; *Le Croy v. Eastman*, 10 Mod. 499; *Mocatta v. Bell*, 27 L. J. Ch. 237.

In *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490, it appeared that the defendants, who were stock and exchange brokers in the city of New York, had purchased shares of United States bank stock for the plaintiff, and had received a transfer of other shares for the plaintiff, making together 430 shares in their hands. They rendered to the plaintiff a general account of their transactions showing a balance of \$53,917.15, for which the plaintiff agreed to give his note to the defendants, the defendants retaining the 430 shares of stock in their hands as collateral security for the payment of the note. They did not keep in their possession the identical shares bought for or received from the plaintiff, but disposed of the same in the course of their business, and the bill was brought to compel them to account for the shares at the highest price at

which they had sold such shares. Chancellor Kent said: "The shares in question were not defined and designated, so as to be distinguished from other bank shares in the same bank; and if the defendants had always in their possession and names, and under their control, shares to that amount during the whole time of credit given by the note, and were ready, able, and willing, at all times, to account to the plaintiff for that number of shares, and the dividends arising thereon, whenever he entitled himself to such an account, it is all that he could ask under the contract. The answer is explicit on this point; and while it admits that the shares in question constituted part of one indiscriminate mass, or fund of stock placed in their names and subject to their control, and from which they, from time to time, made such transfers and appropriations as the exigencies of their business and engagements required, yet it avers that there was no time during the year 1818 in which they were not possessed of shares standing in their own names, at their absolute and rightful control, subject to no contract of sale, to an amount far exceeding the shares deposited by the plaintiff; nor was there any moment at which they would not have been ready, and willing, and able, and right-fully able, without any breach of trust to others, to have transferred the said shares to the plaintiff, upon payment of his note. What color of equity, then, has the plaintiff to call on the defendants to account for the sale of the like amount of shares at the highest price obtained during that year? Nothing could be more unreasonable or unjust. The defendants were not bound to separate 430 shares from the common stock, and mark, or otherwise designate them as the separate property of the plaintiff, inasmuch as the plaintiff had left the shares undefined, and was content to take from the defendants a certificate to return, generally, '430 shares of United States bank stock.' It is sufficient, under this con-

wrongful act.<sup>1</sup> But in order that this rule may apply, it must appear that the broker has complied substantially with the contract of purchase; and, if he has not done so, the customer may repudiate the transaction and recover back money advanced in partial payment of the purchase price of the stock.<sup>2</sup> And the broker has no right to pledge the stock of his client or otherwise

tract, that the defendants always had the requisite quantity of shares on hand, and the law will presume that the shares so on hand, from time to time, were the shares deposited, because the parties have not reduced the shares to any more certainty."

1. *Gruman v. Smith*, 81 N. Y. 25.

In *Capron v. Thompson*, 86 N. Y. 418, the plaintiffs purchased for the defendant, 56,650 shares of stock of a certain railroad company. The referee, in stating the account between the parties gave the plaintiffs credit for 24,200 shares sold by them and excluded from the account 32,450, although he found that the plaintiffs had bought and paid for the whole on account of the defendant. As to the last-named shares, he found that, on the 20th of April, 1874, on which day the plaintiffs failed in business, said shares were not in possession of the plaintiffs, but prior to that time had been pledged by them for a loan for their use and had never been tendered to the defendant and the amount due thereon demanded, but were subsequently sold by the pledgee. Accordingly the referee found as a conclusion of law that the plaintiffs could not recover for the purchase of the last-named shares unless they showed performance of the contract on their part. On appeal, this decision was reversed. The court said: "The purchase of the stock as found by the referee was upon the defendant's account and was a proper charge against the defendant. In this respect the plaintiffs had performed the contract. The sale of the stock was a failure to perform a subsequent and not a precedent duty, and hence no condition precedent was broken which prevented the plaintiffs from charging the defendant for the purchase of the stock."

But in *Minor v. Beveridge* (Supreme Ct.), 21 N. Y. Supp. 691, the doctrine of this case is questioned. Van Brunt, P. J. (O'Brien and Follett, J. J., concurring), said: "In one of the cases, that of *Capron v. Thompson*, 86 N. Y. 418, it was undoubtedly held

that a sale of stock which had been bought upon a margin without notice to the customer, did not constitute a failure to perform a condition precedent, but was a breach of a condition subsequent to the purchase. But it seems to me that this is a mistake in reference to the relations of the parties. A contract in regard to the carrying of the stock is an entire contract, and a failure to carry until the customer has been placed in default is a breach of the entire contract, and the broker under such circumstances is not in a position to establish a condition of affairs which entitles him to any recovery arising out of anything which has been done in connection with that contract. . . . Therefore, it seems to follow that where a purchase of stock is made upon a margin, and where, upon the facts, there is an implied agreement to carry upon a margin, and the broker sells in violation of this agreement, he violates the contract which governs the relations between himself and his customers, and he ought not to be allowed to recover upon the implied promise to pay for the stock purchased, which is part and parcel of the same contract to carry."

2. In *Levy v. Loeb*, 47 N. Y. Super. Ct. 61, the defendants, who were brokers, were employed by plaintiffs to purchase for their account and risk \$100,000 of "United States sixes" of 1881 and the same amount of United States bonds of 1867. The bonds so purchased were to be held by the brokers as collateral security for money advanced by them. The bonds of 1881 were bought by defendants in Frankfurt in their own names through agents there on February 16, 1881. On the 18th of the same month, the defendants gave plaintiffs notice of a purchase on their account at a price which made the amount of the purchase \$577.82 more than the actual cost of the bonds. The bonds of 1867 were bought by defendants in June, 1876, and they rendered an account of the purchase for \$31.25 more than they actually paid, and the defendants carried the bonds

use it as his own after the client has discharged his indebtedness to him, and the broker's lien upon the stock is gone.<sup>1</sup>

**3. Ownership of Stock Purchased.**—Where stock is purchased and carried by the broker, the client for whom it is purchased is the general owner of it<sup>2</sup> and may order it sold or converted into stock or securities of another description, and the broker is bound to obey the instruction or respond in damages.<sup>3</sup> The customer has the right to demand possession of the securities upon payment of the purchase price, together with the broker's

until March 30, 1877, when they rendered an account to plaintiffs, who, relying thereon, paid \$10,746.74, and defendants, in consideration thereof, agreed to carry the original bonds until June 30, 1877; which time was afterwards extended to January 2, 1878. Before that time, defendants sold the bonds for their own account without the knowledge or consent of the plaintiffs. On January 9th of the same year, defendants demanded of plaintiffs payment of the balance of the amount with notice that upon default the bonds would be sold the next day for account and risk of the plaintiffs, and on that day defendants did sell the amount so purchased of similar bonds. Plaintiffs did not discover the excessive charges or the prior sale until after the last sale. Plaintiffs brought their action to recover back the \$10,746.74 paid by them. Defendants set up a counterclaim for the deficiency arising on the second sale. The special term disallowed the counterclaim and directed judgment in favor of plaintiffs for \$713.77, being the amount of the charges in excess of the sums paid on said purchases with interest. Plaintiffs appealed from that portion of the judgment which disallowed them the balance of the sum so paid by them, and defendants appealed from that portion which disallowed their counterclaim, and the appeals were argued separately. Defendants' appeal is reported in *Levy v. Loeb*, 85 N. Y. 365, where it was held that the counterclaim set up by the defendants for the deficiency arising upon the sale of the bonds was properly rejected upon the ground that a substantial performance was a condition precedent to the right to recover, and that this was not shown. Plaintiffs' appeal is reported in *Levy v. Loeb*, 89 N. Y. 306, where the judgment in their favor is reversed on the ground that they had a right under the facts as stated to repudiate the trans-

action and recover back the whole amount of money paid by them. The court said, *inter alia*: "No such purchases were made as reported, and upon discovery of this fact clearly the principal was authorized and justified in repudiating the fictitious transaction reported. It was upon this ground that the former appeal from that portion of the judgment rejecting defendants' counterclaim was sustained, and it is this which distinguishes the case from *Capron v. Thompson*, 86 N. Y. 418 and *Gruman v. Smith*, 81 N. Y. 25, wherein we held that the unauthorized sale by a broker of stock purchased and carried on a margin was not a breach of a condition precedent which prevented the broker from charging for the purchase of the stock, and was not a defense to an action to recover the purchase price, but that he was liable in damages for the unauthorized sale."

1. *Van Voorhis v. Rea*, 153 Pa. St. 19.

2. *Markham v. Jaudon*, 41 N. Y. 245.

3. In *Galigher v. Jones*, 129 U. S. 193, it appeared that the customer had ordered the broker to sell certain stocks and invest the proceeds in certain other stocks, which the broker neglected and refused to do. The court said: "A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. In the absence of a special agreement to the contrary, it is the principal's judgment, and not his, that is to control in the purchase and sale of stocks. The latter did not ask for any further advances by the order in question. He only directed a conversion or change of one stock into another. The plaintiff should have given prompt notice that he objected and declined to make the change. Telegraphic communication was used by the defendant, and no reason appears why the plaintiff could not have used the same. The delay caused by using the mail alone was in-

commissions and proper expenses; and if the broker, by an unauthorized sale or other wrongful disposition of the stock, renders himself unable to respond to the demand, it amounts to an unlawful conversion.<sup>1</sup>

So stock carried on a margin does not go to the assignee of an insolvent broker as part of the broker's estate, but may be claimed by the client for whom it was purchased.<sup>2</sup> On the other hand, the client is subject to the duties and responsibilities of ownership and must pay all assessments and calls upon shares carried for him by his broker, and if the broker has first paid them, as he frequently does, by reason of his carrying the shares in his own name, his client must reimburse him.<sup>3</sup>

**4. Sale by Broker for Want of Margins.**—If the customer fails to keep the margin good, the broker may sell the stock carried and close the transaction, in the absence of an understanding to the contrary, or conduct such as to estop him from calling for further margins.<sup>4</sup> But the customer is entitled to notice, in the absence of an agreement or understanding to the contrary, and a sale without notice may operate as an unlawful conversion<sup>5</sup> and de-

excusable under the circumstances. The plaintiff charged ample compensation for his services and was bound to act faithfully, fairly, and promptly. We think that he was liable for all the damages which the defendant sustained by his refusal to change the stocks."

1. *Markham v. Jaudon*, 41 N. Y. 235; *Gruman v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 N. Y. 418; *Gillett v. Whiting*, 120 N. Y. 402; *Stewart v. Drake*, 46 N. Y. 449.

In *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337, it was held that an offer by the broker to replace the stock did not, so long as it was unaccepted, deprive the client of his right of action for the conversion.

2. *Taylor v. Plumer*, 5 M. & S. 562; *Ex parte Cooke*, 4 Ch. Div. 123; *Willard v. White*, 56 Hun (N. Y.) 581.

3. In *Robbins v. Edwards*, 15 W. R. 1065, it appeared that a broker, at the request of his principal, carried shares in his own name, and had been compelled to pay a call on said shares. The Master of the Rolls ordered the principal to repay the broker and have the shares registered in his own name. See *Taylor v. Stray*, 2 C. B. N. S. 175; 89 E. C. L. 175; *Chapman v. Shepherd*, L. R., 2 C. P. 228; *Whitehead v. Izod*, L. R., 2 C. P. 228; *Emerson's Case*, L. R., 1 Ch. 433. See also *McCalla v. Clark*, 55 Ga. 53, where it appears that the pledgee of the stock

had been compelled to pay calls, and the court held that the pledgor was bound to reimburse him.

4. In *Markham v. Jaudon*, 41 N. Y. 235, the customer's agreement to advance and keep good the margin is neatly stated. The court said: "The customer employs the broker to buy certain stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances 10 per cent. of their market value and agrees to keep good such proportion of the advance according to the fluctuations of the market." In *Gruman v. Smith*, 81 N. Y. 25, it is said: "In such a transaction it is expressly or impliedly agreed that the margin (so called) shall, if the stock depreciates, be replenished and kept good upon demand, and, upon failure to do so, the stock may be sold upon reasonable and customary notice."

5. *Stenton v. Jerome*, 54 N. Y. 480; *Ritter v. Cushman*, 35 How. Pr. (N. Y.) 284; *Hanks v. Drake*, 49 Barb. (N. Y.) 186; *Markham v. Jaudon*, 41 N. Y. 235; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25.

In *Gillett v. Whiting*, 120 N. Y. 402, it appeared that the plaintiffs, who were brokers, brought an action against the defendant to recover losses resulting from a sale of stock which they were carrying for him on

feat the broker's recovery for a loss.<sup>1</sup> And in those jurisdictions where the relation of pledgor and pledgee is held to exist between the client and the broker, it follows that the latter must not only demand additional margins, but also must give his client notice that the stock will be sold upon his failure to comply with the demand, unless such notice is waived by agreement.<sup>2</sup> And this notice may accompany the demand for further margins or be given separately from and subsequently to the demand. But the client's response to the demand for further margins may render it unnecessary for the broker to give this notice.<sup>3</sup>

margins, which sale had been made without giving the client notice to deposit further margins, and the court said: "The plaintiffs had undertaken to purchase and hold the stock for the defendant subject to his order. The defendant had undertaken to make good his margin within a reasonable time after notice so to do, and if this was not done the broker could sell upon giving reasonable notice; but if he sold without demand to supply additional margins, or notice that the sale would be made, the sale would be wrongful and operate as a conversion of the stock."

1. In *Minor v. Beveridge* (Supreme Ct.), 21 N. Y. Supp. 691, the assignors of the plaintiff, who were stock-brokers, were carrying stock for the defendant on margin, which they sold without first demanding the deposit of additional margins, and upon their failure the plaintiff, who was their assignee, brought an action against the defendant to recover losses resulting from said sale. The court held that the sale without such notice was a breach of the implied agreement to carry the stock that would defeat a recovery for any losses arising out of the sale.

2. *Stewart v. Drake*, 46 N. Y. 449; *Stenton v. Jerome*, 54 N. Y. 480; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Gillett v. Whiting*, 120 N. Y. 402; *Esser v. Linderman*, 71 Pa. St. 76.

In *Stenton v. Jerome*, 54 N. Y. 480, the court said: "Under this agreement the relation of pledgor and pledgee existed between the plaintiff and defendants as to all stocks purchased, they holding a lien upon the stocks for any advances made. It was so decided in *Markham v. Jaudon*, 41 N. Y. 235, and in *Morgan v. Jaudon*, 40 How. Pr. (N. Y.) 366. There was only one contingency in which they could under the agreement sell the stock

without notice, and that was if the plaintiff's margin fell below 20 per cent. and she failed upon demand to make the margin good, then by the express stipulation in the agreement they could sell without notice."

In *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80, it appeared that a broker had sold stock which he was carrying for his client without first giving notice of sale, and the court, after referring to the nature of such contracts as expressed in *Markham v. Jaudon*, 41 N. Y. 235 and *Stenton v. Jerome*, 54 N. Y. 480, said: "But it is further considered that the parties to such a transaction, which thus creates the relation of pledgee and pledgor between them, may provide by contract for the manner of disposing of the pledge to satisfy the claim upon it. This is not dissented from by any judge. This restriction is affixed, however, that the manner agreed upon must not be in contravention of the statute, nor against public policy, nor fraudulent." *Citing Wheeler v. Newbould*, 16 N. Y. 392, and *Milliken v. Dehon*, 27 N. Y. 364.

3. In *Covell v. Loud*, 135 Mass. 41; 46 Am. Rep. 446, the same question arose, and the court said: "The relation of the parties existed by force of a mutual and dependent contract, by which the defendants agreed to purchase and hold or carry for the plaintiff a certain number of shares of stock, he paying a certain sum of money at the time, agreeing to pay interest on the sums advanced, and in case the stock depreciated, to make what is termed a margin of ten dollars per share in excess of the market price of the stock as that might change from time to time. As the plaintiff failed to perform his part of the contract by making the necessary advances upon demand, the stock having rapidly depreciated in value, he has no ground of complaint

After giving the client due notice of sale, the broker may sell the stock and close the transaction, unless the client, before the time appointed for the sale, deposits the additional margins called for;<sup>1</sup> and the sale, it seems, may be made in the manner usual in the case of sales of such property.<sup>2</sup>

**5. Sale By Order of Client—***a. IN GENERAL.*—The client may at any time, in the absence of a special agreement to the contrary, order the sale of stock carried for him, and the broker is

that defendants ceased to hold and carry it for him and thereafter disposed of it. . . . When the plaintiff was called on to make good his margin by advancing the necessary sums, he told the defendants that he could pay them no more, and requested them to do the best they could for him. This was sufficient to give them authority to sell the stock, if in so doing they acted fairly and with proper regard to the interests of the plaintiff."

1. See cases cited in other notes of this section.

2. In *Brass v. Worth*, 40 Barb. (N. Y.) 648, it appears that brokers were carrying stock for their client upon a margin, and that certain other stock was deposited with them as such margin. The price of the stock carried declined so that the margin became insufficient; and, without demand for additional margins, or a notice of sale, they sold both the stock carried and the margin on the floor of the Stock Exchange in the usual manner for such sales. The court held that this was a conversion of the stock sold, and that the brokers were liable in damages to their client. In the course of the opinion the court took occasion to say, that a sale on the floor of the Stock Exchange was essentially a private sale, and that such sale should be made in public, following out the analogy of the sale of a pledge by the pledgee. This was a mere *obiter dictum*, inasmuch as it appears that there was no demand for further margins or a notice of sale which alone rendered the transaction an unlawful conversion of the stock, no matter in what manner the sale was made.

In *Porter v. Wormser*, 94 N. Y. 432, it was objected that the sale of the stock was private and not public. The court said that a broker authorized to sell the stock of his client might do so in the usual and ordinary way.

In *Covell v. Loud*, 135 Mass. 41; 46 Am. Rep. 446, it appears that a broker, who was carrying stock for his client,

on failure to put up the additional margins after a demand to do so, sold the stock at the board of brokers in New York city. The point was not directly raised, but the court said: "When the plaintiff was called on to make good his margin by advancing the necessary sums, he told the defendants that he could pay them no more, and requested them to do the best they could for him. This was sufficient to give them authority to sell the stock if in so doing they acted fairly and with proper regard to the interests of the plaintiff. Nothing appears tending to show they acted otherwise."

In *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779, it appears that the plaintiff had made an actual pledge of stock to defendant, which had been sold in default of the payment of a debt. At pages 264 and 5 the court said: "In the absence of any express agreement to the contrary, it has been held in some cases to be necessary for a pledgee before exercising the power of sale to give notice to the pledgor of the time and place of sale. A sale at the board of brokers publicly and fairly made would, in our opinion, have been legal and valid, and if the sale of the 20th of November had been made to a third person, it would be a legal sale under the contract, vesting a good title in the purchaser and terminating the bailment. It was contended by the plaintiff's counsel that the sale must in all cases be made at public auction, and that a sale at the broker's board would not be legal, and some decisions in *New York* were cited in support of this view. There is no evidence of any such custom in Baltimore; and considering the requirements of the law and the reason and nature of the transaction, we are of opinion that the most proper and suitable place for a sale of stock is at the board of brokers. There is the stock market; the mart to which vendors and purchasers resort by their



bound to comply with the order. If he fails to do so, he will be liable to his client for such damages as result from his disobedience to the order.<sup>1</sup>

**b. STOP ORDERS.**—Sometimes the client gives his broker instruction to sell the stock and close the transaction when the price of such stock reaches a certain figure. In such event the broker may not make the price himself; he must wait until some other broker by a distinct transaction has made the stock sell at the price designated. This order is called a "stop order," and is as binding on the broker as any other order to sell. He is bound to sell when the stock reaches the point named by his client in his order.<sup>2</sup>

agents to buy and sell stock; where competition among bidders is most apt to be found. Such sales are public, and unless there be in the particular case some ground for impeaching their fairness, we are of opinion that they are reasonable and ought to be supported." See *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Robinson v. Norris*, 51 How. Pr. (N. Y.) 442; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Robinson v. Mollett*, L. R., 7 H. L. 802; *Westropp v. Solomon*, 8 C. B. 346; 65 E. C. L. 344; *Young v. Cole*, 3 Bing. N. Cas. 724; 32 E. C. L. 302; *Child v. Morley*, 8 T. R. 610.

1. *Ryder v. Sistare*, 15 Daly (N. Y.) 90; *Davis v. Gwynne*, 4 Daly (N. Y.) 218; *affirmed* 57 N. Y. 676; *Allen v. McConihe*, 124 N. Y. 342; *Smith v. Bouvier*, 70 Pa. St. 325; *Jones v. Gallagher*, 3 Utah 54; *Gallagher v. Jones*, 129 U. S. 193.

In *Allen v. McConihe*, 124 N. Y. 342, it appears that a firm of brokers in Troy, N. Y., were buying stock and carrying it on a margin for the defendant. They in turn bought it through a firm of brokers who were members of the New York Stock Exchange, who carried it on a margin for them. On the 15th of August, 1887, the defendant directed his brokers in Troy to sell 300 shares of Manhattan Consolidated stock for \$111 per share, and the shares could then and up to the 20th have been sold for that price, when they fell in the market and did not sell for as much until October. His brokers in Troy neglected to obey the order, and did not notify him of their neglect until the 29th of August. They subsequently sold 100 of the Manhattan shares for \$109.75 each and kept on hand 500 shares. In October the firm of Troy brokers made a general assign-

ment for the benefit of their creditors, and on the 10th, 11th and 13th of that month the New York brokers, who were carrying the stock for them, sold the 500 shares at \$97 and credited the avails to the firm of Troy brokers, whose assignee in turn credited them to the defendant. The sale was made without the knowledge of defendant, and he was not at that time in default with the Troy firm. The referee found that the defendant had never assented to, waived, or acquiesced in the failure of the Troy brokers to sell as directed, and allowed him as damages the difference between the price at which he ordered the sale and the price at which said stock was sold. On appeal this decision was affirmed.

2. *Wronkow v. Clews*, 52 N. Y. Super. Ct. 176; *Wicks v. Hatch*, 62 N. Y. 535; *Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Porter v. Wormser*, 94 N. Y. 431.

In *Hope v. Lawrence*, 50 Barb. (N. Y.) 258, the plaintiff instructed the defendants, his brokers, on the 27th of January, 1865, if gold rose to 217 that afternoon, to sell his gold for him which they held. The gold market being firm, they did not do so, hoping to make a greater profit by delay. The court held, assuming the order to sell to have been peremptory, that the defendants were bound to sell when the price of the gold reached 217, and that the plaintiff was entitled to recover the actual loss sustained by him by reason of the neglect to obey such order, and that the defendants were not to be charged with any loss from their neglect to sell at a price above the limit.

In *Porter v. Wormser*, 94 N. Y. 431, it appears that the defendants were carrying \$1,000,000 of United States

**6. Broker's Right to Close the Transaction—***a.* **AFTER A REASONABLE TIME.**—As the client has the right to pay the broker's commissions and advances and demand the possession of the stock, so the broker, in the absence of an express agreement, has the reciprocal right, after carrying the stock a reasonable time, to tender the certificates, or other securities, to his client, and demand payment therefor, together with his commissions. If the client fails to take up and pay for the stock, the broker may sell it to satisfy his lien, after giving due notice of the time and place of sale;<sup>1</sup> and if such sale is honestly and fairly made, and the proceeds of the stock are insufficient to reimburse him, he may recover the amount of the deficiency from his client.<sup>2</sup> He is not bound, however, to rely upon his lien on the stock, but may hold

four per cent. bonds for the plaintiff. In June, 1869, he gave them a stop order to sell \$500,000 at 100 $\frac{1}{4}$  and \$500,000 at 100 $\frac{1}{2}$ . On August 13th the bonds sold at the Stock Exchange at 101 "flat," that is, carrying the accrued interest from July 1st. Thereupon defendants sold \$200,000 at that price on plaintiff's account; the accrued interest at that time was less than one-half per cent. The next day the bonds sold at 100 $\frac{5}{8}$ , and defendants sold \$300,000 at 101 and 100 $\frac{7}{8}$ , and on August 15th they sold \$500,000 at 100 $\frac{3}{4}$ , the lowest price for that day. The losses on the transaction were charged to the plaintiff's account. In an action to open and review the account, it was held that the first limit of the stop order was reached and the sale was authorized after July 1st, when bonds of the description of those in question had sold in the market for a flat price, which, after deducting therefrom the accrued interest from that date, would leave 100 $\frac{1}{2}$ ; that as the decline had not reached that point when the first sale was made, it was unauthorized, and the plaintiff was entitled to damages.

In *Wronkow v. Clews*, 52 N. Y. Super. Ct. 176, a "stop order," in transactions, such as those under consideration, was thus defined: "It is agreed that usually a stop order signifies that the broker has received and is bound to obey a direction of his principal to sell at a price described when that price is reached in the market. A stop order may, however, describe the price by referring to contingencies and conditions."

1. *Stenton v. Jerome*, 54 N. Y. 480; *Rosenstock v. Tormey*, 32 Md. 169; 3

Am. Rep. 125. In the *New York* case, the court said: "Under this agreement the defendants were not obliged to carry the stock indefinitely. Whenever they desired to close the transaction in reference to any stocks, it was their duty to tender the certificates thereof to the plaintiff and demand payment for them; then if within a reasonable time she did not take and pay for the stocks, they had a right to sell them to satisfy their lien, after giving her notice of the time and place of sale."

2. In *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125, it appeared that a stock-broker of Baltimore was ordered by his clients to buy 100 shares of railroad stock. According to the custom of the trade he wrote to his correspondents in New York city directing them to purchase, and they accordingly bought and were paid by the Baltimore broker. The clients failed to pay for the stock, and after notice to them and in accordance with the customs of the business, the Baltimore broker directed his correspondents to make sale thereof in New York, which was accordingly done. There was a loss from the transaction, and the Baltimore broker sued his clients for the difference. He failed in his action, and upon appeal the court, after reviewing the facts, said: "Having thus made the purchase and expended the money, it was his duty to notify his principals of the fact and request them to receive the stock and pay him the price he had paid for it with the usual and reasonable commissions for making the purchase. At the time of this notice he must show that he was in condition to deliver or transfer the stock by having

his client personally responsible for the full amount due him, including commissions.<sup>1</sup>

b. UPON BANKRUPTCY OR DEATH OF THE CLIENT.—Where a broker is carrying stock on a margin for his client, and the latter becomes a bankrupt, or makes an assignment for the benefit of his creditors, it is usual for the broker to sell the stock so carried and credit the proceeds to the bankrupt or insolvent estate.<sup>2</sup> And it has been held that if the broker continues to hold the stock for an unreasonable length of time and then sells at a sacrifice, without the consent of the assignee or bankruptcy court, and without notice to any one, the insolvent estate will not be chargeable with the loss.<sup>3</sup> And in *England*, where the stock is carried for the client until a day certain called the settling day, the broker may, in case of the death, insolvency, or bankruptcy of the client, summarily close the account. Under such circumstances the broker may enforce his claim against the client's estate for any balance that may be due him on the account, which balance is subject to deduction for any loss that may

the certificates or other property *indicia* of title actually in hand, or in the hands of his New York agents, ready to be delivered or transferred to the defendants. Upon receiving this notice, it was the duty of the defendants to pay for and receive the stock, and on their failure to do so the plaintiff had, in our judgment, the clear right, after a reasonable time and after giving notice to that effect to defendants, to direct it to be sold in New York, and, upon showing by legal and competent proof that it was actually sold by his agents, either at public sale in market overt, or at a sale publicly and fairly made at the Stock Exchange or stock board, or a broker's board where such stocks were usually sold, at its fair market value on the day of sale, he is entitled to recover from the defendants the amount, if any, of the resulting loss."

1. *Esser v. Linderman*, 71 Pa. St. 76; *Wynkoop v. Seal*, 64 Pa. St. 361. See *Merwin v. Hamilton*, 6 Duer (N. Y.) 244; *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 213.

In *Esser v. Linderman*, 71 Pa. St. 76, *Esser* employed brokers to buy stock and carry it. The client was asked to increase his margin or take up the stock. He did neither, and the brokers sold a portion of the stock, and the rest remained with them until it became worthless. They brought an action of assumpsit against him to recover the balance which they

claimed to be due them on their purchase of the stock for him. They recovered, and he brought a writ of error. It was contended by the client that the broker should have sold all the stock and credited him with the purchase price, and that having failed to do so, they ought not to recover losses that might have thereby been avoided. The appellate court said: "Had the plaintiffs (brokers) sold without giving further notice, and the stock had afterward gone up, they would have been responsible according to *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177. It is nothing to the purpose that they did sell the *St. Nicholas*. They assumed the risk, but had a right not to do so as to the *Royal*, but to hold it until they should receive orders to sell." The judgment was accordingly affirmed.

In *Wynkoop v. Seal*, 64 Pa. St. 361, the broker bought stock for his principal and paid his own money for it. He notified his principal of the purchase and frequently asked him to take and pay for it. The principal never called for the stock or tendered payment for the same, and the broker brought his action of assumpsit to recover the price paid for the stock. The broker recovered and upon error the judgment was affirmed.

2. See statement of facts in *Allen v. McConihe*, 124 N. Y. 342.

3. *In re Daniels*, 13 Nat. Bankr. Reg. 46.

have resulted from his selling the stock before the next settling day.<sup>1</sup>

**IV. SALE OF STOCK—1. For Immediate Delivery.**—Where the principal employs the broker to sell stock which the principal owns and is prepared to deliver, the broker, in the *United States*, usually receives the certificates or other securities from his principal, and, after selling them, delivers them to the purchaser's broker and receives the purchase price on behalf of his own principal; although it has been held in *England* that it is no part of his duty as a broker to do so.<sup>2</sup> In the absence of special instructions, he may sell in the usual and ordinary way,<sup>3</sup> but not, without special authority, upon credit, even with a view to the benefit of his principal.<sup>4</sup> In this connection, the customary methods of dealing on the Stock Exchange must be kept in view. In *England* there are two methods of dealing, namely, "for money" and "for the account." The former is a contract for immediate execution. The money is paid down and the stock delivered at once. But the great majority of bargains on the Stock Exchange are made for a certain day called the "account day," and it is not expected that settlement will sooner be made.<sup>5</sup>

1. *Lacey v. Hill*, L. R., 8 Ch. 921; 42 L. J., Ch. 657; 29 L. T., N. S. 280; 21 W. R. 857; *Lacey v. Hill*, L. R., 18 Eq. 182; 43 L. J., Ch. 551; 30 L. T., N. S. 484; 22 W. R. 586.

2. *Booth v. Fielding*, 1 W. R. 245.

3. *Porter v. Wormser*, 94 N. Y. 431; *Robinson v. Norris*, 51 How. Pr. (N. Y.) 442; *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80. See also *Robinson v. Mollett*, L. R., 7 H. L. 802; *Westropp v. Solomon*, 8 C. B. 346; 65 E. C. L. 344; *Young v. Cole*, 3 Bing. N. Cas. 724; 32 E. C. L. 302; *Child v. Morley*, 8 T. R. 610.

4. *Wiltshire v. Sims*, 1 Campb. 258. See also *Baring v. Corrie*, 2 B. & Ald. 137; *State v. Delafield*, 8 Paige (N. Y.) 527; 26 Wend. (N. Y.) 192.

5. In *Maxted v. Paine*, L. R., 4 Exch. 203, the method of selling stock on the London Stock Exchange is set out as follows: "When a broker is instructed by his principal to sell shares on his account, he goes on the Stock Exchange and deals with either a jobber or another broker, as the case may be. In case a broker deals with a jobber, he asks the jobber for the price of a particular class of shares, without saying whether he, the broker, desires to sell or buy. The jobber then names two prices to the broker, the one that at which he will buy, the other that at which he will sell. If the broker be willing to sell at the price named he

declares to sell and accepts the offer of the jobber to buy at that price; thereupon the bargain, which is as follows, is concluded between them: The bargain is made for a certain specified day which is known on the Stock Exchange as the 'account day,' and on the day preceding the account day (which latter day is known on the Stock Exchange as the 'name day') the jobber is bound to pass to the broker the name of a person or persons, as the case may be, as the ultimate purchaser, or respective purchasers, of said shares. But the jobber may in lieu thereof give his own name to the broker as the ultimate purchaser of the shares, or, in the event of his having had no dealing with the shares subsequent to the original bargain, then as the purchaser of the shares, in which latter cases he is bound himself to take the same. This name is passed upon a document called a ticket. The dealings in the shares after the concluding of the first bargain may have been either many or few; but in all cases the ticket is indorsed, either in pencil or ink, with the names of the members of the Stock Exchange, whether acting as principals or brokers, through whose hands the ticket has passed. In addition to his obligation to give the name or names aforesaid, the jobber is also liable to the broker for the price of the shares

A broker employed to sell stock has no implied authority by reason of such employment to make an express warranty, and the principal is not bound thereby, even though, in ignorance of such warranty, he receives and retains the purchase price.<sup>1</sup> But there is an implied condition that the thing delivered shall be the thing sold. There is no implied warranty that the thing is of any value, but the vendor must deliver what he sells, and if he fails to do so, the selling broker may reimburse the purchaser, and, if the purchase price has already been paid over to his principal, may recover it back.<sup>2</sup>

as agreed upon, and the broker can either apply for the price to the jobbers, or can apply to the brokers of the ultimate purchaser for the amount of the purchase money which he is to pay for the shares, looking to the jobber for the difference, if any. But the usual practice is to make application in the first instance to the broker of the ultimate purchaser, and whose name appears on the ticket as the person to pay. In the event of the jobber failing to give a name by two o'clock on the name day, the broker has the right after the lapse of an hour to sell out the shares as against him by auction on the Stock Exchange through the medium of another broker who is, however, in most instances the secretary or clerk of the Stock Exchange; the jobber then becomes liable to the broker for the difference, if any, between the price at which the shares are so sold and the price originally bargained for between the broker and jobber. At any time before the transfer of the shares has been executed by the seller the broker may object to any name or names given by the jobber, and in the event of the jobber and broker failing to agree, the broker may appeal to the committee of the Stock Exchange, who on such appeal have the power to require the jobber to give the broker a better name, in case they consider the broker to be thereunto entitled."

1. In *Smith v. Tracy*, 36 N. Y. 79, an agent employed to sell bank stock made a warranty of the same. His principal, in ignorance of such warranty, received and retained the purchase price of the stock. The vendee of the stock sued the vendor's personal representative to recover the purchase price, and had judgment in the court below, on the ground that the warranty was within the scope of the agent's authority, and that though the testator

neither expressly authorized nor assented to the contract, his act in receiving the proceeds of an authorized sale of his own property estopped his executor from denying the collateral agreement unlawfully entered into by another in his name. The court of appeals said: "We think this view cannot be maintained. It is founded on a misapprehension of the principles settled by a series of decisions in a class of cases to which this does not belong. When a party claims, receives and retains the property of another, knowing that it was obtained through an unauthorized use of his name, it is a ratification of the assumed agency which evinces his assent to the contract or the wrong. The courts, however, have been careful in the leading cases of that class to note as the precise ground of legal liability the knowledge of the facts by the party appropriating the benefit." The judgment was accordingly reversed and a new trial ordered.

2. In *Young v. Cole*, 3 Bing. N. Cas. 724; 32 E. C. L. 302, it appeared that the plaintiff, a stock-broker, was employed by the defendant to sell for him four Guatemala bonds. The plaintiff sold them, and after they had been in the hands of the purchaser two days they were discovered to be not marketable, whereupon the plaintiff took them back and reimbursed the purchaser. He had before doing this turned over the purchase price of the bonds to his principal, and he brought this action against his principal for money paid to his use. Tindal, C. J., said: "It appears to me that the sum for which the verdict has been given is properly called money received by the defendant to the use of the plaintiff. The money which the plaintiff delivered to the defendant was his own money, for he had sold the bonds as a principal to Briant, and was subject to

Where a broker has sold stock in obedience to the instructions of his customer, and the latter refuses or fails to deliver the same, he will be liable to the broker for any losses he may sustain by reason of his inability to complete the contract.<sup>1</sup>

2. "Short Sales"—*a.* IN GENERAL.—When the customer, through the agency of his broker, sells stocks which he does not own and is not prepared to deliver, the transaction is called a

all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were salable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

In *Westropp v. Solomon*, 8 C. B. 345; 65 E. C. L. 345, it appeared that the defendant had employed a stock-broker, a member of the London Stock Exchange, to sell for him certain documents which purported to be scrip or certificates, each for fifty shares in a projected railroad company. The broker sold these certificates and handed over the proceeds to his principal. The certificates being subsequently found to be forged, the broker was called upon and obliged under the rules of the Stock Exchange to pay the purchaser a certain agreed value as for genuine certificates of that company, which considerably exceeded the price at which he had sold the spurious certificates. The broker brought his action against the principal to recover the sum so paid to the purchaser. The declaration contained a special count averring a promise by the principal that the certificates were genuine, and a count for money paid. Upon the latter count the court held that he was entitled to recover the amount actually paid by him to the principal, but that he was not entitled to recover upon the special count, there being no promise, express or implied, that the certificates were genuine.

1. In *Sutton v. Tatham*, 10 Ad. & El. 27; 37 E. C. L. 25, it appears that a person employed brokers to sell shares, directing them by mistake to

sell 250 shares, meaning 50. The brokers contracted with another broker on the Stock Exchange for the sale. The shareholder on the next day informed his brokers of the mistake and asked them if the contract could not be made void. The brokers answered that it could not, and the shareholder left the matter in their hands. The selling brokers applied to the purchasing broker the next day to cancel the bargain, informing him of the mistake, but he declined, saying it was too late. The selling brokers being unable to complete the contract the purchasing broker bought the shares on the best terms in his power, and there was a loss from the transaction. The selling brokers paid this, and brought their action against the customer to recover the amount, together with their brokerage. It was held that for the difference so advanced the shareholder was liable to the brokers in assumpsit for money paid.

In *Sistare v. Best*, 88 N. Y. 527, *affirming* 16 Hun (N. Y.) 611, it appears that a savings bank authorized its president to sell a number of shares of stock held by it as security for a loan. In accordance with such authority the president employed a broker to sell the same. The broker, pursuant to this authority, sold at the price mentioned, and immediately notified the president of the bank, who, however, before this, had sold the shares without notifying the broker or revoking his authority. The president of the bank declined to furnish the stock to meet the broker's contract, and the stock was thereupon bought in under the rules of the Stock Exchange, and the selling broker paid the difference between the price paid and what he was to receive. He brought an action against the bank for this difference, and it was held that the private sale of the stock by which it was disabled from furnishing the stock to meet the sale made by the plaintiff was no defense to the action,

"short sale." In such cases it is not pretended that the customer has any of the stock which he orders sold. He sells with a view of purchasing at a future time and at a lower price to complete his contract. If the contract is made for future delivery, that is, "seller's option" or "buyer's option," as the case may be, then it is not necessary for the vendor to deliver the stock until the expiration of the option or until the buyer calls for it. But if the sale is made in the regular way, in which case the stock is deliverable the next day, the stock must be temporarily procured by the vendor for delivery to the vendee. The customer does not himself so procure the stock. He deposits margins with his broker who borrows the stock for delivery to the vendee. It is a part of the agreement that the broker shall carry the stock for a reasonable time, if the margins are kept good. The transaction having reached this point, the customer bides his time for a fall in prices, that he may buy in stock at a lower figure to replace that borrowed, and thus make a profit. He is called a "bear."<sup>1</sup> A broker, who has thus sold stock "short" for his customer, usually borrows the requisite number of shares from some other broker who has the stock to lend, and pays him the market price for them. Although this transaction has every appearance of a sale, it is treated by the brokers as a loan and is so registered on their books; and if the stock so borrowed fluctuates in price, they put up margins to protect one another against losses until it is returned.<sup>2</sup> Sometimes a broker who is short of stock for one client borrows that of another, and, in that event, no one except the client from whom he borrows may question his right to do so.<sup>3</sup>

and hence the plaintiff was entitled to recover the amount of the loss so sustained by him. See also *Bayliffe v. Butterworth*, 1 Exch. 425; 11 Jur. 1019; 17 L. J. Exch. 78.

1. *Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Hess v. Rau*, 95 N. Y. 359; *Rogers v. Wiley*, 131 N. Y. 527; *Smith v. Bouvier*, 70 Pa. St. 325; *Maxton v. Gheen*, 75 Pa. St. 166.

2. By-laws of New York Stock Exchange.

3. In *Knowlton v. Fitch*, 52 N. Y. 288, it appears that the shares were borrowed from another client of the brokers. The court said: "The fact that the shares thus used belonged to a customer of the defendants can make no difference to the plaintiff. The result of the transaction was to leave the defendants liable to their customer as before, to deliver to him an equal number of shares when demanded, the plaintiff being substituted in the place of Brownell as the borrower of the

shares, and the defendants standing responsible to their customer for the plaintiff instead of for Brownell. Whether or not the defendants were authorized thus to employ the stock of their customer depends upon the arrangements between them, which do not appear in the evidence. In the absence of any evidence, it is not to be presumed that the defendants were acting improperly in that respect. That question is not in issue in this case, and is one in which the plaintiff can have no interest or concern. The shares were procured on the responsibility of his brokers for his benefit and used in his business, and he was bound to provide for replacing them. It does not appear that any advantage could accrue to the defendants from the transaction beyond their commissions, and, so far as the plaintiff is concerned, it is immaterial whether the defendants borrowed the shares from other brokers or employed the shares of their own customer."

The loan amounts in substance to a sale of the stock to be paid for in kind, and the title vests in the borrower.<sup>1</sup>

*b. WHEN BROKER MAY CLOSE THE TRANSACTION.*—The object of a speculation of this character is to remain short until the market price shall fall, and then secure as profit the difference between the sum for which the borrowed shares were sold and the cost of those purchased for return to the lender. It follows that it is a part of the contract of employment that the broker should carry the stock for a reasonable time, provided his customer keeps on deposit a sufficient margin to protect him against losses occasioned by an advance in prices.<sup>2</sup> This being done, the broker has no right to buy in shares to return to the lender without notice to his client or an instruction from him to do so.<sup>3</sup>

When the client fails to keep on deposit with his broker a sufficient margin to protect the latter, or lets his margin fall below that agreed to be kept on deposit, the broker should notify him that his margin is impaired and demand that it be made good. If, after such notice and demand, the client fails to make the margin good, the broker may buy in the stock at the market price for return to the lender and charge the loss, if any, to his client,<sup>4</sup> unless he has conducted the transaction in such a manner

1. In *Dykens v. Allen*, 7 Hill (N.Y.) 497; 42 Am. Dec. 87. Walworth, Ch., said: "There is no doubt that upon an ordinary loan of one hundred shares of the stock of a particular corporation, or of other stock of the like nature, where one share of the stock is just as good as another, it would only be necessary to return the amount of stock in kind. The loan in such a case is in substance a sale to be repaid in kind and quantity, and the title to the fungibles loaned is immediately transferred to the borrower; whereas upon the loan of specific articles to be returned in specie, the title remains in the lender, and the borrower is only entitled to the temporary use thereof;" citing 3 Erskine's Inst., tit. 1, § 18.

2. *Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Hess v. Rau*, 95 N. Y. 359; *Rogers v. Wiley*, 131 N. Y. 527.

In *White v. Smith*, 54 N. Y. 522, Earl, J., said: "Every short sale is made by the seller with the contemplation of covering it when the markets shall have declined, and for the purpose of making a profit by the decline. I believe in such case, until the stock is bought in and the short sale covered, the broker is said to carry the stock for his principal; and while he carries it he generally relies upon the

margin placed in his hands as security against loss by any advance in the market. I am of opinion that when a broker agrees for a commission to be paid to him and upon the deposit with him of the margin agreed on, to make a short sale for a customer, it is part of the bargain that the broker shall carry the stock for a reasonable time, for in no other way can the object of the parties be effectuated. A short sale to be covered immediately without waiting for any decline in the market would be a very idle transaction."

3. In *White v. Smith*, 54 N. Y. 522, Earl, J., said: "The broker has not a right, unless it be specially conferred upon him, to buy in the stock, cover the sale, and thus close the transaction, without some notice to, or direction from, his customer. He is the agent of his customer, and must obey his orders both in making the sale and in covering it. If he acts without orders, or against the orders of his principal, he commits a breach of duty and becomes liable like any agent for any loss he may thus occasion his principal."

4. In *Knowlton v. Fitch*, 52 N. Y. 288, reversing 48 Barb. (N. Y.) 593, the plaintiff employed defendants, stock-brokers, to operate for him in stocks. All the transactions were



as to lose his right to demand further margins.<sup>1</sup> In such transactions the agency of the broker is coupled with an interest and is not revoked by the death of the client. It follows that he is not bound to close the transaction upon his client's death but may continue the same until the appointment and qualification of the personal representative who may thereafter receive notices and give directions as to the conduct of the transaction.<sup>2</sup>

"short sales," defendants' selling deliverable the next day and borrowing stock to deliver until plaintiff directed a purchase to replace it. At the close of the transactions, defendants had to the order of the plaintiff \$1,249.19. He then ordered the sale of one hundred shares of Michigan Southern. Defendants sold accordingly and borrowed the stock for delivery. The stock rose so as to exhaust the margin, and the defendants notified the plaintiff to furnish more. Upon his failure to comply they bought in to replace the borrowed stock. He then sought to repudiate the latter transaction, and brought his action to recover the money due him on the former transactions. He had judgment in the court below, but upon appeal the judgment was reversed and a new trial ordered. The court said: "We think it was clearly established by the evidence that the defendants had furnished the shares for plaintiff in carrying out his order of the 5th of October, and that when the plaintiff failed to keep his margin good, they had the right to buy in shares to replace those so furnished, and that such purchase was in legal effect for account of the plaintiff."

In *Appleman v. Fisher*, 34 Md. 540, it appears that brokers were instructed by their client to sell \$100,000 gold "short" at \$1.31. The brokers accordingly sold at the price named and credited the proceeds to their client, whose margin subsequently became impaired owing to an advance in the price of gold, when they notified him of the fact and demanded a further deposit. He failed to respond to the demand, and the brokers bought in gold at \$1.35 to cover the sale. Gold subsequently fell to \$1.29 and the client sought to repudiate the purchase, tendered the gold to his brokers and demanded the proceeds of the "short sale" at \$1.31, after which he brought his action to recover the sum. The court held that he could not recover, and that he was liable for the loss re-

sulting from the purchase to cover the short sale.

1. In *Rogers v. Wiley*, 131 N. Y. 527, the defendants, who were stock-brokers, sold shares of stock short for the plaintiff under an agreement which required plaintiff to keep on deposit a margin to protect the brokers, defendants to give reasonable notice of want of sufficient margin and of their intention to buy in if the requisite margin was not made good. The stock advanced and the plaintiff in various interviews informed the defendants that he had concluded to close his short account and go long on the stock, but was dissuaded therefrom by them. They finally agreed that if the stock went up to a price specified, which would have exhausted the margin, they would not close plaintiff out but would carry the stock for him until he could get out all right. The plaintiff thereupon consented to leave the matter as it was. The stock continued to advance, but did not go above the price named. The defendants bought in at a price which almost exhausted the margin without notice to the plaintiff. Upon receiving notice of the purchase he repudiated it. The market subsequently declined and the plaintiff directed the defendants to buy to cover the short sale. This they declined to do. In an action to recover damages, it was held that the defendant's promise to carry the stock without further margin gave the plaintiff a right to recover, whether considered as an agreement with sufficient consideration, or as a waiver of notice to furnish more margin, or as an estoppel. In either case, the purchase was unauthorized and the plaintiff was entitled to recover the difference between the amount paid on such purchase and what the stock might have been bought for when the plaintiff gave directions to purchase.

2. In *Hess v. Rau*, 95 N. Y. 359, it appears that a broker had sold stock short for a customer, and, in accordance with the usual custom, had borrowed

c. ORDER TO "BUY IN" STOCK—(1) *In General*.—When the client instructs his broker to buy in stock and return it to the lender, the broker is bound to do so or become liable for such damages as result from his neglect or refusal to obey instructions.<sup>1</sup> On the other hand, if he does buy in the stock in obedience to his client's instructions and is obliged by reason of an advance in prices to pay more for it than he realized from the sale of the borrowed stock, his client is bound to reimburse him to the extent of such loss.<sup>2</sup>

the stock to deliver it, becoming himself obliged to return the borrowed stock, and borrowing from time to time as required to replace the stock previously borrowed. But while the transaction was so kept alive the customer died. The brokers continued the transaction until the appointment of the executrix of their client's estate, after which they notified her to furnish additional margin, and that in default of so doing they would buy in stocks on her account. The margin was not furnished, and the brokers bought in the stocks at a loss on the transaction of more than \$9,000. They brought an action to recover the same, and it was contended by defendant that the death of the client revoked the agency and that the brokers should have closed the transaction at once. The court said: "But the rule that the death of the principal revokes the authority of an agent has a well settled exception when the agency is coupled with an interest. (*Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174.) The death of Rau left the plaintiffs in the position they had previously occupied of being borrowers of stocks to be delivered with a personal liability to replace them when called for by the lenders. This obligation was not and could not be terminated by Rau's death. The estate of Rau, on the other hand, was bound to indemnify the plaintiffs for any loss they might sustain in closing out the transaction, or, as the phrase is, 'covering the sale.' Until the appointment of a representative of Rau's estate, there was no one on whom the plaintiffs could call for additional margin, or to close the transactions, and no one to give directions in its behalf. The result of continuing the transactions might be favorable or unfavorable, but which could not be foreseen. . . . As it turned out, it would have been to the advantage of the estate if the stock had been bought in immedi-

ately after Rau's death. But if this course had been taken and the market had gone the other way, the plaintiffs would then have been called upon to justify the transaction. We think the plaintiffs were not bound to place themselves in this dilemma, but were authorized, acting in good faith, to maintain the existing situation until a representative of the estate should be appointed."

1. In *White v. Smith*, 54 N. Y. 522, it appears that on October 18th, defendants, stock-brokers, on plaintiff's order, sold 300 shares of stock short at 186. On November 1st, without plaintiff's order or knowledge, they bought in stock to cover the sale. On November 2d, the stock having declined to 180½, the plaintiff ordered defendants to cover the sale; which they refused to do. The plaintiff repudiated the purchase made by defendants and sued them for the amount of profits he would have made if they had obeyed his orders. It was held that he was entitled to recover. The court said: "It is quite clear that the plaintiff was entitled to recover something, and the next inquiry is, How much? If the defendants had not disabled themselves from obeying the order and had obeyed it, the plaintiff would have made the precise sum which the jury awarded him. The loss of this profit was the direct and proximate consequence of the defendants' breach of duty to the plaintiff, and I know of no rule of law that was violated by the measure of damages adopted."

2. In *Smith v. Bouvier*, 70 Pa. St. 325, it appears that one Kames, not owning stock, employed a broker to sell stock for him at a named price, to be delivered at a particular day. The stock was sold and at the time of delivery the prices having risen, the broker borrowed stocks to meet the engagements. He afterwards under instructions from Kames bought at a

(2) "*Stop Orders*" in *Short Sales*.—This instruction to buy in may also be given in a stop order—that is, the client gives the broker instructions to buy in stock and cover the short sale when the market price of such stock reaches a certain point. If the order is mandatory and leaves nothing to the discretion of the broker, he is bound to obey it when the price of the stock reaches the point named in the order.<sup>1</sup>

d. LEGALITY OF SHORT SALES.—Short sales such as have just been described, although made purely for purposes of speculation, are real transactions; and, in the absence of statutory prohibition of such contracts, rights acquired under them may be enforced in courts of justice.<sup>2</sup> It was once thought in *England* that an executory contract for the sale and delivery of chattels which the seller did not have and had not contracted for, but intended to buy before the day of delivery, was invalid as a mere wager on the price of the commodity;<sup>3</sup> but this doctrine has been thoroughly exploded.<sup>4</sup>

higher rate to replace the stock borrowed. It was held that Kames was liable to the broker for the difference.

1. *Smith v. Bouvier*, 70 Pa. St. 325.

2. See cases above cited on *Short Sales*.

In *Smith v. Bouvier*, 70 Pa. St. 325, the legality of a short sale of stock was under consideration, and the court said: "They (plaintiffs in error) insisted that the jury should have been instructed that all purchases of stocks with a view to resell and make profit on their rise, or contracts to furnish stocks on time, should be declared gambling contracts and illegal, not only between the buyer and seller, but as to the brokers or agents through whom the sales and purchases had been made. This would make a great inroad into what has for an indefinite period been regarded as a legitimate business, and would either destroy it altogether, or, if continued, put the brokers at the mercy of those for whom they transact such business. Let it be understood that a broker has no power to recover either for advances or commissions, however honestly he may have dealt, and there will be found enough persons whose consciences would throw their loss upon the shoulders of those who advanced the money and earned commissions in their services. It would be a very palpable wrong to the brokers who are licensed to do such business if such were held to be the law. To this extent *Brua's Appeal*, 55 Pa. St. 294, never was intended to go."

In *Maxton v. Gheen*, 75 Pa. St. 166, the same question was before the court, and Agnew, C. J., said: "But here the stock was in every instance actually sold and delivered, and the transaction carried into final execution. The plaintiffs, who were the brokers of the defendant, were not even aware that he was selling short until the term of credit was expiring and he bought to fill his sales. It will not do to say because there is so much gambling in stocks that every sale short, as it is termed, is *ipso facto* a wager." See also *Porter v. Viets*, 1 Biss. (U. S.) 177.

3. In *Bryan v. Lewis*, 1 R. & M. 386, Lord Tenterden held that if goods be sold to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, it is not a valid contract but a wager on the price of the commodity.

4. The doctrine of *Bryan v. Lewis*, 1 R. & M. 386, was questioned in the common pleas in *Wells v. Porter*, 2 Bing. N. Cas. 722; 29 E. C. L. 469, and in *Hibblewhite v. McMorine*, 5 M. & W. 462, it was held that a contract for the sale of 50 shares of Brighton Railway Company, to be transferred, delivered and paid for at a future day, the vendor not having the shares in his possession at the time of the contract, nor any reasonable expectation of getting them otherwise than by purchase after the contract had been made, was

In *England*, short sales of bank shares are prohibited by statute,<sup>1</sup> and in some of the states of the Union there are statutes designed to prevent such sales altogether.<sup>2</sup> And where such contracts are prohibited by the law of the forum, it has been held that they will not be enforced, even though they are legal and valid in the jurisdiction where they are made.<sup>3</sup>

**V. OPTIONS.**—Many transactions in stocks are made under what are called option contracts. Many of these contracts are rendered incapable of being enforced by the statutes aimed at wagering contracts, but it is proposed to consider them at this point so far only as they have been held to be legal and enforceable in the courts. Option contracts are of three sorts, viz., "puts," "calls" and combinations of these, sometimes called "straddles." A "put" is an agreement whereby one party for a valuable consideration paid to the other party acquires the privilege of delivering or not at his option a certain amount of stock

valid. Parke Barron said: "I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in *Bryan v. Lewis*. It excited a good deal of surprise in my mind at the time, and when examined I think is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods of which he has not possession at the time of the bargain and has no reasonable expectation of receiving. Such contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession." Alderson, B., said: "I have always considered the doctrine laid down in *Bryan v. Lewis*, 1 R. & M. 386, as contrary to law and most inconvenient in practice. I have often heard it spoken of with great suspicion, both by lawyers and mercantile men, upon both grounds as against law and against all mercantile convenience. It was with great surprise I heard so accurate a lawyer give utterance to a doctrine so utterly erroneous."

In *Mortimer v. McCallam*, 6 M. & W. 58, the court followed *Hibblewhite v. McMorine*, 5 M. & W. 462, thus completely overruling *Bryan v. Lewis*, 1 R. & M. 386.

1. Stat. 30 Vict., ch. 29, requires the sellers of bank shares to specify the numbers or give the names of the registered proprietors of the shares which they are selling for future delivery.

2. See *Stebbins v. Leowolf*, 3 Cush.

(Mass.) 137; *Barrett v. Hyde*, 7 Gray (Mass.) 160; *Barrett v. Mead*, 10 Allen (Mass.) 337; *Durant v. Burt*, 98 Mass. 161; *Rock v. Nichols*, 3 Allen (Mass.) 342; *Brown v. Phelps*, 103 Mass. 313; *Brigham v. Mead*, 10 Allen (Mass.) 245; *Colt v. Clapp*, 127 Mass. 476; *Bullard v. Smith*, 139 Mass. 492; *Frazier v. Simmons*, 139 Mass. 531; *Pratt v. American Bell Teleph. Co.*, 141 Mass. 225; 12 Am. & Eng. Corp. Cas. 110; 55 Am. Rep. 465; *Duchemin v. Kendall*, 149 Mass. 171; *Jones v. Ames*, 135 Mass. 431, construing the *Massachusetts* statute.

In *New York*, an act against stock jobbing was passed in 1812, and in 1830 was re-enacted. Under this statute the court of appeals held a short sale of stock to be illegal, in the case of *Staples v. Gould*, 9 N. Y. 521. This statute was repealed by ch. 134, Laws of 1858. Since that time courts have upheld contracts of short sales of stock in the state of *New York*. See also *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; construing *New Jersey* statutes on the subject, and *Pickering v. Cease*, 79 Ill. 328, construing the statute of *Illinois*.

3. In *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308, it was held that such contracts, though made in another state where they are presumed to be lawful and enforceable, would not be enforced in *New Jersey*, at least against residents and citizens of that state, because their enforcement would violate the plain public policy of the state, on the subject of gambling and betting, evinced by the statute.

within a specified time and for a price named in the agreement.<sup>1</sup> A "call" is the opposite of a "put," in that the party who pays the consideration has the right to claim delivery of the stock within the time and at the price agreed upon.<sup>2</sup> A "straddle" is a combination of a "put" and "call," and the party who pays the consideration may either claim or deliver the stock, or do neither, at his option.<sup>3</sup> There is nothing on the face of such contracts to brand them as wagers, and, in the absence of extrinsic evidence to show that they are made in violation of the statutes against gaming, they will be presumed to be valid and may be enforced.<sup>4</sup> And when a broker is conducting such a transaction for his customer, it is his duty, in the absence of instructions from his customer, to exercise the option at the most favorable time.<sup>5</sup> But a contract purporting on its face to be a contract of sale may, if the illegality of the contract is set up in defense, be impeached by parol evidence of circumstances which show that the parties were merely gambling on the prices of stocks.<sup>6</sup>

**VI. RIGHTS AND LIABILITIES OF BROKERS—1. Right to Buy and Sell in the Customary Manner.**—It may be stated as a general proposition that the known usages of trade and business enter into the employment of stock-brokers, and that, if a broker conducts his business in accordance with such usages in good faith

1. *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573.

2. *Yerkes v. Salomon*, 11 Hun (N. Y.) 471. See *Kirkpatrick v. Bonsall*, 72 Pa. St. 155.

3. *Story v. Salomon*, 71 N. Y. 420; *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398.

4. *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573; *Yerkes v. Salomon*, 11 Hun (N. Y.) 471; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Story v. Salomon*, 71 N. Y. 420; *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398; *Porter v. Viets*, 1 Biss. (U. S.) 177; *Hibblewhite v. McMorine*, 5 M. & W. 462, *overruling* *Bryan v. Lewis*, Ry. & M. 386; 21 E. C. L. 467.

5. In *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398, the plaintiff bought, through the agency of defendant, a stock option or privilege, known in the language of brokers as a "straddle." On the next day after the purchase the defendant sold the stock short which resulted in a loss. Plaintiff brought an action to recover damages, upon which she recovered, and defendant appealed. The judgment was affirmed. The court said: "It is made very apparent by the evidence that the only right of the defendant, as the agent of the plaintiff, after the

purchase for her of the 'straddle' contract, was to exercise the option secured by it at such time within sixty days as she might direct; or, if no instructions were given and the situation was left to his care, then to exercise that option at such time within the sixty days as, taking into view the state of the market, appeared to be prudent and proper. In no event had he the right to involve the plaintiff in another and distinct speculation having no necessary connection with the straddle contract, except that as the evidence seems to show, it had the effect to neutralize one part of the contract."

6. *Story v. Salomon*, 71 N. Y. 420; *Yerkes v. Salomon*, 11 Hun (N. Y.) 471; *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398; *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *North v. Phillips*, 89 Pa. St. 250; *Hibblewhite v. McMorine*, 5 M. & W. 466. *Porter v. Viets*, 1 Biss. (U. S.) 177, is opposed to other authorities on this point, holding as it does, that the defendant cannot be permitted to show that the intention of the parties was not to deliver or accept the property, but simply to settle the "differences" in cash.

and with reasonable care, he will be exonerated from all further responsibility;<sup>1</sup> and if he has acted within the scope of his authority and conducted his business as above described, his client must protect him against losses and repay him his necessary expenses in the conduct of the business.<sup>2</sup>

**2. Right to Act by Substitute.**—It is doubtless true that a stock-broker has no more power than any other agent to free himself from responsibility by delegating his authority to another, but there are circumstances under which he may act through a sub-agent, as where the purchase or sale is to be made in a distant city,<sup>3</sup> or where the act to be performed is purely ministerial and calls for the exercise of no peculiar skill or discretion.<sup>4</sup>

**3. May Not Act in Dual Capacity in the Same Transaction.**—A stock-broker may not act as principal and agent in one and the same transaction; therefore, if he assumes to buy his client's stock, or to sell his own stock to a client without his knowledge and assent, the client may either repudiate the assumed purchase or sale, or elect to affirm it and hold the broker

1. *Mitchell v. Newhall*, 15 M. & W. 308; *Westropp v. Solomon*, 8 C. B. 345; 65 E. C. L. 345; *Pollock v. Stables*, 12 Q. B. 765; 64 E. C. L. 765; *Tempest v. Kilner*, 3 C. B. 253; 54 E. C. L. 248; *Bayley v. Wilkins*, 7 C. B. 886; 62 E. C. L. 885; *Hunt v. Gunn*, 13 C. B. N. S. 227; 106 E. C. L. 227; *Taylor v. Stray*, 2 C. B. N. S. 175; 89 E. C. L. 175; *Lamert v. Heath*, 15 M. & W. 486; 15 L. J., Exch. 298; *Morrice v. Hunter*, 14 L. T. 897; *Smith v. Lindo*, 5 C. B. N. S. 587; 94 E. C. L. 587; *Rosewarne v. Billing*, 15 C. B. N. S. 316; 109 E. C. L. 316; *Remfry v. Butler*, 1 E. B. & E. 887; 96 E. C. L. 887; *Brederman v. Stone*, L. R., 2 C. P. 504; *Chapman v. Shepherd*, L. R., 2 C. P. 228; *Webb v. Challoner*, 2 F. & F. 120; *McEwen v. Woods*, 11 Q. B. 13; 63 E. C. L. 13; *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 Ad. & El. 27; 37 E. C. L. 25; *Peckham v. Ketchum*, 5 Bosw. (N. Y.) 506; 10 Abb. Pr. (N. Y.) 220; *Porter v. Wormser*, 94 N. Y. 431; *Gheen v. Johnson*, 90 Pa. St. 38.

2. See cases in last note, and also *Sistare v. Best*, 83 N. Y. 527; *Willard v. White*, 56 Hun (N. Y.) 581; *Sweeney v. Rogers*, 10 Daly (N. Y.) 469; *Hill v. Morris*, 21 Mo. App. 256; *Jones v. Gallagher*, 3 Utah 54; *Marshall v. Levy*, 66 Cal. 236; *Ball v. Clark*, 28 Fed. Rep. 179.

In *Marshall v. Levy*, 66 Cal. 236, a broker who was carrying stock for his client, paid assessments thereon. It

was held that he was entitled to credit for the amount of the assessments so paid.

In *Hill v. Morris*, 21 Mo. App. 256, a broker through his agent paid his customer's loss. The court having held that the agent had no right of action against the customer for want of privity of contract, the broker was allowed to recover the amount so paid himself.

3. *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Allen v. McConihe*, 124 N. Y. 342; *Booth v. Fielding*, 1 W. R. 245; *Gheen v. Johnson*, 90 Pa. St. 38.

4. In *Sims v. May* (Supreme Ct.), 1 N. Y. Supp. 671, it appeared that brokers who were authorized to buy and sell stock did so in part through a sub-agent. It was contended that the brokers had no authority to order another firm to execute the purchase or sale, upon the ground that the execution of the order involved an exercise of discretion, and that it was of the character of a trust, and, in its nature, personal. The court said: "In this contention we think the plaintiff has taken an erroneous view of the relations of the parties. There was certainly a discretion vested as to whether a sale should be made or not, but when a sale had been determined upon, the discretion had been exercised and the execution of the order involved the exercise of no discretion whatever. It was not necessary that a member of

to the price which he has reported.<sup>1</sup> But if the client elects to rescind the purchase or sale, he must return to the broker the consideration for the sale, or the certificates or other securities delivered to him.<sup>2</sup> Neither may a broker act as agent for both the buyer and seller in the same transaction.<sup>3</sup>

the firm of John J. Cisco & Son should personally make such sale. They had the right to employ a sub-agent for that purpose."

1. *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 49 N. Y. 301; 58 N. Y. 425; *Quincey v. White*, 63 N. Y. 370; *Pickering v. Demeritt*, 100 Mass. 416; *Day v. Holmes*, 103 Mass. 306; *Todd v. Bishop*, 136 Mass. 286; *Robinson v. Mollett*, L. R., 7 H. L. 802; *Brookman v. Rothchild*, 3 Sim. 153, 224, *affirmed* H. of L., 5 Bligh N. S. 165; *Crull v. Dodson*, Macn. Sel. Cas. 114; *Sel. Ch. Ca.* 41; *Marye v. Strouse*, 5 Fed. Rep. 483; *Gillett v. Peppercorne*, 3 Beav. 78; *Kimber v. Barber*, L. R., 8 Ch. 56; *Bentley v. Craven*, 18 Beav. 76; *Trevelyan v. Charles*, 9 Beav. 140; *Dunne v. English*, L. R., 18 Eq. 524; *Com. v. Cooper*, 15 Am. L. Rev. 360.

Neither can he sell to the firm of which he is a member. *Martin v. Moulton*, 8 N. H. 504.

In *Conkey v. Bond*, 36 N. Y. 427, it appeared that a broker employed to purchase stock imposed his own stock on his principal without his assent. The court said: "There is no view of the facts in which the transaction can be upheld. He stood in a relation to his principal which disabled him from concluding a contract with himself without the knowledge or assent of the party he assumed to represent. He undertook to act at once as seller and purchaser. He bought as agent and sold as owner. The *ex parte* bargain thus concluded proved advantageous to him and very unfortunate for his principal. It was the right of the latter to rescind it on discovery of the breach of confidence. It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself without authority from the plaintiff was a constructive fraud in view of the fiduciary relation which existed between the parties. In such a case the law delivers the agent from temptation by a *presumptio juris et de jure*, which good intentions are unavailing to repel."

In *Todd v. Bishop*, 136 Mass. 386, a broker employed to purchase certain shares of stock upon a margin and carry them for his client reported that he had made a purchase. Upon a decline in prices the client instructed the broker to sell the shares. He reported that he had done this and the client paid him the difference between the purchase price and the selling price, together with interest and commissions. It was held that if no purchase or sale was in fact made and the broker simply assumed the contract himself, his client was entitled to recover the money paid him, unless he made the payment with full knowledge of the facts.

But a broker's notice of sale showing that he himself had been the purchaser will not preclude him from showing that the sale was in fact made to another. *Porter v. Wormser*, 94 N. Y. 431.

2. In *Mayo v. Knowlton*, 10 N. Y. Supp. 230, it appears that a broker was ordered to purchase mining stock for his client, and assumed to act as agent and broker in the transaction. The stock which he delivered to the plaintiff was in reality stock owned by himself which he had merely transferred to the purchaser, himself retaining the purchase price. Afterwards the mine was bought by another company and the shares were made convertible into shares of the new company, and the client so converted his shares. Upon discovery of the fact that his broker had delivered to him his own shares and had not bought them as directed, he sought to repudiate the transaction. The court held that in order that he might do so he must tender the shares which he received in the new company, as he could not retain the subject of his purchase and at the same time maintain an action for the wrongful act of the broker in delivering stock owned by himself.

3. *Levy v. Loeb*, 85 N. Y. 365.

In *Rice v. Davis*, 136 Pa. St. 439; 29 Am. St. Rep. 931, a broker employed to sell stock accepted commissions from both the buyer and the seller.

**4. Liability to Undisclosed Client of Another Broker.**—It is of course true that in every purchase and sale of stock the real parties to the contract are the clients of the brokers who effect such purchase and sale, but their names are not disclosed and they are never brought together; consequently, the rights and liabilities of the ultimate parties to a stock contract are generally determined and enforced by and against their respective brokers. But upon the execution of an order to purchase or sell, it has been seen that the broker reports to his client the name of the broker from whom he has purchased or to whom he has sold, who thus appears to the client as the other party to the transaction. In the majority of cases the contract is enforced between the brokers as principals by the rules of the Stock Exchange, where they are treated as the real parties to the transaction and left to adjust matters with their respective clients afterwards. But there are a few cases in which the relations between a broker and the undisclosed client of another broker have been adjudicated, and they establish the rule that a broker who does not disclose the name of his principal is liable as principal to the other party to the contract in accordance with the general law of agency on this subject;<sup>1</sup> but if the broker dis-

The court said: "The principle underlying this case that an agent for the sale of property cannot at the same time act as agent for the purchase thereof, or interest himself therein, and thus entitle himself to compensation from both vendor and vendee, is grounded on the infallible declaration that no man can serve two masters. As a rule of public policy it is distinctly recognized in our text-books on agency and in numerous adjudicated cases, among which are *Everhart v. Searle*, 71 Pa. St. 256; *Pennsylvania R. Co. v. Flanigan*, 112 Pa. St. 558; 26 Am. & Eng. R. Cas. 88, and cases there cited. It forbids that any one intrusted with the interests of others shall in any manner make the business an object of personal interest to himself, because from the frailty of nature one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interests at the expense of his principal."

1. In *Royal Exchange Assur. Co. v. Moore*, 11 W. R. 592, the plaintiffs authorized a stock-broker to purchase for them certain debentures. On the same day the broker reported that he had bought the debentures of the defendants, who were also stock-brokers. The defendants gave a sold note signed with their own names for the amount, not acting as principals, but

as brokers for an undisclosed principal, who subsequently delivered to them a deed of transfer of the debentures, which was forged. This deed of transfer was handed to the plaintiffs by their broker, and they were afterwards compelled to deliver it to the true owner, together with the dividends collected thereon. The plaintiffs thereupon brought suit against the defendants, who were held liable on the ground that they had signed the sales note and were concluded thereby.

In *Nickalls v. Merry*, L. R., 7 H. L. 530, reversing L. R., 7 Ch. 733, a jobber, who had agreed with a broker of an undisclosed principal to purchase shares, and who had given the name of an infant as the transferee, by reason of which the principal was compelled to pay certain calls, was held liable to pay the same in an action brought against him by such undisclosed principal. Lord Hatherley said: "Nobody denies that when a broker sells shares for his principal (who is what is called an outsider, and who has employed him to sell the shares) to anybody in the market, whether a jobber or a broker, there is a good and valid contract made between those parties—that is to say, between the person whose shares are to be sold and the jobber who purchases those shares from the vendor's broker." See also *Watson v.*



closes the name of his principal, he will not himself be liable in that capacity.<sup>1</sup>

**5. Right to Commissions.**—When a broker has completed the stock transaction for his client, he is entitled to compensation for his services, and the amount of such compensation is fixed by either an express or implied agreement. If there is an express agreement, it, of course, is binding upon the parties in that regard;<sup>2</sup> but if there is no such agreement, the law will imply an agreement on the part of the client to pay the broker customary or reasonable commissions for his services.<sup>3</sup> But to entitle a broker to his commissions he must have performed his whole duty in his client's behalf.<sup>4</sup> A broker who has negotiated an unlawful wag-

Miller, 11 Wkly. Notes 18, and *Stray v. Russell*, 1 El. & El. 888.

1. In *Coles v. Bristowe*, L. R., 4 Ch. 3, the plaintiff, a holder of 200 shares in a company, by his brokers, contracted on the Stock Exchange for the sale of that number of shares to the defendants, who were jobbers, for a future day called a "settling day." Before the settling day the jobbers on a day called a "name day," in accordance with the custom at the Stock Exchange, gave to the vendor's brokers the names of seventeen persons as ultimate purchasers, to whom the shares were to be transferred in different parcels. The brokers of the vendor accordingly prepared seventeen deeds of transfer, got them executed by the vendor, and on said day handed them and the share certificates to the jobbers, who thereupon paid the price agreed upon. In the meantime the company had stopped payment and was ordered to be wound up. The seventeen transferees, through their brokers, had paid their purchase money to the jobbers, and had received but not executed the deeds of transfer, and the plaintiff, whose name remained on the list of shareholders, was obliged to pay calls on these shares. He thereupon filed a bill against the jobbers claiming indemnity against the calls. It was held that after the jobbers had paid to the vendor his purchase money and given the names of the transferees to whom the vendor executed the transfers, and these transferees through their brokers had received the transfers and paid their purchase money to the jobbers, the liability of the jobbers ceased and the bill was dismissed.

2. In *Mattingly v. Roach*, 84 Cal. 207, it appears that the owner of certain mining stock made a written

agreement with a broker that the broker should have all in excess of a certain price for which he might be able to sell the stock. He claimed to have found a purchaser for the stock ready and willing to buy the same and pay for it, and the owner thereof refused to perform his part of the contract. The broker accordingly sued for \$125,000, the amount which he claimed to have sold the stock for in excess of that agreed to be accepted by the owner. It was held that proof tending to show this state of facts was sufficient to entitle him to have the cause submitted to the jury as to whether or not he had performed the contract on his part.

3. As to the effect of custom to determine the rate of commissions, see *Morgan v. Mason*, 4 E. D. Smith (N. Y.) 636; *Miller v. Insurance Co. of N. A.*, 1 Abb. N. Cas. (N. Y.) 470 and note; *Erben v. Lorillard*, 2 Keyes (N. Y.) 567; *Adams v. Capron*, 21 Md. 186; 83 Am. Dec. 566; *Deshler v. Beers*, 32 Ill. 368; 83 Am. Dec. 274; *Potts v. Aechternacht*, 93 Pa. St. 138.

4. In *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552, it was held that a failure on the part of a broker to give his client notice and information of the exact condition and state of her account in his hands by which she could see at any time that in the end it would prove to be an irremediable loss to her, and of profit to him, was such negligence as would preclude him from recovering his commission. The court said: "If the duties of a broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble." Citing *Hamond v. Holiday*, 1 C. & P. 384. See also *Taylor v.*

ering contract for his client cannot recover his commissions therefor;<sup>1</sup> and where the broker is required to have a license, one who is not a licensed broker cannot recover his commissions,<sup>2</sup> although it seems he may recover money expended for the use of his client in the transaction.<sup>3</sup>

**VII. SPECIAL CONTRACTS AND JOINT UNDERTAKINGS.**—The customary rights and obligations which exist between broker and client may be modified by special agreement, whereby the liabilities of either party may be limited;<sup>4</sup> as where the client agrees that his business may be conducted in accordance with the usage of a particular office,<sup>5</sup> or agrees that his broker may sell the stock without notice under certain circumstances mentioned in the agreement.<sup>6</sup>

Stray, 2 C. B. N. S. 179; 87 E. C. L. 179.

A person who as a broker and commission merchant violates a contract of purchase to hold and carry grain for another by selling the grain contrary to contract cannot recover his commissions and advances. *Ball v. Clark*, 24 Blatchf. (U. S.) 81.

1. In *Josephs v. Pebrer*, 3 B. & C. 639; 10 E. C. L. 209, a stock-broker sued for his commissions and money expended in the purchase of shares in a concern called the Equitable Loan Bank Company. It appeared that the company was not legally organized, and upon a finding that the company was to be considered illegal and against the operation of 6 Geo. I., ch. 18, as having transferrable shares and affecting to act as a body corporate without authority by charter or act of parliament, it was held that the plaintiff could not maintain his action which arose out of an illegal transaction. See also *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; *Ream v. Hamilton*, 15 Mo. App. 577.

2. In *Field v. Sawyer*, 5 C. B. 844; 57 E. C. L. 842. *note A*, it was held that a broker could not recover his commissions unless he was a sworn broker.

In *Hustis v. Pickands*, 27 Ill. App. 270, it was held that brokers in mining stocks are embraced within an ordinance of the city of Chicago which renders it unlawful for any person to exercise within the city the business of a money-changer or banker, broker or commission merchant, without a license therefor, and that a broker who has purchased mining stock for a third party in violation of such ordinance without a license cannot maintain an action for his commissions.

3. In *Watts v. Brooks*, 3 Ves. 612, it

was held that if a broker had made disbursements on behalf of his client, he could recover them whether he was a sworn broker or not.

In *Jessopp v. Lutwyche*, 10 Exch. 614; 3 C. L. R. 359; 24 L. J. Exch. 65, to a declaration for money paid and on accounts stated, the defendant interposed a plea that the causes of action accrued to the plaintiff as a broker in the city of London about the purchasing and selling for the defendant in the city of London of shares, and that he was not duly licensed. It was held that the plea was bad, as the statute 6 Anne, ch. 16, does not prevent an unlicensed broker from recovering money paid at the request of his employer, or for money due on accounts stated with his employer.

4. *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80; *Markham v. Jaudon*, 41 N. Y. 244; *Wicks v. Hatch*, 62 N. Y. 535; *Stenton v. Jerome*, 54 N. Y. 480; *Hyatt v. Argenti*, 3 Cal. 151.

5. In *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80, the plaintiff employed the defendants to purchase stocks for him upon a margin, he agreeing that all transactions in stocks should be in every way subject to the usages of the defendants' office. In an action for conversion by sale without notice of stocks so purchased, the defendants offered to prove that it was the custom of their office to sell on account of failure to furnish sufficient margins at the Stock Exchange without giving notice to the customer of the time and place of sale. The offer was rejected. On appeal it was held error.

6. In *Wicks v. Hatch*, 62 N. Y. 535, the plaintiff executed a written contract authorizing his brokers to sell in their discretion at public or private sale, without notice, the stocks, etc.,

Sometimes the broker and his client engage in joint adventures, as where one of them furnishes the information, and the other contributes the capital to carry on the operation; and it has been held that the contribution of information which is acted upon in a stock transaction is a sufficient consideration to support an agreement to give the party furnishing it a portion of the profits.<sup>1</sup> Where it is agreed between the broker and his client that the former shall have a certain proportion of the proceeds of stock as compensation for his services in handling and disposing of it, the client cannot compel a surrender of the certificates without showing a breach of duty on the part of the broker.<sup>2</sup> And where two parties agree to operate jointly in stocks, and one of them opens an account with a broker in his own name and manages the transactions, keeping the broker in ignorance of the other party's interest, and at the same time carries on transactions of his own in which the other party has no interest, the silent partner cannot compel the broker to account for his share of the proceeds of the joint adventures without a settlement of the other party's entire account.<sup>3</sup> And where parties bought stock agreeing to pay a certain sum per share therefor, and in addition to such sum one-half of the profits they might realize from a sale thereof, after deducting commissions and expenses, and they subsequently agreed to

which they might be carrying for him whenever the margin should fall below five per cent. It was held that the defendants were authorized to sell at the board of brokers, without notice, in good faith and in sound discretion, when they deemed the state of the market justified or demanded it, and that the plaintiff was liable for any loss on sales beyond the amount of the margin.

In *Robinson v. Norris*, 51 How. Pr. (N. Y.) 442, *affirmed* in 6 Hun (N. Y.) 233, the client signed an agreement which authorized the brokers to sell at their discretion at the brokers' board or elsewhere, or at public or private sale, with or without advertising, and without prior demand of any kind upon or notice to the customer, of the time and place of sale, all or any gold, stocks, property, things in action, or collateral securities held by them and belonging to the customer. It was held that the customer was bound by the terms of the agreement.

1. *White v. Drew*, 56 How. Pr. (N. Y.) 53; *Marston v. Gould*, 69 N. Y. 220; *Crosby v. Watts*, 49 How. Pr. (N. Y.) 364; *Monroe v. Peck*, 3 Daly (N. Y.) 128; *Strong v. Place*, 33 How. Pr. (N. Y.) 114.

In *White v. Drew*, 56 How. Pr. (N. Y.) 53, the plaintiff was in possession of valuable information in relation to certain stock which he proposed to impart to the defendant upon condition that if the defendant should consider it sufficiently important to warrant his acting upon it, he should hold 5,000 shares of such stock at cost for the plaintiff's account and at his risk and subject to his orders for the period of sixty or ninety days. To this the defendant assented, and thereupon the plaintiff imparted the information which the defendant accepted and acted upon, pronouncing it the best point he had heard of in a long time. It was held the moment the information was given and the transaction assented to by the defendant it was an executed contract and the defendant bore the same relation to the plaintiff in regard to this stock as stock-brokers ordinarily bear to the customers for whom they are carrying stocks, and that such information being conceded of great value, was just as effective to take the case out of the Statute of Frauds as if cash payment had been made.

2. *Wight v. Wood*, 85 N. Y. 402.

3. *Read v. Jaudon*, 35 How. Pr. (N. Y.) 303.

divide their profits with a third party, who undertook to dispose of the stock, and succeeded in doing so at a profit through the agency of a stock-broker, it was held that the original vendees must account to the original vendors for the full amount of the profits realized from the sale of the stock, less their own expenses and the commissions of the broker who effected the sale, and that the interest of the third party who undertook to dispose of the stock was not chargeable either as expenses or commissions.<sup>1</sup>

**VIII. USAGES AND CUSTOMS.**—Persons who voluntarily become members of an organization are bound by the laws and usages of the same, provided they do not contravene the law of the land or public policy. It will readily be seen that there may be usages and customs of the Stock Exchange which are binding on its members in their dealings with one another, but would not be enforced in transactions between members and non-members. For example, the usage authorizing a pledgee to sell stock held as collateral security for a debt without notice to the pledgor has been held valid and lawful as between members of the Stock Exchange;<sup>2</sup> but in another case such custom was not upheld in a transaction the parties to which were not both members of the Exchange.<sup>3</sup>

1. *Berdell v. Allen*, 54 N. Y. Super. Ct. 38, *affirmed* 116 N. Y. 661.

2. In *Colket v. Ellis*, 32 Leg. Int. (Pa.) 82; 10 Phila. (Pa.) 375, the parties were both members of the Philadelphia Stock Exchange. The plaintiffs borrowed on call a sum of money from defendants, depositing as collateral security certain stocks. The plaintiffs failed to repay the money upon demand, and the defendants sold the stock without notice to the plaintiffs. Several months afterward, the stock having advanced, the plaintiffs tendered the full amount of their debt and demanded a return of the stock, which was refused, and the plaintiffs brought their action, basing their claim upon the law that the sale of collaterals must be public after due notice, and that a usage to the contrary was bad and of no effect. It was shown on the trial that there was an established general usage among brokers, when a call loan was not paid on the day it was demanded, to sell out the collateral securities at the board of brokers without further notice to the borrower. The trial court found that both parties were familiar with the usage and both acted throughout on the basis of its validity. The court was of the opinion that, as between the plaintiffs and defendants who were both members of the board of brokers, familiar with and

dealing on the basis of the usage, it was a valid and lawful custom and should control the rights of the parties.

3. In *Markham v. Jaudon*, 41 N. Y. 235, the same question arose, except that the pledgor was not a member of the Stock Exchange. The court said: "On the trial the defendants offered to prove the existence of a custom in the city of New York between brokers and their customers, by which brokers have the right to sell out their customer's stock on the exhaustion of the margin. This was an offer not to explain the meaning of particular terms or to prove attending circumstances to enable the court to construe the agreement, but to change the rights of the parties to the contract. By the law as I have interpreted it, the customer did not lose the title to his stock by any process less than a sale upon a reasonable notice or by judicial proceedings. The broker had no right to sell without such notice. A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of brokers not to purchase shares at all in a case like the present, but to content themselves with a memorandum or entry in their books of the contract made with their customer. Such practice in each case would be in hostility to the terms of the contract, an at-

But it may be laid down as a general proposition that one who employs a broker to operate in stocks for him must be presumed to give him authority to act as other brokers do, and in the execution of his orders to follow the rules and usages of the Stock Exchange.<sup>1</sup> And in the application of this rule, it has been held that it is immaterial whether the principal is familiar with such rules and usages or not.<sup>2</sup> And it seems that no private instructions given by a principal to his broker will so limit his general

tempt to change its application and would be void. The proof could not therefore be legally given;" *citing* Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235; *Beirne v. Dord*, 5 N. Y. 102; 55 Am. Dec. 321; *Thompson v. Ashton*, 14 Johns. (N. Y.) 317; *Thompson v. Riggs*, 5 Wall. (U. S.) 679.

1. *Sutton v. Tathan*, 10 Ad. & El. 27; 37 E. C. L. 25; *Pollock v. Stables*, 12 Q. B. 765; 64 E. C. L. 765; *Mitchell v. Newhall*, 15 M. & W. 308; *Smith v. Lindo*, 5 C. B. N. S. 587; 94 E. C. L. 587; *Mortimer v. McCallan*, 6 M. & W. 58; *Magee v. Atkinson*, 2 M. & W. 440; *Lloyd v. Guibert*, 35 L. J. Q. B. 74; *Nickalls v. Merry*, L. R., 7 H. L. 530; *Bayliffe v. Butterworth*, 1 Exch. 425; *Higgins v. Senior*, 8 M. & W. 834; *Lacey v. Hill*, L. R., 8 Ch. 921; *Stray v. Russell*, 29 L. J. Q. B. 115; *Cruse v. Paine*, L. R., 4 Ch. 441; *Gris-sell v. Bristowe*, L. R., 4 C. P. 36; *Coles v. Bristowe*, L. R., 4 Ch. 3; *Johnston v. Osborne*, 11 A. & E. 549; 39 E. C. L. 549; *Maxted v. Paine*, L. R., 4 Exch. 205; *Stewart v. Cauty*, 8 M. & W. 160; *Westropp v. Solomon*, 8 C. B. 345; 65 E. C. L. 345; *Hodgkinson v. Kelly*, L. R., 6 Ex. 501; *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490; 7 Johns. Ch. (N. Y.) 69; 13 Am. Dec. 606; 11 Am. Dec. 403; *Horton v. Morgan*, 19 N. Y. 170; 75 Am. Dec. 311; *Lawrence v. Maxwell*, 53 N. Y. 19; *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 142; *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. 451; *affirmed* 77 N. Y. 612; *Porter v. Wormser*, 94 N. Y. 431; *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Sumner v. Stewart*, 69 Pa. St. 321; *Durant v. Burt*, 98 Mass. 161.

2. In *Sutton v. Tathan*, 10 Ad. & El. 27; 37 E. C. L. 25, it was held that a person who employs a broker must be supposed to give him authority to act as other brokers do; and that it does not matter whether or not he himself is acquainted with the rules by which brokers are governed.

In *Pollock v. Stables*, 12 Q. B. 765; 64 E. C. L. 765, it is held that if a party authorizes a broker to buy shares for him in a particular market where the usage is that when a purchaser does not pay for his shares within a given time, the vendor giving the purchaser notice may resell and charge him with the difference, and the broker acting under this authority buys at such market in his own name, such broker if compelled to pay a difference on the shares through the neglect of his principal to supply funds, may sue the principal for money paid to his use, and it is not necessary in such action to show that the principal knew of the custom. See also *Bayliffe v. Butterworth*, 1 Exch. 425, and *Mitchell v. Newhall*, 15 M. & W. 308.

In *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407, which was not, however, a case in which the usages of the Stock Exchange were under consideration, the court cited *Pollock v. Stables*, 12 Q. B. 765; 64 E. C. L. 765, on this point, with approval, saying: "There are cases, too, of principal and agent where one has been set by another to do acts in a particular business to be done at a particular locality as on Stock Exchange, where the power to deal is a privilege obtained by a payment of a fee and is restricted to a body which has, for its regulation and government, come under certain prescribed rules or established usages. And as the agent could not do the will of his principal, nor the principal himself save in conformity with those rules or usages, it is held that the principal must be bound thereby whether cognizant of them or not, and that ignorance will not excuse him."

In *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 142, it was held that one who employs a broker is presumed to deal with reference to the customs of brokers whether known to him or not. In the complaint by the broker against his principal an allegation of the prin-

authority to transact business on the Stock Exchange in accordance with the usages thereof as to affect the rights of third parties with whom the broker deals on the Exchange.<sup>1</sup>

But it has been held that a rule of the Stock Exchange can have no retroactive operation on the dealings of non-members, notwithstanding its observance and enforcement among the members themselves.<sup>2</sup> The rule that a jobber<sup>3</sup> is relieved from the liabilities of a purchaser after he has passed a name which was not objected to within the time required by the rules, has been held reasonable and valid, although the party named as the ultimate purchaser is financially worthless.<sup>4</sup> So also the custom of closing all a broker's transactions on the Exchange when he becomes a defaulter, has been held reasonable;<sup>5</sup> but his customers will not be liable for any losses occasioned purely by his insolvency and

principal's knowledge of the custom relied upon was omitted. The court said: "The omission to aver that the defendants had knowledge of the custom appeared to me at first to be a clear objection to the complaint, but the authorities cited by counsel, particularly that of *Pollock v. Stables*, 12 Q. B. 765, 64 E. C. L. 765, are decisive as to the English rule, and I do not find that it has been ruled with us that knowledge is necessary. It existed in *Horton v. Morgan*, 6 Duer (N. Y.) 56, but it is not relied upon as essential."

1. *Coles v. Bristowe*, L. R., 4 Ch. 3.

2. *Westropp v. Solomon*, 8 C. B. 345; 65 E. C. L. 344.

3. It should here be remembered that the members of the London Stock Exchange are divided into two classes, viz., brokers and jobbers. A broker never acts as a principal, but buys and sells for other parties whose names are not disclosed. The jobber either deals on his own account, or passes names of other parties whom he represents; in case no name is passed a jobber is considered as dealing in his own behalf. See *Maxted v. Paine*, L. R., 4 Exch. 205.

4. In *Maxted v. Paine*, L. R., 6 Exch. 132, a party through his broker on the Stock Exchange sold to a jobber ten shares in Overend, Gurney & Co., Limited. The jobber on the same day passed a ticket to the plaintiff's brokers, containing the name of the ultimate purchaser; no objection was made to the name, and the plaintiff executed a transfer, to the party named, for the ten shares. It was afterwards discovered that the party named on the ticket was insolvent, and was not the real purchaser of the stock.

Calls were made on the shares which the plaintiff was compelled to pay, and being unable to recover the amount so paid from the person named as the ultimate purchaser, he sought to recover it from the jobber, on the theory that he had not relieved himself from the liabilities of a purchaser. The court held that the jobber's duty was fulfilled when he had passed a name to which no objection had been raised within the time limited by the rules, and that no recovery could be had against him, saying: "It is not likely that any rules will satisfactorily meet all the questions which may arise in cases of this kind, where the real nature of the transaction is that the holders of shares with large prospective liabilities are trying to dispose of them to unknown substitutes, but we confess that it seems to us that the usages of the Stock Exchange in this respect, if acted on, would reasonably provide for the security both of the seller and of the jobber; and if the brokers of the sellers will take care to exercise the power of objection in the cases requiring it, their employers may in the future be protected from the danger of transferring any shares to persons unable to fulfill the obligations they undertake."

5. In *Duncan v. Hill*, L. R., 6 Exch. 255, the defendant had directed plaintiffs, his brokers, to buy various stocks for the account, as it is called. Before the settling day arrived the broker was declared a defaulter, and by the rules of the Stock Exchange his transactions were closed as of the date of his default; the result was a difference against the defendants of more than £6,000, for which the plaintiffs, as the broker's assignees, brought this action,

the consequent closing of his transactions before the settling day.<sup>1</sup> And a custom prevailing on the Stock Exchange as to the form and character of transfers required to put a particular kind of securities in condition for delivery is sufficient to put the transferee on notice if the usage has not been observed.<sup>2</sup> But the general rule is that customs which are unreasonable, or are contrary to the fixed principles of the law, or to public policy, will not be upheld by the courts.<sup>3</sup>

#### IX. TRANSFER, REGISTRATION AND NEGOTIABILITY OF CERTIFICATES.

—See STOCK, vol. 23, p. 582.

#### X. PLEDGE OF STOCK CERTIFICATES AND OTHER SECURITIES.—See PLEDGE, vol. 18, p. 610.

and they were held to be entitled to recover. Counsel for the defendant took the position in the argument that while it must be admitted that the usages of the Stock Exchange are incorporated into contracts made with persons who are not members, yet that the defaulting broker had no right to avail himself as against his principal of the usages, the object of which was solely to regulate and control in case of defaulters, and to fix their liabilities to other members of the Exchange with whom they had entered into contracts. The chief baron, however, did not think this point well taken. He held that the principal must be considered as having become completely identified with his brokers, even to the extent of having his liability regulated by the accidental default of the latter, and of being subject, so far as his responsibility under the contract was concerned, to all the rules to which the latter were liable.

1. On appeal to the exchequer chamber the decision of the court of exchequer in the above case, *Duncan v. Hill*, L. R., 6 Exch. 255, was reversed in *Duncan v. Hill*, L. R., 8 Exch. 245, in so far as it held the principal liable for the losses occasioned by the insolvency of his brokers, upon the ground that while a principal who employs a broker undoubtedly authorizes the latter to bind him according to the rules and usages of the Stock Exchange, yet he does not enter into any obligation to be answerable for a liability which has arisen solely by reason of his agent's insolvency.

2. *Taliaferro v. First Nat. Bank*, 71 Md. 200.

3. In *Hamilton v. Young*, 7 L. R. Ir. 289, it was held that a usage of the Stock Exchange relied upon as author-

izing stock-brokers, who are entitled to sell stock or shares of the customer for the realization and payment of money due to them from such customer, to take over to themselves at the price of the day stock or shares of the customer for which there was an inadequate demand, or where a forced sale would lower the selling price, was unreasonable and incapable of being supported.

In *Neilson v. James*, 9 Q. B. Div. 546; 51 L. J. Q. B. 369; 46 L. T. 791, a stock-broker who had undertaken to sell shares of a joint stock bank sold them to a jobber on the Stock Exchange and sent an advice note of such sale to his client, but in accordance with the custom of the Stock Exchange omitted to state the name of the registered proprietor of the shares as required by 30 and 31 Vict. ch. 29, § 1, by reason of which the contract for the sale was void, and the bank having stopped, and an order for its winding up having been made before the day on which the jobber was entitled to name a person willing to be the purchaser, the contract for sale was repudiated and the plaintiff remained the holder of the shares. It was held that the defendant had committed a breach of duty in not making a valid contract of sale, notwithstanding the custom of the Stock Exchange to disregard the above-named statute, as such custom was both unreasonable and illegal.

In *Parson v. Martin*, 11 Gray (Mass.) 111, it was held that the custom among brokers to transfer shares to the name of another person, or to their own names for purposes other than those for which they were intrusted to them by their clients, was bad, and would not be supported.

**XI. AVOIDANCE OF THE CONTRACT—1. For Failure of Consideration.**

—It has been seen<sup>1</sup> that while there is no implied warranty that stocks or other securities sold by a broker are valuable, yet there is an implied condition that the thing delivered shall be the thing sold. If it is not, there is a failure of the consideration, and the vendee may avoid the contract and recover back the purchase price.<sup>2</sup>

In *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; 97 Am. Dec. 107, it appeared that a certificate of stock was transferred to one as trustee, and was by him fraudulently pledged for his own debt and accepted without inquiry. Upon the trial it was attempted to be shown that it was customary for stock certificates appearing to be held in trust to be bought and sold without inquiry. The court said: "The circumstance that stock certificates issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. The usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts."

In *Day v. Holmes*, 103 Mass. 306, it was attempted to enforce a custom whereby a broker ordered to buy stock deliverable at any time at buyer's option in sixty days, might buy the stock himself at thirty days and deliver it to his customer at the end of sixty days at an increased price with interest and the usual commissions. It was held that such usage was bad.

In *Lombardo v. Case*, 30 How. Pr. (N. Y.) 117, it was attempted to show that by a custom among brokers and dealers in stocks the word, "dividends," or "surplus dividends" in the contract was intended to mean dividends declared on the stock without regard to whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling "dividend on" and not "ex dividend." The court held that the custom would not be allowed to be proven, for the reason that effect could not be given to it without making a new contract between the parties. See also *Spear v. Hart*, 3 Robt. (N. Y.) 420.

In *DeCordova v. Barnum*, 130 N. Y. 615, the court refused to admit evidence of a custom of stock-brokers, where collateral was put up as a mar-

gin, and the account became sufficiently reduced to jeopardize it, to advertise and sell the collateral and charge the customer with the balance. Upon appeal it was held no error to exclude such evidence.

In *Evans v. Waln*, 71 Pa. St. 69, a person employed one Wister, a broker in Philadelphia, to sell stock. He sold it through a broker in New York, who kept this together with other transactions of the Philadelphia broker in one account, settling with him from time to time by paying and receiving net balances in cash. Upon the failure of the Philadelphia broker it was insisted on the part of the New York broker that he was authorized so to keep his account by a custom among stock-brokers. The court said: "Nor was there any error in rejecting the offer to show that it was a custom of stock-brokers, when dealing with stock-brokers in other cities, to put all the transactions between them into one account, and to remit, or draw, for the general balance. Such custom, if proven, would have constituted no defense to the action; admitting its existence, the defendant had no right to credit Wister's account with the proceeds of the stock. If there is a custom among stock-brokers, when dealing with others, to appropriate money belonging to the principal to the payment of the broker's indebtedness, the sooner it is abolished the better: *Malus usus est abolendus*. A custom so iniquitous can never obtain the force or sanction of the law, and the marvel is that it should be set up as a defense to this action."

In *Marye v. Strouse*, 5 Fed. Rep. 483, it was held that a custom among stock-brokers to charge an arbitrary sum for telegrams, regardless of the actual cost of the same, was bad.

1. See *supra*, this title, *Sale of Stock*.

2. *Young v. Cole*, 3 Bing. N. Cas. 724; 32 E. C. L. 302; *Westropp v. Solomon*, 8 C. B. 345; 52 E. C. L. 345.



2. By Operation of the Statute of Frauds.—See *STOCK*, vol. 23, p. 582.

3. For Illegality of the Transaction—*a*. *STOCK-JOBGING ACTS*.—In the absence of statutory limitations, stock may be bought and sold the same as any other species of personal property.<sup>1</sup> But in *England*<sup>2</sup> and in some of the states of the Union,<sup>3</sup> statutes known as “Stock-Jobbing Acts” have been enacted for the purpose of checking speculation in stocks generally, or of preventing it in some particular kinds of securities.

It is not proposed to make a minute examination of the provisions of these statutes, but to inquire how far they render stock contracts incapable of enforcement. For the purpose of this inquiry these statutes may be divided into two classes, viz., those which are intended to prohibit altogether the transactions embraced within their terms and impose penalties for engaging therein, as did Sir John Barnard’s Act, and those which simply declare certain transactions void or voidable and impose no penalties for engaging in them. Contracts in violation of statutes of the first class are not only incapable of enforcement themselves, but obligations incurred by the parties thereto to third parties who have knowledge that their means are to be used in the promotion of such transactions, cannot be enforced.<sup>4</sup> So a promis-

1. *Barklay’s Case*, 26 Beav. 177; *Aston’s Case*, 4 De G. & J. 320; *Harrison v. Heathorn*, 6 M. & G. 81; 46 E. C. L. 81; *Tempest v. Kilner*, 2 C. B. 308; 52 E. C. L. 300; *Bagge’s Case*, 13 Beav. 162; *Noyes v. Spaulding*, 27 Vt. 429.

2. 7 Geo. II., ch. 8 and 10 Geo. II., ch. 8, known as “Sir John Barnard’s Act,” was enacted to prevent speculation in the government securities of England. The act applied only to public stocks and not to railway and joint-stock shares. *Williams v. Trye*, 18 Beav. 366; *Hewitt v. Price*, 5 Scot. N. R. 229; 4 M. & G. 355; 46 E. C. L. 188; *Ex parte Turner*, 3 De G. & J. 46; *Thacker v. Hardy*, 4 Q. B. Div. 680. The act did not apply where the seller really had possession of the stock intended to be transferred. *Saunders v. Kentish*, 8 T. R. 162; *Tate v. Wellings*, 3 T. R. 531. It did not apply to bargains in foreign funds, but was confined to the stocks of England. *Elsworth v. Cole*, 2 M. & W. 31; *Henderson v. Bise*, 3 Stark 158; *Wells v. Porter*, 3 Scot. 141; 2 Bing. N. Cas. 722; 29 E. C. L. 469; *Oakley v. Rigby*, 2 Bing. N. Cas. 732; 29 E. C. L. 469; *Robson v. Fallows*, 3 Bing. N. Cas. 392; 32 E. C. L. 173; *Morgan v. Pebrer*, 3 Bing. N. Cas. 457; 32 E. C. L. 202;

*Patterson v. Powell*, 9 Bing. 329; 2 M. & S. 399; 23 E. C. L. 290; *Thackoorseydass v. Dhondmull*, 12 Jur. 315.

One possessed of *omnia* was considered as potentially in possession of stock and could legally contract to sell out *omnia* to be replaced by stock. *Oliverson v. Coles*, 1 Stark 496.

*Omnium* is the aggregate value of the different stocks in which the loans of the government are usually funded. McCulloch, “Sir John Barnard’s Act” was repealed by 23 and 24 Vict. ch. 28.

3. See *supra*, this title, *Legality of Short Sales*.

4. The law on this point has undergone a change since the first decisions were rendered. In *Faikney v. Reynolds*, 4 Burr. 2070, which came before the King’s Bench in 1767, a party had paid, at the request of another, money on a contract which was illegal, and sued for its recovery. Judgment was given for the plaintiff. Lord Mansfield said: “One of these two persons has paid money for the other and on his account, and he gives him his bond to secure the repayment of it. This is not prohibited. He is not concerned in the use which the other makes of the money.” Next came *Petrie v. Hannay*, 3 T. R. 418, which was decided in 1769. In this case *Faikney v. Rey-*

**Avoidance of the Contract. STOCK-BROKERS. For Illegality of Transaction.**

nous, 4 Burr. 2070, was followed with considerable hesitation and against the opinion of Lord Kenyon. Much stress was laid upon the distinction between *malum in se* and *malum prohibitum*. These two cases were repeatedly questioned and disapproved in *Booth v. Hodgson*, 6 T. R. 405; *Aubert v. Maze*, 2 B. & P. 371; *Mitchell v. Cockburn*, 2 H. Bl. 379; *Webb v. Brooke*, 3 Taunt. 6, and *Langton v. Hughes*, 1 M. & S. 594. In these cases the distinction between *malum in se* and *malum prohibitum* was overruled. Next came the case of *Bowry v. Bennett*, 1 Camp. 348, which followed the earlier decisions on this point; as did also the case of *Hodgson v. Temple*, 5 Taunt. 181, decided in the year 1813. But in the same year *Langton v. Hughes*, 1 M. & S. 593, was decided in the King's Bench. It was tried before Lord Ellenborough at *nisi prius*, and was an action for the price of drugs sold to the defendants who were brewers, the plaintiffs knowing that the defendants intended to use the drugs for mixing with beer—a use prohibited by the statute. His lordship charged the jury that the plaintiffs, in selling drugs to the defendants knowing that they were to be used contrary to the statute, were aiding them in a breach of the law, and were, therefore, not entitled to recover. He, however, reserved the point, and the ruling was maintained by all the judges. Next came the leading case of *Cannan v. Bryce*, 3 B. & Ald. 179; 5 E. C. L. 255, which was decided in the King's Bench in 1819, and definitely settles the law as it is stated in the text. In this case it appears that the plaintiffs had loaned money to a party engaged in an illegal stock transaction in violation of Sir John Barnard's Act. Upon their refusal to repay he brought his action to recover the money. Abbot, C. J., in delivering the opinion of the court, said: "On the part of the plaintiffs it was contended, that this loan being made for the purpose of enabling Amos to pay or compound differences upon illegal stock-jobbing transactions, was in itself illegal, and, consequently, all securities given for repayment of the loan were void. On the part of the defendant it was contended, that as he was not a party to the illegal transaction, the loan was not illegal, and the securities, therefore, were available in law. The case was

very fully and ably argued; all the authorities bearing upon it on one side or the other were quoted and discussed in such a manner that it is not necessary to notice many of them with any particularity. The authorities principally in favor of the defendant are those of *Faikney v. Reynous*, 4 Burr. 2070, and *Petrie v. Hannay*, 3 T. R. 418. The propriety of these decisions has been questioned in several subsequent cases that are quoted on the part of the plaintiff, and the distinction taken in the former of them between *malum prohibitum* and *malum in se* was expressly disallowed in the case of *Aubert v. Maze*, 2 B. & P. 371. Indeed we think no such distinction can be allowed in a court of law. The court is bound in the administration of the law to consider every act to be unlawful which the law has prohibited to be done. The statute upon which the objection to the loan in this case arises, viz., 7 Geo. II., ch. 8, was founded upon public policy to prevent, according to the language of the preamble, 'the pernicious and destructive practice of stock-jobbing, whereby many of his majesty's subjects are diverted from pursuing their lawful trades and vocations to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce.' By the 5th section, upon which this case more particularly depends, it is enacted that no money or other consideration shall be voluntarily given, paid, had or received for the compounding and satisfying or making up any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed, and all and every person who shall voluntarily compound, make up, pay, satisfy, take or receive such difference money, etc., shall forfeit the sum of one hundred pounds. . . . Then as the statute in question has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making of such payment is not an unlawful act, and if it is unlawful for one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing

sory note, given for a balance of money advanced to be used in illegal stock-jobbing transactions, is void;<sup>1</sup> and a bill given for the amount of stock-jobbing differences is void in the hands of an indorsee with notice,<sup>2</sup> or in the hands of one to whom it was indorsed for value after maturity.<sup>3</sup> But a bill of exchange or promissory note, given for such differences, is valid in the hands of one to whom it was indorsed for value, before it was due, and without notice of the illegal consideration.<sup>4</sup>

But where the statute imposes no penalty for engaging in such transactions, and does not make it unlawful to meet the obligations incurred therein, the payment of debts contracted with third parties for the purpose of meeting such obligations may be enforced, notwithstanding the knowledge of such third parties of the use to which the money is to be put.<sup>5</sup> So where a broker buys stock upon the order of his principal, who refuses to accept and pay for the same, and the broker sells it at a loss, he may recover the difference between the purchasing and selling price

that object." This case was followed in the later cases of *McKinnell v. Robinson*, 3 M. & W. 435; and *Pearce v. Brooks*, L. R., 1 Exch. 213. See *Staples v. Gould*, 9 N. Y. 520, holding that a principal who had sold stock "short," through the agency of his broker, in violation of the act against stock-jobbing, could not recover any differences from the broker, although he would otherwise be entitled to them.

1. *Ex parte Bulmer*, 13 Ves. 313.

2. *Steers v. Laishley*, 6 T. R. 61; 1 Esp. 166; *Amory v. Merryweather*, 4 D. & Ry. 86; 2 B. & C. 573; 9 E. C. L. 183.

3. *Brown v. Turner*, 7 T. R. 630; 2 Esp. 631.

4. *Day v. Stuart*, 6 Bing. 109; 3 M. & P. 334; 19 E. C. L. 20; *Greenland v. Dyer*, 2 M. & R. 422; *Amory v. Merryweather*, 4 D. & Ry. 86; 2 B. & C. 573; 9 E. C. L. 183.

5. In *Wyman v. Fiske*, 3 Allen (Mass.) 238; 80 Am. Dec. 66, it appears that a third party, upon the request of one of the parties to a stock-jobbing transaction, furnished the money to pay debts incurred therein, for which the party who borrowed it gave his promissory note. Upon the point as to whether or not the note was valid, the court said: "The auditor credits the defendant with a note of \$1,724.28. In respect to this item it was proved that one Wheelock, a broker, contracted to sell on time for the plaintiff certain stocks which he did not own, and of which he had no control; that Wheelock purchased

other stocks in order to fulfill this contract; that this transaction resulted in a loss of \$1,724.28, and that the defendant, knowing the facts, paid this sum to Wheelock for the plaintiff and took his note therefor. The plaintiff contended before the auditor that this transaction was within St. 1836, ch. 279, which is re-enacted in Gen. Sts. ch. 105, § 6, against stock-jobbing. It provides, in substance, that all contracts for the sale or transfer of stock shall be absolutely void, unless the party contracting to sell or transfer is at the time of making the contract the owner or assignee of the stocks, or authorized by the owner or assignee, or his agent, to make the sale; but it does not make the act penal, and does not, like the statutes of *England* and *New York* on the same subject, provide that any money paid on such a contract may be recovered back. It merely denies to the parties all legal aid in enforcing such contracts, and this places them on similar grounds with oral agreements that are within the Statute of Frauds. It is not criminal to make them; they are merely deprived of legal validity. It is clear that the plaintiff's contract, which he made through his broker, Wheelock, was within the statute. It is not necessary to decide whether Wheelock could have compelled the plaintiff to refund the money which he had advanced for the plaintiff to enable him to make good his losses, for if the plaintiff chose to reimburse him he had a legal right to do so. The payment would at least be legal as a

from his principal, and the fact that the original vendor was not the owner of the stock at the time he bargained for the sale of it is no defense to the action.<sup>1</sup> And if the vendor of stock owns it at the time of making a contract for future delivery, the fact that he sells it before the time set for the delivery is not sufficient to avoid the contract.<sup>2</sup> But a contract within the statute cannot be enforced between the parties to it; the courts will leave them to their own resources.<sup>3</sup> The general rule is that one who seeks to avoid a contract on the ground of illegality has the burden of proving such defense,<sup>4</sup> and it has been held that this rule applies to contracts within the statutes against stock-jobbing,<sup>5</sup> although the contrary conclusion has been reached in a very forcible opinion in another jurisdiction.<sup>6</sup>

gift, and the plaintiff having a legal right to make this voluntary payment had a right to procure a third person to make it, and such payment would be a valid consideration for a note. The note in question has such a consideration, and is therefore valid, and the auditor properly allowed it."

1. *Durant v. Burt*, 98 Mass. 161.

A broker employed to purchase stock contracted for it in his own name with J. S., who owned it at the time, but had made a prior contract for its sale. The employer, for groundless reasons, repudiated the contract; but the broker, having no knowledge of or reasons to suspect a prior sale by J. S., paid for the stock when tendered to him. It was held that the Gen. Sts., ch. 105, § 6, making void contracts for the sale of stocks not owned by the seller did not debar the broker from recovering from his employer the amount so paid. *Brown v. Phelps*, 103 Mass. 313.

2. *Frost v. Clarkson*, 7 Cow. (N. Y.) 26. See also *Barrett v. Hyde*, 10 Allen (Mass.) 160; *Barrett v. Mead*, 7 Gray (Mass.) 337; *Thompson v. Alger*, 13 Met. (Mass.) 428; *Price v. Minot*, 107 Mass. 49.

3. *Staples v. Gould*, 9 N. Y. 520; *Dykens v. Townsend*, 24 N. Y. 57; *Wyman v. Fiske*, 3 Allen (Mass.) 238; 80 Am. Dec. 66; *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137.

4. *Rex v. Hawkins*, 10 East 211; *Bennett v. Clough*, 1 B. & Ald. 461; *Sissons v. Dixon*, 5 B. & C. 758; 12 E. C. L. 371; *Monke v. Butler*, 1 Rol. 83; *Harris v. White*, 81 N. Y. 532.

5. *Dykens v. Townsend*, 24 N. Y. 57, was an action against a purchaser to recover for a refusal to perform his contract to purchase certain shares of

stock. He set up as a defense that the contract was void under the stock-jobbing act, and it was held that the burden of proof was on him to show that the sellers at the time the contract was made did not own and were not authorized to sell the stock contracted for. The court said, after referring to the case of *Stebbins v. Leowolf*, 3 Cush. (Mass.) 143: "If, as has been shown, the contract is a valid one upon its face, and not void by the Statute of Frauds, all that was necessary for the plaintiff to do was to prove the execution of the contract, a readiness and offer to perform on his part, and a refusal of the defendant, to entitle him to recover. Such a contract at common law and in absence of the stock-jobbing act would be clearly valid, and the courts will not presume that the party contracting to sell stocks was not the owner thereof for the purpose of rendering the contract void. On the contrary, the presumption is that the contract is valid until the contrary is shown by the defendant. Where a contract is apparently valid upon its face, the party seeking to impeach it must prove that it is made under such circumstances or for such purposes as to render it void before the defense can be made available. We are quite clear that the burden of proof rested upon the defendant to show that the plaintiffs at the time they made these contracts did not own and were not authorized to sell the stock contracted for."

6. In *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137, a conclusion directly the opposite of that in *Dykens v. Townsend*, 24 N. Y. 57, was reached. In this case a contract to be performed in the state of *New York* was before the court, and

b. *WAGERING CONTRACTS*—(See *GAMBLING CONTRACTS*, vol. 8, p. 1004).—At common law wagering contracts are not void, unless they tend to violate some rule of public decency or morality, or some principle of public policy.<sup>1</sup> But in *England*, and perhaps all of the states of the Union there are now statutes designed to prevent gambling, and these take away from the parties to wagering contracts all remedy in the courts of justice. In the absence of statutes aimed specifically at stock-jobbing, many stock transactions have been held to be within the purview of the statutes against wagering generally. As has been seen, *bona fide* contracts for the future delivery of stocks or other chattels are legal and valid;<sup>2</sup> but the general rule is that if the transaction is fictitious, and the parties to the contract do not intend an actual sale and delivery of the article dealt in, but contemplate merely a settlement of the differences between the

the defendant, as in the other case, set up the *New York* statute as a defense to the action. The court said: "The next question is, upon whom is the burden of proof to show that the vendors at the time of making the contract had the shares of stock to the amount stipulated to be sold, and that such shares were so held by them as to authorize them to contract for a sale and delivery thereof at a future day? If this was a contract in writing promising to pay a certain sum of money, and the promise was of a character which imported a consideration on the face of it, so that the proof of the contract would of itself make a *prima facie* case, there is no doubt that if the defendant would avail himself of any secret taint which rendered the contract illegal—as, for example, if the defendant in an action upon a note of hand alleges usury, or sets up in defense that the note was given for a gaming debt—the burden of proof rests upon the party who relies upon such defense; but the present case differs from the one just stated. The plaintiff, in this case, must show a legal contract binding upon the vendor and vendee with relation to these shares before he can establish a *prima facie* case. He proposes, then, in the first instance, to show an agreement by the one party to sell, and by the other to buy, certain shares of Harlem railroad stock to be transferred, at a future day; but evidence to this extent shows no valid contract. The law requires that the vendor shall be the owner of the stock he stipulates to transfer at the time he makes such contract, and this fact he is bound to

prove. It is an element essential to the validity of the contract, and one without which the contract could not be enforced against the plaintiff, as the purchaser, or the plaintiff as agent have any claim against the defendant as his principal." Considering that this is a case in which a peculiar knowledge of the fact to be proved rests with the plaintiff, it is hard to see how the *New York* court has the best of the argument.

1. *Sherbon v. Colebach*, 2 Vent. 175; *Morgan v. Pebrer*, 4 Scott 230; *Goold v. Elliott*, 3 T. R. 693; *Johnson v. Lansley*, 12 C. B. 468; 74 E. C. L. 468; *Dalby v. India, etc., L. Assur. Co.*, 15 C. B. 365; 24 L. J. C. P. 2, 6; 80 E. C. L. 365; *Hussey v. Crickitt*, 3 Camp. 168; *Jones v. Randall, Cowp.* 39; *Thackoorseydass v. Dhondmull*, 6 Moore P. C. C. 300; *Doolubdas v. Ramlool*, 3 Eng. L. & Eq. 39.

2. See *supra*, this title, *Legality of Short Sales*; also *Grizewood v. Blane*, 11 C. B. 540; 73 E. C. L. 525; *Story v. Salomon*, 71 N. Y. 420; *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573; *Cassard v. Hinman*, 1 Bosw. (N. Y.) 207; *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. 451; *Stanton v. Small*, 3 Sandf. (N. Y.) 230; *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398; *Kirkpatrick v. Bonsall*, 72 Pa. St. 158; *Brua's Appeal*, 55 Pa. St. 294; *Pickering v. Cease*, 79 Ill. 330; *Logan v. Musick*, 81 Ill. 419; *Corbett v. Underwood*, 83 Ill. 327; 25 Am. Rep. 392; *Pixley v. Boynton*, 79 Ill. 353; *Barnard v. Backhaus*, 52 Wis. 593; *Porter v. Viets*, 1 Biss. (U. S.) 178.

alleged selling price and the market price at the maturity of the contract, it is a mere wager upon the price of the article, and does not constitute a valid and enforceable contract.<sup>1</sup>

It is not, however, a contract between the principals that is the special object of this inquiry, but the rights of the stock-broker through whom such contract is made. In *England* the statute against gaming<sup>2</sup> imposes no penalty for paying gambling debts, and does not make wagering contracts unlawful, but simply declares them null and void. In this respect it differs from Sir John Barnard's Act, and, as might be expected, the courts have made a distinction between the two as regards the right of third parties to recover money advanced to pay the losses of one of the parties to contracts within these statutes, respectively. It is well settled there, that if a stock-broker negotiates a wagering contract for his principal, he may nevertheless recover his commissions, and if he pays losses at the request of his principal, or himself suffers loss from the transaction through the operation of the rules of the Stock Exchange, he may recover from his principal the amount so paid, or the amount of such loss, notwithstanding his knowledge of the nature of the transaction.<sup>3</sup>

In the *United States* there is a manifest disposition on the part of many of the courts to ignore the distinction between contracts to do an unlawful act and those which are simply void and the parties thereto left remediless in the courts. It should be observed also that many of the statutes against gaming declare such contracts unlawful; and when cases arise under such statutes, due consideration should be given to that fact. There is also a tendency on the part of the courts to declare such contracts unlawful, in the absence of statutory declarations on the subject, on the ground that they are contrary to public policy. The cases on

1. *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *Brua's Appeal*, 55 Pa. St. 294; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Maxton v. Gheen*, 75 Pa. St. 166; *North v. Phillips*, 89 Pa. St. 250; *Dickson v. Thomas*, 97 Pa. St. 278; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Wolcott v. Heath*, 78 Ill. 437; *Walls v. Bailey*, 49 N. Y. 472; 10 Am. Rep. 407; *Tyler v. Barrows*, 6 Robt. (N. Y.) 104; *Cassard v. Hinman*, 1 Bosw. (N. Y.) 207; *Yerkes v. Salomon*, 11 Hun (N. Y.) 471; *Durant v. Burt*, 98 Mass. 167; *Sampson v. Shaw*, 101 Mass. 150; 3 Am. Rep. 327; *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; *Rourke v. Short*, 5 E. & B. 904; 85 E. C. L. 904; *Hibblewhite v. M'Morine*, 5 M. & W. 466; *Petrie v. Hannay*, 3 T. R. 424; *Brown v. Speyers*, 20 Gratt. (Va.) 309; *Dickson v. Thomas*, 97 Pa. St. 279, and other cases cited in last note.

2. 8 & 9 Vict., ch. 109, § 18.

3. *Jessopp v. Lutwyche*, 10 Exch. 614; *Knight v. Cambers*, 15 C. B. 562; 80 E. C. L. 562; *Knight v. Fitch*, 15 C. B. 566; 24 L. J. C. P. 122; 80 E. C. L. 566; *Rosewarne v. Billing*, 15 C. B. N. S. 316; 109 E. C. L. 316; *Bubb v. Yelverton*, 24 L. T., N. S. 822; *Thacker v. Hardy*, 4 Q. B. Div. 685. In *Rosewarne v. Billing*, 15 C. B. N. S. 316; 109 E. C. L. 316, a broker conducted a stock transaction for his principal, which was within 8 & 9 Vict., ch. 109, and at the request of his principal paid losses which resulted from such transaction. He sued his principal to recover the money, and the plea was set up that the contract between the principals was a wagering contract and therefore void. The plea was held bad in an action between the broker and his client. *Erle, C. J.*, said: "I am of opinion that our judgment

## Avoidance of the Contract. *STOCK-BROKERS. For Illegality of Transaction.*

upon this demurrer must be for the plaintiff. He sues the defendant for money which he alleges he paid for the defendant at his request. The answer the defendant sets up is that the money became due by reason of certain wagering contracts made by the plaintiff for the defendant with certain other persons since the passage of 8 & 9 Vict., ch. 109. Now the law, as to gaming contracts, is that all such contracts are null and void, and no action can be maintained upon them; but they are not therefore illegal. The parties making them are not liable to any actions or to any penalties. Here the plaintiff paid the differences according to the result and at defendant's request. I am clearly of opinion that if a man loses a wager and gets another to pay the money for him, an action lies for the recovery of the money so paid. In *Jessopp v. Lutwyche*, 10 Exch. 614, and *Knight v. Cambers*, 15 C. B. 562; 80 E. C. L. 562, the court of Exchequer and this court both say that the plaintiff was entitled to judgment, on the ground that the money was alleged to have been paid at request of the defendant, and that there was nothing to show that there was any illegality. Those cases are in point to show this to be a bad plea. I should incline to think that if one requests another to make a wagering contract on his account and to pay the loss, if loss happens, that would be a continuing request to pay until revoked. If the party were a broker who by the usage of the share market was bound in all events to pay, it might be a question whether the principal could be allowed to rescind. It will be time enough to decide that question whenever it shall arise."

In *Thacker v. Hardy*, 4 Q. B. Div. 685, the question suggested by the court in *Rosewarne v. Billing*, 15 C. B. N. S. 316; 109 E. C. L. 316, did arise. In that case the plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange. To the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable, and he sued the defendant for indemnity

against the liability incurred by him and for his commissions as a broker; and it was held that he might recover notwithstanding the contracts which he negotiated were within 8 & 9 Vict., ch. 109, § 18. Lindley, J., said: "This act does not expressly mention or allude to Stock Exchange transactions, but it has been decided that agreements between buyers and sellers of shares and stocks to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering contracts within the meaning of the statute. *Grizewood v. Blane*, 11 C. B. 526; 3 E. C. L. 526; *Barry v. Croskey*, 2 J. & H. 21, and *Cooper v. Neil*, 13 W. N. 128, all decided that. But the plaintiff did not agree to buy or sell from or to the defendant. I have the authority of Brett, Lord, J., for saying that the statute only affects the contract which makes the bet or wager. The agreement between the plaintiff and defendant rendered it necessary that the plaintiff should himself as principal enter into real contracts of purchase and sale with jobbers, and the plaintiff accordingly did so, and in respect to these contracts he incurred obligations, for the non-performance of which actions could and can now be brought against him. It is against the liability so incurred that he seeks to be indemnified.

Now, if the gaming and wagering were illegal, I should be of the opinion that the illegality of the contracts in which the plaintiff and defendant were engaged would have tainted as between themselves whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming in a court of law any indemnity from the defendant in respect of the liabilities that he had incurred. *Cannan v. Bryce*, 3 B. & Ald. 179; 5 E. C. L. 255; *M'Kinnell v. Robinson*, 3 M. & W. 434; *Lyne v. Siesfield*, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced they are not illegal. *Fitch v. Jones*, 5 E. & B. 238; 85 E. C. L. 238, is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange. *Oulds v. Harrison*, 10 Exch. 572; and if money be paid by plaintiff at the request of a defendant, it can be recovered by action against him. *Knight v. Cambers*, 15 C. B. 562; 80 E. C. L. 562; *Jessopp v. Lutwyche*, 10 Exch.

this point arising out of stock transactions are not numerous; but from such as there are, and from analogous cases, the rule may be evolved that where the broker enters into a gambling transaction with full knowledge of the nature of the same, and renders his assistance in its consummation, he can recover neither his commissions nor advances made by him to one of the parties in furtherance of the undertaking.<sup>1</sup> And it has been held that, in stock transactions, where the contract between the principals is shown to be tainted with gambling, the broker himself will be considered a principal, and, as such, left without remedy in the courts;<sup>2</sup> and that a minor, for whom he has conducted stock transactions of a wagering character, may recover back the margins deposited with him and lost in such transactions, notwithstanding the bro-

614; *Rosewarne v. Billing*, 15 C. B. N. S. 316; 109 E. C. L. 316. And it has been held that a request to pay may be inferred from an authority to bet. *Oldham v. Ramsden*, 44 L. J. C. P. 309. Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining his action."

1. *Fareira v. Gabell*, 89 Pa. St. 89; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354; *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *Irwin v. Williar*, 110 U. S. 510; *Embrey v. Jemison*, 131 U. S. 336; *Bartlett v. Smith*, 13 Fed. Rep. 263; *In re Green*, 7 Biss. (U. S.) 338; *Clarke v. Foss*, 7 Biss. (U. S.) 540; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745 and note. See also *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23 and note; *Kahn v. Walton*, 46 Ohio 195; *Cothran v. Ellis*, 125 Ill. 496; *Whitesides v. Hunt*, 97 Ind. 191; 49 Am. Rep. 441; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa 41; *Rumsey v. Berry*, 65 Me. 570; *Marshall v. Thurston*, 3 Lea (Tenn.) 740; *McLean v. Stuve*, 15 Mo. App. 317; *Ream v. Hamilton*, 15 Mo. App. 577; *Warren v. Hewitt*, 45 Ga. 501. *Wyman v. Fiske*, 3 Allen (Mass.) 238; 80 Am. Dec. 66, which arose out of a stock-jobbing transaction, supports the English rule.

But in *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159, the court decided that the broker who knowingly makes a wagering contract and advances money on account thereof, at the request of his principal, cannot recover either the money so advanced or commissions for his services. After a review of the American and English

authorities, the court said: "It is not denied that wagering contracts are void by the common law of *Massachusetts*; but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal."

In *Irwin v. Williar*, 110 U. S. 499, it is said: "In *England*, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable; *Thacker v. Hardy*, 4 Q. B. Div. 685; while generally, in this country, all wagering contracts are held to be illegal and void as against public policy." *Citing* *Dickson v. Thomas*, 97 Pa. St. 278; *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Melchert v. American Union Tel. Co.*, 3 McCrary (U. S.) 521; 11 Fed. Rep. 193 and note; *Barnard v. Backhaus*, 52 Wis. 593; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Love v. Harvey*, 114 Mass. 80. It was accordingly held that when a broker is privy to the unlawful design of the parties, and brings them together for the very purpose of making an illegal agreement, he is *particeps criminis* and cannot recover for services rendered or losses incurred by himself in behalf of either in forwarding the transaction.

2. *Ruchizky v. De Haven*, 97 Pa. St.



ker's ignorance of his customer's infancy.<sup>1</sup> But these decisions have been much criticised, and it would seem that their authority is somewhat shaken by late utterances of the court in which they were rendered.<sup>2</sup> But on the other hand, it appears to be the rule in the *United States* as in *England*, that if the broker acts in good faith, and enters into *bona fide* contracts with third parties on his customer's behalf in which he incurs a personal liability, he may recover his commissions and advances made in payment of losses, notwithstanding the gambling intent of his principal.<sup>3</sup> Where, after the successful termination of a series of speculative transactions in stocks, an account was rendered and the profits paid over to the principal, it was held that he was also entitled to recover back the margins he had deposited with his brokers, not-

202; *Fareira v. Gabell*, 89 Pa. St. 89; *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308.

1. *Ruchizky v. De Haven*, 97 Pa. St. 202.

2. In *Peters v. Grim*, 149 Pa. St. 163, decided in the Supreme Court of *Pennsylvania* in May, 1892, Mitchell, J., said: "In dealing with stock transactions falling within or in any way connected with wagering contracts, the law of *Pennsylvania* is of exceptional and, for myself I would say, of illogical and untenable severity in its interference with the business contracts of parties *sui juris*, and entirely competent to manage their own affairs. But, even in this class of cases, the decisions have only gone so far as to sustain the opening of the whole transaction after it has nominally closed, where the demand is for a part of the actual gains or losses of the illegal acts. See *Brua's Appeal*, 55 Pa. St. 294; *North v. Phillips*, 89 Pa. St. 250; *Dickson v. Thomas*, 97 Pa. St. 278; *Griffiths v. Sears*, 112 Pa. St. 523. Even *Fareira v. Gabel*, 89 Pa. St. 89, and *Ruchizky v. De Haven*, 97 Pa. St. 202—two extreme cases, of which it is justly said by Mr. Biddle, in his *Law of Stock-brokers*, p. 308, that they are 'opposed in principle to all the decisions both of the English courts and of every court of every state in the Union'—were decided upon the ground that the cause of action was loss in the illegal transactions."

3. *Bartlett v. Smith*, 13 Fed. Rep. 263; *Lehman v. Strassberger*, 2 Woods (U. S.) 554; *In re Green*, 7 Biss. (U. S.) 338; *Clarke v. Foss*, 7 Biss. (U. S.) 553; *Marshall v. Thurston*, 3 Lea (Tenn.) 740; *Warren v. Hewitt*, 45 Ga. 501; *Owen v. Davis*, 1 Bailey (S. Car.)

315; *Durant v. Burt*, 98 Mass. 167. See also *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

In *Warren v. Hewitt*, 45 Ga. 507, the court said: "The judge, in his charge to the jury, and in his judgment refusing a new trial, treats *Warren, Lane & Co.* as a principal party to the transaction, and as selling the cotton to *Hewitt*. This error is fundamental. The evidence shows that they only acted as his agents in effecting the purchase in *Baltimore*. The transaction for the purchase of the cotton was clearly such as indicated in section 2596 of the Code, and would not have been enforced, as between *Hewitt* and the seller, in favor of either party. But where the transaction has been completed, and *Warren, Lane & Co.* seek to recover advances made by them, in good faith, as the agents of *Hewitt*, which advances were authorized or ratified by him, we think they are entitled to do so."

In *Bartlett v. Smith*, 13 Fed. Rep. 268, *Nelson, J.*, after stating the law applicable to the case if it should be found that the brokers were privy to and knowingly assisted in the illegal transaction, charged the jury as follows: "On the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, without disclosing the name of their principal, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties for defendant's account, and at his request subsequently settled the losses and paid the amount due under the contracts, they are entitled to recover from the defendant the moneys thus paid out at his request."

withstanding the wagering character of the transactions in which they had been engaged.<sup>1</sup>

c. "CORNERS" IN STOCKS.—A "corner" is a scheme whereby a greater or less number of "bulls" or those who are "long" of certain stocks or securities obtain control of the available quantity thereof, and thus compel the "bears" who have sold such stocks or securities "short" to pay exorbitant prices for stock to cover their short sales, or to pay large sums as differences at the maturity of their contracts. Contracts made for the consummation of such agreements are illegal and void,<sup>2</sup> and conspiracies to enhance the prices of stocks to the damage of the purchasing public are indictable offenses in *England*.<sup>3</sup>

**XII. MEASURE OF DAMAGES**—(See also DAMAGES, vol. 5, p. 1).—In cases arising out of breaches of contract for the purchase and sale of stock, and out of breaches of duty on the part of the agent when ordered to purchase or to sell, the law of damages is the same as in similar transactions concerning other personal property and will not be considered here.<sup>4</sup> But in reference to the unlawful conversion of stock certificates and other securities which fluctuate widely in value, the law of damages differs somewhat from that applied in cases arising out of the conversion of other chattels, and it is to this difference that attention is here directed. It was formerly the rule that, where a broker was carrying stocks for his customer and unlawfully converted them to his own use, he was liable in damages to an amount equal to the highest market price of the stocks converted at any time between

1. *Peters v. Grim*, 149 Pa. St. 163; *Repllier v. Jacobs*, 149 Pa. St. 167.

2. *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327; *Barry v. Croskey*, 2 Johns. & H. 21. See also *Raymond v. Leavitt*, 46 Mich. 447; 41 Am. Rep. 170; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190; *Ex parte Young*, 6 Biss. (U. S.) 53, *sub nom*; *In re Chandler*, 13 Am. Law. Reg. N. S. 210.

In *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327, it appears that the plaintiff, together with the firm of Thaxter & Co. and one John Richardson, entered into an agreement to operate in the stocks of the Melden & Melrose Horse Railway Company for the purpose of getting a "corner," Thaxter & Co. taking one-half and the plaintiff and Richardson each one-quarter interest in the operation. The plan of operation was as follows: Thaxter & Co. were to be the managers and were to buy up a large quantity of the stock and control it in such a man-

ner as to make a large demand for it, so the parties selling on time would be compelled to pay large differences. Thaxter & Co. were then to receive and make proposals and agreements thereon for the purchase of stock to be delivered at a future day; the parties agreeing to sell not then having the stock in possession or owning it, and then the sellers when the day for delivery should arrive would be compelled to pay such prices as differences as the parties to this combination might ask. This was an action against the executor of Thaxter for money had and received by the testator to the plaintiff's use in furtherance of the scheme above described. The court held that the contract was illegal and void, and that no recovery could be had for the money expended in such transaction.

3. *Rex v. De Berenger*, 3 M. & S. 67; *Reg. v. Aspinall*, 1 Q. B. Div. 730; *affirmed* 2 Q. B. Div. 48. See also *Rex v. Gurney*, 11 Cox C. C. 414; *Reg. v. Esdaille*, 1 F. & F. 213.

4. See DAMAGES, vol. 5, p. 1.

the date of the conversion and the day of trial.<sup>1</sup> But the manifest hardship of this rule in cases where the trial has been greatly delayed, for years it may be, and stocks which were comparatively worthless at the time of their unlawful conversion have fluctuated widely in value, has compelled the adoption of a different rule. The better rule now appears to be that, in such cases, the broker is liable in damages to an amount equal to the highest market value of the stock converted at any time between the act of conversion and a date which gives his customer a reasonable time, after notice of the unlawful act, to replace the stocks so converted.<sup>2</sup> But in such cases, the customer may elect to affirm a wrongful sale made by his broker, and in that event, the broker is

1. *Romaine v. Van Allen*, 26 N. Y. 309; *Lawrence v. Maxwell*, 6 Lans. (N. Y.) 469; *Nauman v. Caldwell*, 2 Sweeny (N. Y.) 212; *Markham v. Jaudon*, 41 N. Y. 235; *Ritenbaugh v. Ludwick*, 31 Pa. St. 131; *Bank of Montgomery v. Reeve*, 26 Pa. St. 143; *North v. Philips*, 89 Pa. St. 250; *Douglass v. Kraft*, 9 Cal. 562. In *Page v. Fowler*, 39 Cal. 412; 2 Am. Rep. 462, the court seemed disposed to change the rule, but in *Dent v. Holbrook*, 54 Cal. 145, it was again applied. See also *Shepherd v. Johnson*, 2 East 211; *Downes v. Back*, 1 Stark 318; *McArthur v. Seaforth*, 2 Taunt. 257; *Harrison v. Harrison*, 1 C. & P. 412; 11 E. C. L. 436; *Owen v. Routh*, 14 C. B. 327; 78 E. C. L. 327; *Williams v. Archer*, 5 C. B. 318; 57 E. C. L. 318; *Archer v. Williams*, 2 C. & K. 26; 61 E. C. L. 25; *Cud v. Rutter*, 1 P. Wms. 572; *France v. Gaudet*, L. R., 6 Q. B. 199.

2. *Baker v. Drake*, 53 N. Y. 211; 13 Am. Rep. 507; 66 N. Y. 518; 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of Metropolis*, 110 N. Y. 237. In *Baker v. Drake*, 53 N. Y. 211; 13 Am. Rep. 507, there is a very thorough consideration of the subject, and the earlier case of *Markham v. Jaudon*, 41 N. Y. 235, is overruled on the question of damages and the modified rule stated in the text is adopted.

In *Galigher v. Jones*, 129 U. S. 193, *Bradley, J.*, said: "It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place

himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy; and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence with regard to them, the ordinary measure of damages is their value at the time of conversion, or in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value as applied to stock transactions has been adopted in *England* and in several of the states in this country; whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. The *English* cases usually referred to are *Cud v. Rutter*, 1 P. Wms. 572, 4th ed., n. 3; *Owen v. Routh*, 14 C. B. 327; 78 E. C. L. 327; *Loder v. Kekule*, 3 C. B. N. S. 128; 91 E. C. L. 128; *France v. Gaudet*, L. R., 6 Q. B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it,

liable for the amount actually received for the stock.<sup>1</sup> And if he fails to keep and produce an account, all presumptions of value will be against him.<sup>2</sup>

**STOCK EXCHANGE.**—(See also AGENCY, vol. 1, p. 331; BROKERS, vol. 2, p. 571; DAMAGES, vol. 5, p. 1; GAMBLING CONTRACTS, vol. 8, p. 992; PLEDGE, vol. 18, p. 585; SOCIETIES AND CLUBS, vol. 22, p. 803; STOCK, vol. 23, p. 582; STOCK-BROKERS, vol. 23, p. 699; TRADE, BOARDS OF; USAGES AND CUSTOMS.)

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**I. DEFINITION.**—A Stock Exchange has been defined as “an association or body of stock-brokers who meet and transact busi-

the measure of damages will be the value of the stock at its highest price on or before the day of trial. The same rule was approved by the Supreme Court of *Pennsylvania* in *Bank of Montgomery v. Reese*, 26 Pa. St. 143; and *Musgrave v. Beckendorff*, 53 Pa. St. 310. But it has been restricted in that state to cases in which a trust relation exists between the parties—a relation which would probably be deemed to exist between a stock-broker and his client. See *Wilson v. Whitaker*, 49 Pa. St. 114; *Huntingdon, etc., R., etc., Co. v. English*, 86 Pa. St. 247. Perhaps more transactions of this kind arise in the state of *New York* than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that state, and may be found laid down in *Romaine v. Van Allen*, 26 N. Y. 309; and *Markham v. Jaudon*, 41 N. Y. 235, and other cases—although the rigid application of the rule was depreciated by the *New York* superior court in an able opinion by Judge Duer, in *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which

might be years after the transaction occurred, was often so great that the court of appeals of *New York* was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the court of appeals delivered by Judge Rapallo, in the case of *Baker v. Drake*, 53 N. Y. 211; 13 Am. Rep. 507, and in *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of Metropolis*, 110 N. Y. 237. It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the *New York* rule, as finally settled by the court of appeals, has the most reason in its favor, and we adopt it as a correct view of the law.”

- 1. *Taussig v. Hart*, 49 N. Y. 301; 38 N. Y. 425.
- 2. *Bate v. McDowell*, 49 N. Y. Super. Ct. 106.

ness by certain recognized forms, regulations, and usages;"<sup>1</sup> and again, as "a voluntary association (usually unincorporated) of persons who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their business. It is usually not a corporation, and in such case it is not a partnership."<sup>2</sup> Again, the Stock Exchange in its present form in *England* and the *United States*, may be defined to be a voluntary business association or club formed by its members for the purpose of buying and selling stocks and other money securities, among each other, either as principals in their transactions, or as agents acting for parties who are not members of the body, and having a code of laws regulating the admission, conduct, suspension, and expulsion of its members.<sup>3</sup>

**II. LEGAL STATUS.**—The legal status of the Stock Exchange is anomalous; ordinarily, it is not a corporation, neither is it a partnership, and yet it possesses some of the characteristics of both. It may, perhaps, be more properly classified with voluntary societies and clubs than with any other institution known to the law.<sup>4</sup>

Like a corporation the Stock Exchange may adopt a constitution and by-laws which are laws as to its members,<sup>5</sup> and it has perpetual being unless dissolved by its voluntary act.<sup>6</sup> But unlike a corporation it has no charter and does not exist by virtue of any legislative act; it issues no stock and the members have no claim to its property as stockholders. The privileges of membership may be conferred or withheld at the pleasure of the body, and courts will not interfere to compel the admission of one seeking to become a member.<sup>7</sup> It has no special privileges conferred

1. Webster's Dict.

2. Bouv. L. Dict.

3. This last definition is that of the Messrs. Biddle in their treatise on the law of Stock-brokers. See also Paterson, *Stock Exchange*, p. 26.

4. In *Leech v. Harris*, 2 Brewst. (Pa.) 571, Peirce, J., said: "These associations have some elements in common with corporations, joint stock companies, and partnerships; such as association, and being governed by regulations adopted by themselves for that purpose. They are what is known to the law of *Pennsylvania* as unincorporated societies or associations." The association here under discussion was the Philadelphia Board of Brokers. See generally SOCIETIES AND CLUBS, vol. 22, p. 803.

5. *Leech v. Harris*, 2 Brewst. (Pa.) 571. See *Thompson v. Adams*, 93 Pa. St. 55; *MacDowell v. Ackely*, 93 Pa. St. 277; *Kuehnemundt v.*

*Smith*, 2 N. Y. Supp. 625; *Weston v. Ives*, 97 N. Y. 222; *Belton v. Hatch*, 109 N. Y. 593; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495; *Lewis v. Wilson*, 121 N. Y. 284; *affirming* 50 Hun (N. Y.) 166; *Goddard v. Merchants' Exchange*, 9 Mo. App. 290; *Albers v. Merchants' Exchange*, 39 Mo. App. 583.

6. *Dos Passos*, *Stock-brokers, etc.*, p. 17.

7. In *White v. Brownell*, 2 Daly (N. Y.) 329; 3 Abb. Pr. N. S. (N. Y.) 318. Van Vorst, J., in speaking of the Open Board of Brokers (an institution similar to the Stock Exchange, and which has since been consolidated with it), said: "It follows from the very nature of such an organization with such objects, intents and purposes, that there must be rules and regulations for the good order of the association, and which rules shall be held to be conclusive as to the mode of transacting

upon it by the state and it owes no special duties to the public.<sup>1</sup> Neither does the Stock Exchange come within the legal definition of a partnership. There is no contribution of capital by its members for the prosecution of a common business. The ownership of property is a mere incident and not an end for which the organization is maintained. The members do not share each other's profits or losses; neither is there a division among the members of any profits which may accrue to the association from such property as it possesses; nor does the death, resignation, or bankruptcy of a member work a dissolution of the organization.<sup>2</sup>

**III. ORIGIN AND HISTORY.**—The Stock Exchange as it now exists cannot be said to have originated at any particular epoch, either in the *United States* or in *Europe*. It is comparatively a modern

business between the members, and as to the privilege of admission to and continued enjoyment of membership. As this association is not organized in pursuance of any statute, nor the terms of membership fixed by the principles of the common law, it follows that the agreement which the members make among themselves on the subject must establish and determine the rights of the parties on the subject. The constitution of the association, and its laws agreed upon by the members, contains all the stipulations of the parties, and is the law which should govern. The members have established a law for themselves. No person is entitled to membership in the Open Board of Brokers except he is approved by the appropriate committee, voted for by the board, and shall agree to, adopt, and affix his name to the constitution; and having done this, each member should stand by his contract." See also *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 192.

1. In *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494, Van Brunt, P. J., said: "The claim that the Stock Exchange has no right to exclude the Commercial Telegram Company from its floors upon the ground of public policy, evidently proceeds upon an entirely erroneous theory. The Exchange is a private association; it has the right to admit to its floor whom it pleases; it obtained nothing from the state, except that protection which the law affords to every citizen; it has sought no special privilege and obtained no special powers. It is, therefore, just as much the master of its own business and of the method of conducting the same as any private individual within the state. It may make public the

transactions which occur within its walls, or it may refuse all information in respect thereto. No matter which course is pursued, so long as it violates no law, it has a right to continue its business as it pleases."

2. **Not a Partnership.**—In *White v. Brownell*, 2 Daly (N. Y.) 329, Van Vorst, J., said: "The association is engaged in no business and does not devote its funds to the prosecution of any undertaking to produce profit or gain to its members; nor is it a copartnership; in its organization, the essential features which characterize a partnership are wholly wanting. There are no profits earned to be divided among the members, nor are there losses to be borne. The constitution, the contract between the parties, does not establish copartnership relations between the members; the associates do not hold themselves out to the world as copartners, nor is there anything to show that they regard themselves, the one to the other, in that relation. The association looks to a continued existence, unaffected by the death, resignation, suspension or removal of its members. If it was a simple copartnership, the death or retirement of an associate would dissolve it. It is an established principle in the law of partnership that if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership, and the civil law contains the same rule (Kent's Com. vol. 3, p. 53). The death of either party is, *ipso facto*, from the time of the death a dissolution of the partnership, however numerous the association may be. But in this organization, although individual members retire, die, or are

institution, and has been developed step by step in response to the demands of business necessity.<sup>1</sup>

**IV. PROPERTY RIGHTS OF MEMBERS.**—As has been seen, it is not one of the functions of the Stock Exchange to hold property and accumulate profits for the benefit of its members. But such bodies always possess more or less property as a necessary incident to their existence. While the Stock Exchange differs essentially in many respects from a partnership, yet, in respect to the

expelled, the body lives. The status, rights, and obligations of this plaintiff are not, therefore, to be determined by a consideration of this association in the light of its existence either as a corporation, joint stock association, or copartnership."

In *Belton v. Hatch*, 109 N. Y. 596; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 405, the court, by Gray, J., said: "The New York Stock Exchange is a voluntary association of individuals, united, without a charter, in an organization for the purpose of affording to the members thereof certain facilities for the transaction of their business as brokers in stocks and securities, and a convenient exchange or salesroom for the conduct of such transactions. It cannot be said to be strictly a copartnership, for its objects do not come within the definition of one. A copartnership results from a contract between the parties by which they agree to combine their property or labor, or both, in some common enterprise and for a common profit, to be shared in the proportion stated in their agreement. The objects of a voluntary association of brokers do not, however, involve any such combination, or any communion of profits from the business transacted by the members. Like a business club, its principal object is the promotion of the convenience of its members by furnishing facilities which aid them in doing their business, and are, therefore, of benefit to them. It may be said, however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned. The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws, which are the basis on which is founded the association."

In *Leech v. Harris*, 2 Brewst. (Pa.) 575, the court, by Peirce, J., said: "The

Philadelphia Board of Brokers is not a corporation. It is not a joint stock company in the sense in which such companies are regarded by the *English* law, although it has a large amount of property which belongs to it in its joint or aggregate capacity. Such private associations are said not to be partnerships as between themselves, whatever may be their relations to third persons. (*White v. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318; *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. (Pa.) 98.) The Board of Brokers is a voluntary association of persons, who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business; agreeing among themselves to pay the expenses incident to the support of the objects of the association, in which each for himself at stated hours of the day, and for his individual profit, may prosecute his own business, and enter into separate engagements with his fellow-members."

See the following cases in which this question arose as to unincorporated societies and clubs: *Park v. Spaulding*, 10 Hun (N. Y.) 131; *Lafond v. Deems*, 81 N. Y. 514; *Ebbinghausen v. Worth Club*, 4 Abb. N. Cas. (N. Y.) 300; *Koehler v. Brown*, 2 Daly (N. Y.) 78; *Gorman v. Russell*, 14 Cal. 532; *Fleming v. Hector*, 2 M. & W. 172; *Ellison v. Bignold*, 2 J. & W. 503; *Brown v. Dale*, 9 Ch. Div. 78; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Pierce v. Piper*, 17 Ves. 15; *Babb v. Reed*, 5 Rawle (Pa.) 159; 28 Am. Dec. 650.

1. The London Stock Exchange was organized in 1801, though brokers and jobbers had congregated together to conduct their operations for more than a hundred years before that time. The Paris Bourse has had a legal character ever since 1724. Its present building was completed in 1826. The New York Stock Exchange dates

ownership of its personal property, it is much like a partnership. It is true that the member has no severable proprietary interest in such property and may not demand his part of it upon his withdrawing, but when the body ceases to exist, those who are then members may claim their proportionate share of its assets.<sup>1</sup>

In respect to the real estate which such bodies may acquire, more difficult questions may arise. According to the common law, the title would be vested in such members only as were named as grantees in the instrument of conveyance, and all would be obliged to join in the execution of the deed in order effectually to dispose of such property.<sup>2</sup> And even if some of the members should hold the title as trustees for all, grave complications might arise owing to the changes which necessarily occur in the membership of the body. In order to avoid such difficulties, the title to the property of such associations is usually held by a corporation organized for the purpose.<sup>3</sup>

from 1817, and in Philadelphia a board of stock-brokers possessed a formal organization before that time. Dos Passos, *Stock-brokers, etc.*, p. 89; Medbury's *Men and Mysteries of Wall St.* 286; Lewis, *Stocks, Bonds, etc.*, p. 10.

1. "It may be said, however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned. The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws which are the basis on which is founded the association." *Belton v. Hatch*, 109 N. Y. 596; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495.

In *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 162, Daly, J., at pp. 190, 191, said: "There may be property belonging to this body derived from the payment of dues or fines or consisting of the furniture of the room where the board meets, yet possession of it is merely an incident and not the main purpose or object of the association. A member has no severable proprietary interest in it or a right to any proportionate part of it upon withdrawing; he has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body, while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation and not in the pewholder, and when the body ceases to exist those who may then be members become entitled to their proportionate

share of its assets. (*St. James Club*, 13 Eng. L. & Eq. 592; *Fassett v. Boylston*, 19 Pick. (Mass.) 361.) This board of stock-brokers is in fact analogous to the organization which came under consideration in *Caldicott v. Griffith*, 8 Exch. 898, called Midland Counties Guardian Society for the Protection of Trade, which was decided not to be a partnership."

2. Co. Litt. 3 a; Comyn's Dig., tit. *Capacity* B. 1; Sugd. Law of Vendors, 388; *Jackson v. Cory*, 8 Johns. (N. Y.) 385; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Hornbeck v. Sleight*, 12 Johns. (N. Y.) 198; *East Haddam Cent. Baptist Church v. East Haddam Baptist Eccles. Soc.*, 44 Conn. 259.

In some jurisdictions the rule is changed by statute and unincorporated societies may hold real property in the name of the organization. *Hamlett v. Bennett*, 6 Allen (Mass.) 140; *Oakes v. Hill*, 10 Pick. (Mass.) 344.

3. "The London Stock Exchange now consists of two distinct bodies: First, the shareholders or proprietors who own the building where business is transacted, and who are interested as members of a joint-stock undertaking; second, the subscribers or persons generally described as members of the Stock Exchange, or members of the house, who transact the business." Lewis, *Stocks, Bonds, and other Securities* 11; Cavanaugh, *Law of Money Securities* 515.

"To avoid many questions of the above nature which doubtless would have arisen if real estate were held by the Exchange, a company was incorpo-



**V. INDIVIDUAL LIABILITY OF MEMBERS.**—In unincorporated associations, such as the Stock Exchange, the members of which are not engaged in the prosecution of a common enterprise and do not share profits and losses, the law of partnership may not be safely relied upon to hold the members individually liable for the debts of the association. The better opinion seems to be that such liability should be determined rather by the law of principal and agent. The rule is that such members as incur the debt are personally liable for the payment, as are also all members who advise, sanction, or ratify the incurring of the same. And if it is the rule or custom of the association to allow its officers and servants to deal on credit in its behalf, it seems that all of the members may be liable personally for debts so contracted.<sup>1</sup>

rated under the laws of the State of *New York* (incorporated Jan. 30, 1863) duly empowered to hold real estate; the stock of the company being exclusively owned and held by the Stock Exchange." *Dos Passos, Stock-brokers, etc.*, p. 20.

In *Clute v. Loveland*, 68 Cal. 254, the court by Ross, J., said: "The findings show that during the times mentioned in the record the San Francisco Stock and Exchange Board was, and yet is, a voluntary association, consisting of one hundred members, formed for the purpose of dealing in stocks, and buying and selling the same on commission in the city and county of San Francisco; that the Company of Associated Stock-brokers was, and yet is, a corporation organized and existing under the laws of the state, with its principal place of business in the said city; that the said corporation was formed by and is composed of the members of said volunteer association solely, of both of which institutions the defendant in this action was at all times, and yet is, a member; that the members of the association and of the corporation are entitled to an equal share or proportion of its property, effects, and assets; that the only qualification for membership in the corporation is that such member shall be a member in good standing of the volunteer association, and shall sign the constitution and by-laws of the corporation; that the corporation was formed for the purpose of receiving donations with which to purchase land in the city of San Francisco, upon which to erect a building for the use of its members as stock-brokers, and has no shares or capital stock; that the lot of land described in the complaint was

purchased, and the building thereon erected in 1875, with funds belonging to the aforesaid volunteer association, at a cost of more than five hundred thousand dollars, in which building the board has since held its sessions; and that each member's right and title to the property, goods, effects, and assets of the association, and the privilege of participating in the meeting of the board, is represented by what is called and known as a 'seat in the San Francisco Stock and Exchange Board.'

1. In *Flemyng v. Hector*, 2 M. & W. 172, Lord Abinger stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in the community of profit and loss, and each partner has the right of property for the whole, and in particular transactions may bind the partnership by a credit. He held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. See also *Lloyd v. Loaring*, 6 Ves. 773.

In *Ash v. Guie*, 97 Pa. St. 500; 39 Am. Rep. 818, the court, by Trunkay, J., said: "Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner, so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of the members, had a right to contract debts for the building of a temple, which would be valid against

**VI. SEATS.**—A seat in the Stock Exchange is practically synonymous with membership in the association. The membership of the Exchange as a rule is limited, and if any one desires to become a member or obtain a seat in case a vacancy occurs, he makes his application to the proper officers or committee, and an election, usually by ballot, is held for his admission. In the event of his election a fixed initiation fee is paid and the member elect is entitled to his seat. As a rule also an outgoing member of good standing may sell his seat, and the purchaser, upon being duly elected and paying the fees in such case provided, is entitled to the seat and all the privileges incident thereto, subject to the constitution and by-laws of the association.<sup>1</sup>

It is well settled that a seat in the Stock Exchange is a species of property, but the member is not the absolute owner of it. His ownership is qualified and restricted by the rules and regulations of the body, and he cannot in any manner dispose of the seat so as to free it from the operation of such rules and regulations.<sup>2</sup> The legal character of seats has frequently been considered by the

every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking, or subsequently ratified it. Those who participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade."

In *Richmond v. Judy*, 6 Mo. App. 465, Bakewell, J., said: "Associations and clubs, the objects of which are social or political and not for purposes of trade or profit, are not partnerships, and pecuniary liability can be fastened upon the individual members of such associations only by reason of the acts of such individuals or of their agents. Agency must be made out; none is implied from the mere fact of association. *Bailey v. Macauley*, 19 L. J. Q. B. 73; *Wood v. Finch*, 2 F. & F. 447; *De-launay v. Strickland*, 2 Stark. 416; *Suckomb v. Carleton*, 2 F. & F. 787." See also *Cockerill v. Ancompte*, 40 Eng. L. & Eq. 284; 2 C. B. N. S. 439;

*In re St. James Club*, 2 De G. M. & G. 383; 16 Jur. 1073; *Jenne v. Sutton*, 43 N. J. L. 257; 39 Am. Rep. 578; *Downing v. Mann*, 3 E. D. Smith (N. Y.) 36; *Secor v. Law*, 4 Abb. App. Dec. (N. Y.) 188; *Ridgely v. Dobson*, 3 W. & S. (Pa.) 118; *Robinson v. Robinson*, 10 Me. 240; *Abbott v. Cobb*, 17 Vt. 597; *Cheeny v. Clark*, 3 Vt. 434; 23 Am. Dec. 219; *Newell v. Borden*, 128 Mass. 31; *Todd v. Emly*, 8 M. & W. 505; *Ebbinghausen v. Worth Club*, 4 Abb. N. Cas. (N. Y.) 300; *McGrew v. City Produce Exchange*, 85 Tenn. 572.

1. Constitution and By-laws of N. Y. & Phila. Stock Exchanges; Const. and By-laws San Francisco Stock and Exchange Board; Biddle, Law of Stock-brokers, pp. 49 and 50.

2. In *Hyde v. Woods*, 94 U. S. 524, Miller, J., said: "There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think that there can be any reason to doubt that if he had made no such assignment it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and if there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee."

In *Ritterband v. Baggett*, 4 Abb. N.

courts in cases where creditors have sought to attach or seize upon execution the seat of a member of the Stock Exchange. It has been held that seats are not subject to seizure and sale in this manner.<sup>1</sup> Nevertheless it appears that such property may be reached by a creditor's bill or by proceedings supplemental to execution, and the court will compel the debtor to perform such acts as may be necessary under the rules and regulations of the association to transfer the seat to the purchaser thereof.<sup>2</sup> But there is conflict of authority on this point. Some courts, still adhering to the strict rules of the common law, hold that such

Cas. (N. Y.) 67, Speir, J., said: "The question whether the seat in the board was property has been fully settled in a late case, almost, if not entirely, identical with the case at bar (*Hyde v. Woods*, 94 U. S. 524). It is there held that a seat in such a board is not a matter of absolute purchase; that there is no reason why the stock board should not make membership subject to the conditions and rules of the board, unless it is a violation of some statute, or of some principle of public policy. The reason given is sound, that the rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come. (See also *Nichols v. Eaton*, 91 U. S. 716.)"

In *Londheim v. White*, 67 How. Pr. (N. Y.) 467, Hall, J., said: "It must be conceded, I think, in the light of all the decisions, that a seat or membership in the Stock Exchange is property, and should be applied in the same manner as other property of a debtor to the payment of his debts. It may be surrounded and clogged with conditions and restrictions, and still it is property available for the payment of debts and can be made available for that purpose subject to and by an observance of those restrictions and conditions. That the membership is valuable is shown by the fact that the initiation fee is ten thousand dollars, and among all business men has an established and tangible value. It is an asset upon which creditors have a right to rely for payment of debts. This question has been passed upon so frequently by the courts as to make it no longer doubtful or debatable. *Grocers' Bank v. Murphy*, 60 How. Pr. (N. Y.) 426; *Ritterband v. Baggett*, 4 Abb. N. Cas. (N. Y.) 67; U. S. Dist. Ct., *in re Ketcham*, Daily Reg. Feb. 9th, 1880; *Powell v. Waldron*, 89 N. Y.

328; 42 Am. Rep. 301; *Platt v. Jones*, (Sup. Ct. Gen. Term, Ms. Opin.)"

1. *Thompson v. Adams*, 93 Pa. St. 55. In *Pancoast v. Gowen*, 93 Pa. St. 66, the court said: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meeting of the board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce. Whether the proceeds of the sale of the seat in the hands of the treasurer of the board and payable to the defendant according to the regulations and by-laws of the board, could be thus reached is an entirely different question. This and no more is what we understand to have been decided by the Supreme Court of the United States in *Hyde v. Woods*, 94 U. S. 525, where Mr. Justice Miller says: 'If there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee in bankruptcy.'" See *Moxey v. Philadelphia Stock Exchange*, 9 W. N. C. (Pa.) 441; *Evans v. Wister*, 1 W. N. C. (Pa.) 182; *Leech v. Leech*, 9 Phila. (Pa.) 211; *Singerly v. Johnson*, 3 W. N. C. (Pa.) 541.

2. In *Grocers' Bank v. Murphy*, 60 How. Pr. (N. Y.) 426, Beach, J., after criticising *Thompson v. Adams*, 93 Pa. St. 55, and *Pancoast v. Gowen*, 93 Pa. St. 66, said: "If such a result may be attained, the effort of active imagination cannot circumscribe the associations human ingenuity will produce to thus transmute veritable assets into intangible and yet most substantial and valuable shadows. Thus would follow the nullification of the legal principle which makes the debtor's

property cannot be reached by the creditor either upon execution or by any proceeding in aid thereof.<sup>1</sup> The question of the legal character of seats has been considered in another class of cases, viz., where the owners of such seats have become bankrupt, and it has been sought to reach the seats or the proceeds

possessions liable to his creditors, and honest claimants would be remediless because of the insufficiency of the statute enacted to facilitate the collection of just demands. There may be minor difficulties in the practicable application of the statute, but these, in my opinion, are easily surmounted; probably an order appointing a receiver containing directions for the judgment debtor to do whatever may be deemed needful to transfer the seat under the rules of the Exchange would accomplish the result sought."

In *Ritterband v. Baggett*, 4 Abb. N. Cas. (N. Y.) 67, Speir, J., said: "The question being settled that the seat in question is property of value, I think it is the duty of the court to enforce its transfer for the plaintiff's benefit in this action, either to a receiver or to a third person qualified to work out the designs of the law. Rights of property from time immemorial could be reached by a creditor's bill, and it is now well settled that the same result may be accomplished by proceedings under the code which furnish a substitute for that proceeding in chancery. Personal property passes to the receiver without assignment; but if an assignment be necessary to effect the purpose of the law, I do not question the power of the court to direct it to be done. It is not an indispensable requisite that such an assignment should be made direct to the receiver. It may be made to said purchaser from him who is either a member or member elect of the Exchange, or to a member or member elect to hold in trust to assign under the receiver's direction to said purchaser from him who shall be either a member or a member elect." See *Roome v. Swan*, 2 N. Y. Supp. 614; *Powell v. Waldron*, 89 N. Y. 330; 42 Am. Rep. 301; *Londheim v. White*, 67 How. Pr. (N. Y.) 467.

In *Clute v. Loveland*, 68 Cal. 254, the court held that a member of the San Francisco Stock and Exchange Board has power to pledge his seat, and that the lien thereby created may be foreclosed and the seat sold sub-

ject to the conditions imposed by the rules of the association. And in *Habenicht v. Lissak*, 78 Cal. 351; 12 Am. St. Rep. 63, the court, after a review of the authorities, held that a seat in the San Francisco Stock and Exchange Board is property, and should be applied as other property of the debtor to the payment of his debts, and might be reached for that purpose by proceedings supplemental to execution. See *Freeman on Executions* (2d ed.), § 110.

In *Elliot v. Merchant's Exchange*, 14 Mo. App. 234, it was held by the court, after a review of the authorities, that a judgment debtor who was a member of the Exchange might be compelled to transfer the certificate of his membership to such purchaser at sheriff's sale as possessed the qualifications of membership in the Exchange.

1. In *Barclay v. Smith*, 107 Ill. 249; 1 Am. & Eng. Corp. Cas. 298; 47 Am. Rep. 437 (which was a creditor's bill to enforce the sale of a certificate of membership in the Board of Trade of the city of Chicago), Craig, J., said: "A certificate of membership in the Board of Trade of Chicago empowers the person who is admitted as a member to attend the meetings of the board and deal in the various products of the country. This right to appear at a certain place and transact certain business, in our judgment, is not property, but it is a mere privilege conferred upon the member which cannot be reached and sold by the process of the courts. It is a right which may be regarded as valuable but which cannot be divested or destroyed except by the board itself for a failure of the member to conform to the rules and regulations of the association. This view is in harmony with the rule announced by the Supreme Court of the state of *Pennsylvania* where a similar question arose. (*Thompson v. Adams*, 93 Pa. St. 55; *Pancoast v. Gowen*, 93 Pa. St. 66.) We have been referred to some cases which seem to hold a different view, but without entering upon a review of the cases cited, we do not think they establish the correct rule,

thereof as assets of the bankrupts' estates. In such cases it seems to be settled, notwithstanding an early opinion to the contrary,<sup>1</sup> that such title to the seat as the insolvent member possesses passes to the assignee in bankruptcy, who may dispose of the same subject to the rules and regulations of the association. And, as in the case of a judgment debtor, the courts will compel the bankrupt member to perform such acts and execute such instruments as may be necessary to vest the title to the seat in such purchaser from the assignee as may be acceptable to the association, who may be admitted to membership in the same in accordance with its rules.<sup>2</sup> But the bankrupt cannot after his discharge be com-

and we are not inclined to follow them."

And in *Weaver v. Fisher*, 110 Ill. 146, Schofield, J., said: "It is a misapprehension to suppose, as counsel for plaintiff in error seem to, that we held in *Barclay v. Smith*, 107 Ill. 349; 1 Am. & Eng. Corp. Cas. 298; 47 Am. Rep. 437, that there are no property rights of any kind in a certificate of membership in the Board of Trade of the city of Chicago. We simply there held that such a certificate is not property which is liable to be subjected to the payment of debts of the holder by legal proceedings. We did not intimate that from the nature of a certificate of membership in the Board of Trade it could not by statute be subjected to the payment of debts, but only that under the law as it now is, it cannot be. Whether property shall be liable to be subjected to the payment of debts by legal proceedings, and if so in what manner, is merely a matter of statutory regulation. At common law, shares in stock were held not to be chattels (Ang. & Ames, Corp. 5th ed., § 560; Hermann on Executions, § 362); and also to be of such an intangible nature that there could be no change of possession, and therefore that they could not be sold on execution."

1. *In re Sutherland*, 6 Biss. (U. S.) 526.

2. *McCabe v. Emmons*, 51 N. Y. Super. Ct. 219; *Platt v. Jones*, 96 N. Y. 24; *In re Gallagher*, 16 Blatchf. (U. S.) 410.

In *Re Ketchum*, 1 Fed. Rep. 840, Choate, J., said: "The case of *In re Sutherland*, 6 Biss. (U. S.) 526, can perhaps be distinguished from *Hyde v. Woods*, 94 U. S. 525, and from *In re Gallagher*, 16 Blatchf. (U. S.) 410, on the ground suggested in the latter

case, that the right in that case was less distinctly of a mere business character. But if not, I am not satisfied by the reasoning in that case that property like this seat in the New York Stock Exchange was not intended to pass to the assignee in bankruptcy under the bankrupt law. The controlling consideration is, it seems to me, that practically and whatever its form or incidents with respect to other matters may be, it is a part of the bankrupt's business assets, or, more generally of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and that the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, unessential—mere technicalities, cobwebs which the law is strong enough to break through. Let an order be entered requiring the bankrupt to execute any transfer, assignment, or instrument necessary for the purpose of vesting the title to his seat in the New York Stock Exchange in such person as an assignee in bankruptcy may procure as transferee."

In *Re Warder*, 10 Fed. Rep. 275, Nixon, J., said: "I am aware that in *Re Sutherland*, 6 Biss. (U. S.) 526, Judge Blodgett seems to have come to a different conclusion. I have read the case with care hoping to find some provisions in the charter of the Chicago Board of Trade to distinguish it from the case under consideration. This I have been unable to do, but *Hyde v. Woods*, 94 U. S. 525, is subsequent in date, and in questions of this sort it is my duty to follow the supreme court. The district court of the United States for the southern district of New York in February, 1880, made an order requiring a bank-

pelled by order of court to execute such instruments as will enable the assignee to make his seat available as assets.<sup>1</sup>

Upon the death of a member it seems that his seat may be sold and the proceeds, after payment of his debts to his fellow members, be turned over to his personal representative as a part of the assets of his estate.<sup>2</sup>

**VII. PARTIES TO ACTIONS.**—At common law an unincorporated company or association cannot sue or be sued in the name of the company or association, but the individual members of the body must be made parties to any action by or against it.<sup>3</sup> The inconvenience of this rule has led to statutory changes of the law in many of the states, providing that joint stock companies and unincorporated associations may sue and be sued, either in the name of the association itself or of some officer thereof. Stock Exchanges, being unincorporated associations, are within the pro-

rupt to vest the title to his seat in the New York Stock Exchange in the assignee in bankruptcy. I think the present application falls within the principle of that case, and I approve of the ruling of Judge Choate in his opinion granting the order. *In re Ketchum*, 1 Fed. Rep. 840. Let an order be entered directing the bankrupt to transfer his membership from the New York Produce Exchange to the assignee." See *In re Werder*, 15 Fed. Rep. 789; *Hyde v. Woods*, 94 U. S. 523; *Sparhawk v. Yerks*, 142 U. S. 1, where it is held, in an opinion by Fuller, C. J., that the assignee in bankruptcy, after sleeping twelve years on his rights and allowing the bankrupt member to pay off liens on his seat, cannot claim it as a part of the assets of the bankrupt's estate.

1. *In re Nichols*, 1 Fed. Rep. 842.

2. In *Grocers' Bank v. Murphy*, 60 How. Pr. (N. Y.) 426, Beach, J., said: "The controlling feature appurtenant to a seat in the Stock Exchange is that it may be bought and sold subject to the rules of the association, and in case of the owner's death a sale is made by the Exchange and the proceeds distributed. Herein exists the difference between it and membership of a social club; the latter can neither be bought nor sold; it has no general value or marketable quality, and nothing remains after a member's death."

In *Thompson v. Adams*, 93 Pa. St. 55, it is said in the agreed statement of facts for the opinion of the court that "originally a seat in the Board of Brokers (*i. e.*, the collective privileges

of a full member of the board) was valuable only during the life or membership of its owner. Subsequently by the said constitution the members were allowed under certain conditions to transfer their seats for value, and subsequently to that a clause was added to the constitution giving value upon certain conditions to a member's seat after his death." And section 12 of the constitution of the Philadelphia Stock Exchange, late Board of Brokers, provides that "when a member dies his seat may be sold by the secretary, and after satisfying the claims of the members of the board, the balance shall be paid to his legal representatives."

An article of the New York Stock Exchange, provides: "When a member dies, his membership may be disposed of by the Committee on Admissions, and after satisfying the claims of the members of the Stock Exchange, they shall pay any balance to the legal representatives of the deceased."

3. *Dacey on Parties to Actions* (2d Am. ed.) 169; *Wright v. Williamson*, 3 N. J. L. 532; *Smith v. Crichton*, 33 Md. 106; *American Cent. R. Co. v. Milas*, 52 Ill. 178; *Choteau v. Raitt*, 20 Ohio 144; *Haskins v. Alcott*, 13 Ohio St. 216; *Halliday v. Doggett*, 6 Pick. (Mass.) 359; *East Haddam Cent. Baptist Church v. East Haddam Baptist Eccles. Soc.*, 44 Conn. 259; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 542; *Wells v. Gates*, 18 Barb. (N. Y.) 554. See also *Leech v. Harris*, 2 Brewst. (Pa.) 571, where the action was brought against the members of a

visions of such statutes, and may sue and be sued as provided therein.<sup>1</sup>

**VIII. EXPULSION OF MEMBERS—1. Power to Expel.**—Corporations established for purposes other than the pecuniary gain of their members have an inherent power, without express authority in their charters, to disfranchise or expel members who have been convicted in a court of justice of infamous offenses or have committed acts against their respective societies which tend to their destruction and injury.<sup>2</sup>

Whether or not Stock Exchanges, being unincorporated associations, possess the same inherent power to expel their members, in the absence of by-laws or rules providing therefor, does not

committee and the members of the Board of Brokers of Philadelphia.

1. In *Sewell v. Ives*, 61 How. Pr. (N. Y.) 54, it was held that as the New York Stock Exchange was composed of more than seven persons owning and having an interest in property in common, and who would be liable to an action on account of such ownership and interest, an action brought by a member, in relation to his interest in that property was properly brought against the president. See *Birdseye's Rev. St. of New York*, vol. 2, p. 1684; *New York Code Civ. Proc.*, § 1919. In the following cases in that state the president was named as the party defendant under the statute. *Heath v. Gold Exchange*, 7 Abb. Pr. N. S. (N. Y.) 251; 38 How. Pr. (N. Y.) 168; *White v. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318; 4 Abb. Pr. N. S. (N. Y.) 162; *Rorke v. Russell*, 2 Lans. (N. Y.) 244; *Olery v. Brown*, 51 How. Pr. (N. Y.) 92; *Weston v. Ives*, 97 N. Y. 222; *Belton v. Hatch*, 109 N. Y. 593; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495.

The *Pennsylvania* statute provides that such associations shall sue and be sued in their association name, and that when suit is brought against any such association, service of process shall be made upon the chairman, secretary, or treasurer thereof. *Bright. Purd. Dig.*, vol. 1, p. 939. In the following cases, the association itself was named as the party defendant: *Moxey v. Philadelphia Stock Exchange*, 14 Phila. (Pa.) 185; *Sexton v. Commercial Exchange*, 10 Pa. Co. Ct. Rep. 607; *Moxey v. Philadelphia Stock Exchange*, 9 W. N. C. (Pa.) 441.

Where the action is brought against the president or treasurer of such association, the remedy against the prop-

erty of the association must be exhausted before an action can be brought against one or more of the individual members. *Robbins v. Wells*, 18 Abb. Pr. (N. Y.) 191; 26 How. Pr. (N. Y.) 15. And the judgment against the president or other officer is only *prima facie* evidence in the plaintiff's favor, in a subsequent action against the individual members. *Allen v. Clark*, 65 Barb. (N. Y.) 563; *Withehead v. Allen*, 4 Abb. App. Dec. (N. Y.) 628; *Robbins v. Wells*, 18 Abb. Pr. (N. Y.) 191; 26 How. Pr. (N. Y.) 15; *Kingsland v. Braisted*, 2 Lans. (N. Y.) 17.

2. "There is a tacit condition annexed to the franchise of a member which if he breaks he may be disfranchised. The cases in which this inherent power may be exercised are of three kinds: First, when an offense is committed which has no ordinary relation to a member's corporate duty but is of so infamous a nature as renders him unfit for the society of honest men; such are the offenses of perjury, forgery, etc. But before an expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a jury according to the law of the land. Second, where the offense is against his duty as a corporator. And in that case he may be expelled on trial and conviction by the corporation. And the third is an offense of a mixed nature against the member's duty as a corporator and also indictable by the law of the land." *Lord Mansfield, in Rex v. Liverpool*, 2 Burr. 733. See also *State v. Milwaukee Chamber of Commerce*, 20 Wis. 71; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453; *People v. Medical Soc.*, etc., 32 N. Y. 187; *Society for Visitation of Sick v. Com.*, 52 Pa. St. 125; 91 Am.

seem to be thoroughly settled. But the better opinion seems to be that where there is no property in which all the members have a joint interest, a member may be expelled after giving him notice of the charges made against him and an opportunity to make his defense.<sup>1</sup>

Dec. 139; *Dickenson v. Chamber of Commerce*, 29 Wis. 49; 9 Am. Rep. 544; *Loubat v. LeRoy*, 15 Abb. N. Cas. (N. Y.) 1. See elaborate review of English authorities in *Evans v. Philadelphia Club*, 50 Pa. St. 107.

1. In *Innes v. Wylie*, 1 C. & K. 257; 47 E. C. L. 255. Lord Denman, C. J. (in summing up), said: "I am of opinion that where there is not any property in which all the members of the society have a joint interest, the majority may by resolution remove any one member. I think that in this instance the members of this society had that power in case the plaintiff misconducted himself." And again, on motion for a new trial, he said: "Any society may undoubtedly make any rules by which the admission and expulsion of its members are to be regulated, and the members must conform to and cannot question them. But where there are no directions on the subject contained in the rules, a party expelled may lawfully complain that his expulsion has been effected contrary to the general principles of law; and a member is not to be expelled by vote unless there be regular notice given to him and an opportunity of his being heard."

In *White v. Brownell*, 2 Daly (N. Y.) 329, the plaintiff was a member of the Open Board of Brokers in New York, a voluntary association, and sought to restrain the body from interfering with his privileges as a member. In the course of the opinion, Daly, F. J., said, at page 359: "Such an organization may prescribe the conditions upon which persons will be admitted to membership as well as the conditions upon which the continuance of membership will depend. And where they have no regulation upon the subject, they may expel a member by vote of a majority if he has been notified of the charge against him and afforded an opportunity of being heard in his defense." Citing *Innes v. Wylie*, 1 C. & K. 257; 47 E. C. L. 255.

In *Otto v. Journeymen Tailors' Protective, etc.*, Union, 75 Cal. 308,

Searls, C. J., said: "The contention of appellant is that the power of expulsion is inherent in every society, and that the offense of which plaintiff was found guilty was sufficient ground for expulsion as matter of law irrespective of any provision of the constitution or by-laws. We subscribe to that portion of the proposition which asserts the inherent right of expulsion, subject, however, to the limitations hereinbefore expressed."

In *Leech v. Harris*, 2 Brewst. (Pa.) 571, in which the legality of plaintiff's expulsion from the Philadelphia Board of Brokers, an unincorporated association, was under consideration, the court found that the charges against the plaintiff did not come within any of the regulations of the board providing for the suspension or expulsion of its members. And after quoting the language of Lord Mansfield, cited above, as the law of the case, proceeded to inquire whether or not the plaintiff was subject to expulsion through the inherent or common law power of such associations to expel a member for an infamous offense, or for an offense against his duty as a member of the association thus assuming the possession of such power by the board. But see *Dawkins v. Antrobus*, 17 Ch. Div. 615; affirmed 44 L. T., N. S. 577, in which Jessel, M. R., said: "There are two principal points raised as to whether the rule in question under which the expulsion of Colonel Dawkins has taken place is or is not a rule binding on him as a member of the 'Travelers' Club.' Now that does not depend on the inherent power of a club to pass a rule to expel one or more of its members. I for one am not aware of the existence of such a power and I am surprised to hear such a proposition put forward. There is no more inherent power in the members of a club to alter their rules so as to expel one of its members against the wishes of the minority than there is in the members of any society or partnership which is founded on a contract; that written contract, of course, expressing the terms on which the mem-



The members of a Stock Exchange may agree to be governed by such rules as they think proper to adopt, provided there is nothing in them in conflict with the law of the land; and for a violation of such rules, they may suspend or expel a member after a fair and orderly hearing in accordance with the methods prescribed in the constitution and by-laws.<sup>1</sup>

The legality of proceedings in the exercise of this jurisdiction is called in question in judicial tribunals, sometimes in actions for damages for wrongful expulsion, but more frequently by injunction to prevent such expulsion, or to prevent the enforcement of the decision, if the expulsion has been determined upon. And here again the courts recognize a distinction between incorporated and unincorporated associations, in that a corporation is subject to the visitatorial power of the courts of the state from which it receives its franchise, while an unincorporated association has its foundation in contract and is subject to no such visitatorial power. In the one case, wrongful prevention of a member's enjoyment of the franchise is sufficient cause for the interference of a court of justice; whereas, in the other, the courts usually refuse to interfere unless the complaining member has some pecuniary interest involved or the action complained of involves a violation of the law.<sup>2</sup>

And if the Stock Exchange or other voluntary association has provided means whereby a member, who has been wrongfully suspended or expelled, may have the matter reviewed within the association, the courts will not interfere in such case until the

members associate together. And it is intolerable to imagine that the majority should in such case claim an inherent power of expelling the minority."

1. *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Thompson v. Adams*, 93 Pa. St. 55; *McDowell v. Ackley*, 93 Pa. St. 277; *Moxey v. Philadelphia Stock Exchange*, 9 W. N. C. (Pa.) 441; *White v. Brownell*, 2 Daly (N. Y.) 359; *Fischer v. Raab*, 57 How. Pr. (N. Y.) 87; *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69; *Kuehnemundt v. Smith*, 2 N. Y. Supp. 625; *Weston v. Ives*, 97 N. Y. 222; *Belton v. Hatch*, 109 N. Y. 593; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495; *Lewis v. Wilson*, 121 N. Y. 284; *Hyde v. Woods*, 2 Sawy. (U. S.) 655; 94 U. S. 523; *Otto v. Journeymen Tailors' Protective, etc., Union*, 75 Cal. 308; *Innes v. Wylie*, 1 C. & K. 257; 47 E. C. L. 255; *Wachtel v. Noah Widows, etc., Soc.*, 84 N. Y. 28; 38 Am. Rep. 478.

2. In *State v. Georgia Medical Society*, 38 Ga. 608; 95 Am. Dec. 408, *Brown, C. J.*, said: "It is insisted in this case that the Georgia Medical

Society was in existence long before it was incorporated, and that its objects were in no way changed by its application for, and acceptance of, its present charter from the state. This may be very true, but its legal responsibilities were changed by the acceptance of the charter; while it remained a voluntary society the courts had no jurisdiction over it if it violated no law of the state, and its members had no property in their membership which the law could protect, but its acceptance of a charter subjected it to the supervision of the proper legal authorities having jurisdiction in such case. When the voluntary society accepted the charter it became a private civil corporation, and the corporators then in being acquired a property in the franchise; every person who has since become a corporator has acquired a like property. The property which the corporator acquires is not a visible, tangible property, but it is none the less property because it is invisible and intangible; it is not a corporal hereditament, but it is incor-

poral. . . . The law on this subject is thus stated by Judge Blackstone, vol. 1, p. 381. The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place where he shall exercise this jurisdiction, which is the court of the king's bench, where, and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all other controversies decided. In this state the same visitatorial power of correcting the misbehavior of corporations and deciding their controversies is vested in the superior courts of the counties where they are located, which in *England* belongs to the king's bench."

In *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561, it was held that the franchise of a corporation was property, and as such a proper object of taxation. *Citing West River Bridge Co. v. Dix*, 6 How. (U. S.) 529; *Veazie Bank v. Feno*, 8 Wall. (U. S.) 547; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Monroe Sav. Bank v. Rochester*, 37 N. Y. 367. But in *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625, and *People v. Chicago Board of Trade*, 80 Ill. 134, this principle seems to have been lost sight of.

In *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, Lyon, J., said: "The visitatorial or superintending power of the state over corporations created by the legislature will always be exercised in proper cases through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchise. (*State v. Milwaukee Chamber of Commerce*, 20 Wis. 63; *Dickenson v. Milwaukee Chamber of Commerce*, 29 Wis. 45.) In the light of these judgments we cannot accept the doctrine which seems to have received the sanction of the Supreme Court of *Illinois* in *People v. Chicago Board of Trade*, 80 Ill. 134, that the power of such corporations to enact by-laws is unlimited, and that the courts will not interfere with the enforcement of any by-law thus enacted. The case seems to be in conflict with earlier decisions of that court, and we are not aware that the court has reasserted any such doctrine, although it has since considered several cases involving the legality of the proceedings of the same board of trade.

See *Fisher v. Chicago Board of Trade*, 80 Ill. 84; *Sturges v. Chicago Board of Trade*, 86 Ill. 441; *Baxter v. Chicago Board of Trade*, 83 Ill. 146. True these were equity cases, in which the respective complainants sought to restrain the board from expelling them, or to compel it to restore them after expulsion, yet the doctrine of *People v. Chicago Board of Trade*, 80 Ill. 134, is referred to hypothetically in the opinions of the court, and no mention whatever is made of that case; whether that learned and able court adheres to that doctrine, we are unable, as at present advised, to adopt it as the law of this state."

In *Rigby v. Connol*, 14 Ch. Div. 482, Jessel, M. R., said: "The first question that I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt, whatever, that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed in this country, at least, in any of the queen's courts, to decide upon the rights of persons to associate together when the association possesses no property."

Courts of equity have jurisdiction over unincorporated voluntary associations where pecuniary rights of members are involved. *Thomas v. Ellmaker*, 1 Par. Eq. Cas. (Pa.) 98; *Adley v. Whitstable Co.*, 17 Ves. 316; *Lyman v. Bonney*, 101 Mass. 562; *Olerly v. Brown*, 51 How. Pr. (N. Y.) 92; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. (C. C.) 66. See *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Lamphere v. Grand Lodge*, 47 Mich. 429; *Babb v. Reed*, 5 Rawle (Pa.) 151; 28 Am. Dec. 650; *Berry v. Cross*, 3 Sandf. Ch. (N. Y.) 1; *Van Houten v. Pine*, 36 N. J. Eq. 133.

Recourse to law cannot be had where no pecuniary rights are involved. *Thompson v. Society of Tammany*, 17 Hun (N. Y.) 305; *White v. Brownell*, 2 Daly (N. Y.) 329; *Bauer's Appeal* (Pa.), 18 Alb. L. J. 218. The Board of Brokers is not a corporation so as to be subject to the interference of equity to restore a member. *White v. Brownell*, 2 Daly (N. Y.) 329.

party complaining exhausts his remedy before the tribunals provided by the association itself.<sup>1</sup>

As every member of the Stock Exchange agrees, on becoming a member, to be obedient to the constitution and by-laws of the association, his suspension or expulsion, in the manner provided in such constitution and by-laws, is analogous to an award made by a tribunal of his own choosing. In the matter of such expulsion, the society acts in a *quasi* judicial capacity; and, if there is nothing unreasonable or contrary to law in the rules providing for expulsion, and the expelled member has had due notice of the charges made against him, and has had an opportunity to defend himself, and has had a fair and impartial trial in pursuance of the methods prescribed by the laws of the association, the sentence of expulsion is conclusive, and the courts will not sit as appellate tribunals to review such decisions.<sup>2</sup> In such cases the courts will inquire into the regularity of the proceedings under the constitution and rules of the association, will hold the association to a fair administration of its rules, will inquire whether or not such rules are reasonable, and whether or not the proceedings of the association are within the bounds of its proper jurisdiction;<sup>3</sup> but they will not inquire into the merits of a cause which has been

1. *Moxey v. Philadelphia Stock Exchange*, 14 Phila. (Pa.) 185; *White v. Brownell*, 2 Daly (N. Y.) 329; 4 Abb. Pr. N. S. (N. Y.) 162. See also *Lafond v. Deems*, 81 N. Y. 507; *Poultney v. Bachman*, 31 Hun (N. Y.) 49; *Loubat v. Le Roy*, 40 Hun (N. Y.) 546; *Olery v. Brown*, 57 How. Pr. (N. Y.) 92; *Grosvenor v. United Soc. of Believers*, 118 Mass. 78; *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Chamberlain v. Lincoln*, 129 Mass. 70; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Harrington v. Workingmen's Benev. Assoc.*, 70 Ga. 340; *Rex v. Ginever*, 6 T. R. 732; *Rex v. Head*, 4 Burr. 2513; *Carlen v. Drury*, 1 Ves. & B. 154; *Mulroy v. Supreme Lodge*, 28 Mo. App. 463; *Bauer v. Samson Lodge*, 102 Ind. 262; 13 Am. & Eng. Corp. Cas. 618; *Supreme Council v. Garigus*, 104 Ind. 133; 54 Am. Rep. 298.

2. *Leech v. Harris*, 2 Brewst. (Pa.) 571; *White v. Brownell*, 2 Daly (N. Y.) 329; *Kuehnemundt v. Smith*, 2 N. Y. Supp. 625; *Belton v. Hatch*, 109 N. Y. 593; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495; *Lewis v. Wilson*, 121 N. Y. 284; *affirming* 50 Hun (N. Y.) 166. See also *Bachmann v. New York Deutcher Arbitr Bund*, 64 How. Pr. (N. Y.) 442; *Poultney v. Bachman*, 31 Hun (N. Y.) 49; *McAlees v. Supreme Order of Iron Hall*

(Pa.), 17 Ins. L. J. 832; *Osceola v. Schmidt*, 57 Md. 98; *Woolsey v. Independent Order of Odd Fellows*, etc., 61 Iowa 492; 1 Am. & Eng. Corp. Cas. 172; *Harrison v. Hoyle*, 24 Ohio St. 254; *Pitcher v. Chicago Board of Trade*, 121 Ill. 412; *Robinson v. Yate City Lodge*, 86 Ill. 598; *Burt v. Grand Lodge*, 44 Mich. 208; *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490.

3. *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 38; *Sewell v. Ives*, 61 How. Pr. (N. Y.) 54; *Kuehnemundt v. Smith*, 2 N. Y. Supp. 625; *Belton v. Hatch*, 109 N. Y. 593; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495; *Lewis v. Wilson*, 121 N. Y. 284; *affirming* 50 Hun (N. Y.) 166; *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Powell v. Abbott*, 9 W. N. C. (Pa.) 231; *Moxey v. Philadelphia Stock Exchange*, 9 W. N. C. (Pa.) 440. See also *Medical & Surg. Soc. v. Weatherly*, 75 Ala. 248; 10 Am. & Eng. Corp. Cas. 26; *State v. Georgia Medical Soc.*, 38 Ga. 608; 95 Am. Dec. 408; *Bouldin v. Alexander*, 15 Wall. (U. S.) 131; *Shannon v. Frost*, 3 B. Mon. (Ky.) 253; *German Reformed Church v. Com.*, 3 Pa. St. 282; *State v. Farris*, 45 Mo. 183; *Dawkins v. Antrobus*, 17 Ch. Div. 615; *Innes v. Wylie*, 1 C. & K. 257; 14 E. C. L. 255; *Fisher v. Keane*, 11 Ch. Div. 353; 41 L. T. 335; 49 L. J. Ch. 11; *Sibley v. Carteret Club*, 40 N. J. L. 295.

decided by the association, or a committee thereof duly empowered to act in such matters.<sup>1</sup>

2. **Remedy for Improper Expulsion.**—If a member of an incorporated association is improperly expelled, he may, as a rule, seek the assistance of a court of law by a writ of *mandamus* to restore him to the enjoyment of his rights and privileges in the association.<sup>2</sup> But over unincorporated associations, such as the Stock Exchange, the courts exercise no visitatorial power, and a writ of *mandamus* will not issue to restore an expelled member to his rights and privileges in the association,<sup>3</sup> unless the issuance of the writ in such case be authorized by statute.<sup>4</sup> However, a

1. See cases in last note; also *Toram v. Howard Ben. Soc.*, 4 Pa. St. 519; *Com. v. Pike Ben. Soc.*, 8 W. & S. (Pa.) 247; *Franklin Ben. Assoc. v. Com.*, 10 Pa. St. 327; *Sperry's Appeal*, 116 Pa. St. 391; *Black & White Smith's Soc. v. Vandyke, 2 Whart.* (Pa.) 308; 30 Am. Dec. 263; *Com. v. German Soc.*, 15 Pa. St. 247; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *Pitcher v. Chicago Board of Trade*, 121 Ill. 412; *Barrows v. Massachusetts Medical Soc.*, 12 Cush. (Mass.) 402; *Gregg v. Massachusetts Medical Soc.*, 111 Mass. 185; 15 Am. Rep. 24; *Burt v. Grand Lodge*, 44 Mich. 208.

2. *Witherington's Case*, 1 Keb. 2; *Middleton's Case*, *Dyer* 333a; *Rex v. Liverpool*, 2 Burr. 732; *Earle's Case*, *Carthue* 173; *Rex v. Mayor, etc.*, 2 Ld. Raym. 1564; *Rex v. Chalke*, 1 Ld. Raym. 225; *State v. Georgia Medical Soc.*, 38 Ga. 608; 95 Am. Dec. 408; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Sweeney v. Ben. Soc.*, 14 W. N. C. (Pa.) 466; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453; *Soc. for Visitation of Sick v. Com.*, 52 Pa. St. 125; 91 Am. Dec. 139; *Com. v. German Soc.*, 15 Pa. St. 251; *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469; *State v. Milwaukee Chamber of Commerce*, 20 Wis. 68; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *People v. Medical Society*, 24 Barb. (N. Y.) 570; *People v. St. Francis Ben. Soc.*, 24 How. Pr. (N. Y.) 216; *People v. New York Ben. Soc.*, 3 Hun (N. Y.) 361; *People v. American Institute*, 44 How. Pr. (N. Y.) 468; *People v. New York Cotton Exch.*, 8 Hun (N. Y.) 216; *State v. Union Merchants' Exchange*, 2 Mo. App. 66; *People v. Mechanics' Aid Soc.*, 22 Mich. 86; *Medical, etc., Soc. v. Weatherly*, 75 Ala. 248; 10 Am. & Eng. Corp. Cas. 26; *Delacy v.*

*Neuse River Nav. Co.*, 1 Hawk. (N. Car.) 274; 9 Am. Dec. 636.

But in a few cases where the right of membership was said to be of no pecuniary value, the visitatorial power of the courts has been denied and this relief withheld. See *State v. Grand Lodge*, 8 Mo. App. 148; *People v. Chicago Board of Trade*, 80 Ill. 134; *Hatch v. City Bank*, 1 Rob. (La.) 470. See *State v. Slavonska Lipa*, 28 Ohio St. 665.

3. In *Burt v. Grand Lodge*, 66 Mich. 85, Campbell, C. J., said: "The only ground on which this court can interfere with organized bodies by *mandamus* in aid of a member is that, as corporations, they are subject to our judicial oversight to prevent their depriving members of corporate privileges illegally. Where such bodies are not corporations, or where the question presented does not involve tangible and valuable corporate privileges, we cannot interfere in this way. A person who is wronged, if he has a legal cause of action, may pursue it in the appropriate action for damages against the person who wronged him, but *mandamus* cannot lie."

In *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69, Merwin, J., said: "Coming to the merits of the case, the question is whether the propriety of the expulsion of plaintiff can be reviewed here, and if so, whether it was proper. Cases are cited showing that the proper remedy is by *mandamus* where parties seek restoration to the membership of a corporation. (*People v. New York Ben. Soc.*, 3 Hun (N. Y.) 361, and cases cited.) This does not, I think, apply to an unincorporated association. (See *White v. Brownell*, 2 Daly (N. Y.) 358.)" See also *Merrill on Mandamus*, § 157.

4. In *Otto v. Journeymen Tailors' Protective, etc., Union*, 75 Cal. 308, an

member of such association who is threatened with wrongful expulsion may invoke the equitable power of the court by injunction to restrain the association from the commission of the wrongful act of expulsion, if he has property rights involved and no adequate remedy at law for the threatened injury;<sup>1</sup> or, if the resolution of expulsion has been passed, he may in such case have an injunction to prevent its being carried into execution.<sup>2</sup>

If one who has been wrongfully expelled from such voluntary association does not wish to seek restoration to membership therein, he may bring an action against the association to recover his damages.<sup>3</sup> But he may not have both forms of relief; if he enforces his remedy in the recovery of damages, the court will not interfere to restore him to membership.<sup>4</sup>

**IX. FURNISHING QUOTATIONS.**—It has been held that an unincorporated Stock Exchange is under no obligation to furnish quotations of prices to the public, and may furnish or refuse to furnish information of the business transactions on its floor to such persons or companies as it sees fit.<sup>5</sup>

unincorporated society was compelled by *mandamus* to reinstate an expelled member. See 3 Deering's *California Code* (1885), § 1085.

1. *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Powell v. Abbott*, 9 W. N. C. (Pa.) 231; *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 38; *Heath v. Gold Exchange*, 7 Abb. Pr. N. S. (N. Y.) 251. See also *Lutheran Evangelical Church v. Gristgau*, 34 Wis. 328; *Riddell v. Harmony Fire Co.*, 8 Phila. (Pa.) 310; *Harmstead v. Washington Fire Co.*, 8 Phila. (Pa.) 331; *Knights of Pythias Case*, 3 Brewst. (Pa.) 452; *Metropolitan Base Ball Club v. Simmons*, 17 W. N. C. (Pa.) 153; *Brunnenmeyer v. Buhre*, 33 Ill. 183; *Fisher v. Keane*, 41 L. T. 335; *Lambert v. Addison*, 46 L. T. 20; *Lyttelton v. Blackburn*, 33 L. T., N. S. 641. In *Illinois*, the decisions are otherwise. See *Waugelin v. Goe*, 50 Ill. 463; *Menard v. Hood*, 68 Ill. 122; *Fisher v. Chicago Board of Trade*, 80 Ill. 85; *Baxter v. Chicago Board of Trade*, 83 Ill. 146; *Sturges v. Chicago Board of Trade*, 86 Ill. 441; *Pitcher v. Chicago Board of Trade*, 121 Ill. 412. But see *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, for a review and criticism of the *Illinois* cases. And see *supra*, this title, *Expulsion of Members—Power to Expel*.

2. *Kuehnemundt v. Smith*, 2 N. Y. Supp. 625; *White v. Brownell*, 2 Daly (N. Y.) 329; *Lewis v. Wilson*, 121 N.

Y. 284; *Rorke v. Russell*, 2 Lans. (N. Y.) 244; *In re St. James Club*, 2 D. M. & G. 383; 16 Jur. 1075; *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq. 63; *Labouchere v. Wharnccliffe*, 13 Ch. Div. 346.

3. In *Sewell v. Ives*, 61 How. Pr. (N. Y.) 54. *Speir, J.*, said: "Although the plaintiff is a suspended member of the New York Exchange, it having been held and decided by this court that his alleged expulsion therefrom was void and of no effect, it clearly follows that the sale of his seat by the board having been made solely upon the ground of his wrongful expulsion, the Exchange have become by that act responsible to the plaintiff for any injury or damage done thereby." See also *Washington Ben. Soc. v. Bacher*, 20 Pa. St. 425; *Burt v. Grand Lodge*, 66 Mich. 85; *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69.

4. *State v. Slavonska Lipa*, 28 Ohio St. 665.

5. *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494, a case determined in the first department of the general term of the *New York Supreme Court*, in 1888.

In *Wilson v. Commercial Tel. Co.* (Supreme Court), 3 N. Y. Supp. 636; 18 N. Y. St. Rep. 78, a special term case, decided also in 1888, *Brown, J.*, said: "We come, therefore, to the real question in the case, which is, Does any public duty rest upon the New York Exchange to make known

the prices of securities dealt in by members on its floor? The direct authorities upon this question are few. With the exception of the decisions that have been made in the litigation between the parties to this action, the only direct authorities to which I have been referred, or which I have been able to find, arose in the state of *Illinois*. In two cases in the circuit court of that state it has been decided that the Chicago Board of Trade could not exercise any discrimination as to who should receive its market quotations, or as to what telegram companies should be allowed facilities for distributing the information to the public. *Stock Exchange v. Telegraph Co.*, reported in note to *Bryant v. Telegraph Co.*, 17 Fed. Rep. 830; *Murphy v. Board*, 20 Chicago Leg. N. No. 7. But in the case of *Stock Exchange v. Board*, in the appellate court of the first district of that state, directly the opposite was held, and an injunction against the board of trade was dissolved, the court holding that the board of trade was a private corporation, in whose affairs no one was especially interested except its members, and that it had the right of discrimination in the distribution of its market reports. This decision affirmed an order of Justice Bagby, dissolving an injunction against the board of trade, and must be regarded as overruling the decision of Justice Collins in the *Murphy Case*, and Chancellor Tuley in *Stock Exchange v. Telegraph Co.* See Const. *Illinois*, art. 11, § 6; 1 Gen. St., p. 702, § 28. To the same effect are the decisions of the circuit court of the United States. *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825; *Stock Exchange v. Board*, 15 Fed. Rep. 847; *Stock Exchange v. Western Union Tel. Co.*, 22 Fed. Rep. 25. In these cases it was held that the board of trade was a private corporation, and could give or withhold from the public its transactions, and that it might give the transactions to the public through such agents or upon such conditions as the board may deem advisable. In this state we have the decision of Justice Dykman, made on granting the temporary injunction in this action, against the Stock Exchange, holding the doctrine of the public character of the business of the Exchange, and its duty to make public its transactions; and the decision of the general term of the first depart-

ment, in the case of *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494, holding the contrary doctrine, and that there was no duty on the defendant to make known the transactions taking place on its floor. The weight of judicial authority is thus adverse to the plaintiff's claim. The cases in the circuit court of *Illinois*, and also the decision of Justice Dykman, were based on the doctrine of *Munn v. Illinois*, 94 U. S. 130, in which it was held that property, when used in a manner to make it of public consequence and affect the community at large, became clothed with a public interest, and might be controlled by the public for the common good, and the plaintiff's whole argument is based on the doctrine in this case. I am unable to see how *Munn v. Illinois*, 94 U. S. 130, has any application to the question involved in this case. That case arose under the statute of *Illinois* regulating the use of elevators and warehouses in the city of Chicago, and which was enacted pursuant to the general police power of the legislature. The question presented to the court was as to the constitutionality of that law. But we are not dealing with any legislation in reference to the Stock Exchange or its property. . . . In the absence of any act of the legislature regulating the stock business, or imposing any public duty upon the New York Stock Exchange, we must therefore be guided solely by the common law in determining the rights and obligations of the parties; and I think it will not be disputed that, if any duty rests upon the Stock Exchange to make public the ruling price of transactions on its floor, such duty must be found either in the character of the organization or in the nature of the business there transacted."

#### Competency of Quotations as Evidence.

—The published reports of sales by the Stock Exchange Board are not competent evidence to show the market value of shares of stock at a given time, unless accompanied by evidence showing or tending to show in what manner the reports were made up. *Vogt v. Cope*, 66 Cal. 31.

#### Incorporated Boards of Trade, etc.—

*Metropolitan Grain, etc., Exch. v. Chicago Board of Trade*, 15 Fed. Rep. 847; *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825, and *Marine Grain, etc., Exchange v. Western Union Tel. Co.*, 22 Fed. Rep. 23, seem

**X. RULES AND REGULATIONS—1. Right to Adopt.**—The Stock Exchange, in common with other voluntary associations, has a right to adopt a constitution and by-laws, and to make such rules and regulations concerning the conduct of its business as it may see fit, provided there is nothing in them which is unreasonable or contrary to law, and the members are bound by them as the laws of the body after they are regularly adopted.<sup>1</sup> No member,

to put boards of trade, although incorporated, upon the same basis as to their duties to the public in this respect as the Stock Exchange. But the Supreme Court of *Illinois* in *New York, etc., Grain, etc., Exch. v. Chicago Board of Trade*, 127 Ill. 153, which is later than *Wilson v. Commercial Tel. Co.* (Supreme Ct.), 3 N. Y. Supp. 636, note 1, *supra*, expressly denies the power of the board of trade to make discriminations against individuals when once it has undertaken to furnish quotations to the public. The court said: "Assuming these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. . . . The question here is not one of withholding altogether instantaneous quotations and information respecting the prices at which grain and provisions are being sold upon the market of the exchange, nor one of discriminating between its own members and such persons as are not members, in giving such information. Before the board itself assumed to control the sending of this news, no discrimination was made in distributing it between those who were and those who were not members of the board, and since the change was made, a very large proportion of the approved correspondents are not members, and the rule contemplates that persons other than members should be such correspondents. The question is, can the board so conduct its affairs for a long term of years as to create a standard market

for agricultural products, and acting in concert or combination with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, and until, by the usage and custom of merchants, thus advanced by the methods adopted by the board and telegraph companies, such instantaneous market quotations become necessary to the successful and safe transaction of business, and until such system has become impressed and affected with a public interest, and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements, and pay for the information desired, say that one shall and another shall not have such information. If the board has such right, and these corporations are lawfully permitted so to do, then they have the power to create monopolies, and dictate who shall deal in the agricultural products of the country, and at will impoverish or enrich merchants, shippers and producers. . . . We do not wish to be understood as holding that the board of trade is bound, by law, to continue the business of collecting and furnishing to the public market quotations, or that it may not voluntarily abandon such business; but we hold that so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms." And see note by Adelbert Hamilton to *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 828.

1. *Hyde v. Woods*, 94 U. S. 523; *Thompson v. Adams*, 93 Pa. St. 55; *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Singerly v. Johnson*, 3 W. N. C. (Pa.) 541; *Leech v. Leech*, 3 W. N. C. (Pa.) 542, note; *Evans v. Wister*, 1 W. N.

however, is thus bound unless such laws have received his personal assent;<sup>1</sup> but such assent need not be expressed; it may be implied from the circumstances, such as his admission to membership and acting as a member.<sup>2</sup>

Such associations in enforcing their laws act in a capacity analogous to that of arbitrators chosen by the parties. They will be held to a fair and impartial administration of their rules.<sup>3</sup> And in case such rules are contrary to established legal principles, the courts will declare them void and without binding effect upon the members, notwithstanding their personal assent thereto.<sup>4</sup>

**2. Members as Preferred Creditors.**—The seat of a member, as has been seen,<sup>5</sup> is a species of property, but the member is not the unqualified owner of it. His ownership is subject to the condi-

C. (Pa.) 181; *Moxey v. Philadelphia Stock Exchange*, 9 W. N. C. (Pa.) 441; *affirming* 37 Leg. Int. 82; *Hibernia F. Engine Co. v. Com.*, 93 Pa. St. 264; *Hochreiter's Appeal*, 93 Pa. St. 479; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 442; 4 Am. Dec. 453; *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 162; *Weston v. Ives*, 97 N. Y. 222; *Belton v. Hatch*, 109 N. Y. 593; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495; *Lewis v. Wilson*, 121 N. Y. 284; *affirming* 50 Hun (N. Y.) 166.

"Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land, and those who become members of the body are presumed to know them, to have assented to them, and they are bound by them." *Daly, J.*, in *White v. Brownell*, 2 Daly (N. Y.) 359; *citing* *Innes v. Wylie*, 1 C. & K. 262; 47 E. C. L. 255; *Brancker v. Roberts*, 7 Jur. N. S. 1185; *Hopkinson v. Marquis of Exeter*, London Times, Dec. 21, 1867, L. R., 5 Eq. Cas. 63. See also *People v. Chicago Board of Trade*, 80 Ill. 134; *Baxter v. Chicago Board of Trade*, 83 Ill. 146; *Sturges v. Chicago Board of Trade*, 86 Ill. 441; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *Grosvenor v. United Soc. of Believers*, 118 Mass. 96; *Venable v. Baptist Church*, 25 Kan. 177; *State v. Williams*, 75 N. Car. 134; *Note to Austin v. Searing*, 69 Am. Dec. 672; *Master Stevedores' Assoc. v. Walsh*, 2 Daly (N. Y.) 1.

1. *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665; *Heath v. Gold Exchange*, 7 Abb. Pr. N. S. (N. Y.) 251.

2. *White v. Brownell*, 2 Daly (N. Y.) 329; *Palmyra v. Morton*, 25 Mo. 593; *Innes v. Wylie*, 1 C. & K. 262; 47 E. C. L. 255; *Brancker v. Roberts*, 7 Jur. N. S. 1185; *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq. 63.

Amendments to the constitution and by-laws adopted in the regular way after one becomes a member are binding on him whether he was present at the time of their adoption or not. *MacDowell v. Ackley*, 93 Pa. St. 277.

**The Gratuity Fund.**—In *MacDowell v. Ackley*, 93 Pa. St. 277, it was held that, with the loss of full membership, one's right to the gratuity fund of the Stock Exchange fell with it during his life, and there was nothing to transmit to his personal representatives.

3. *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 38, *citing* *Sharpe v. Bickerdike*, 3 Dow 102; *Wood v. Woad*, L. R., 9 Exch. 194; *Thorburn v. Barnes*, L. R., 2 C. P. 384; *Capel v. Child*, 2 C. & J. 558; *In re Plews*, 6 Q. B. 845; 51 E. C. L. 845; *Oswald v. Grey*, 24 L. J., Q. B. 69; *Walker v. Frobisher*, 6 Ves. 69; *Drew v. Drew*, 2 McQueen H. L. Cas. 1; *Fisher v. Keane*, 11 Ch. Div. 353. See *infra*, this title, *Expulsion of Members*.

4. *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Kent v. Woodhull*, 55 N. Y. Super Ct. 311; *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 38; *Phillips v. Wickham*, 1 Paige (N. Y.) 590; *People v. New York Ben. Soc.*, 3 Hun (N. Y.) 361; *State v. Union Merchants' Exchange*, 2 Mo. App. 96; *Pulford v. Fire Department*, 31 Mich. 458; *State v. Williams*, 75 N. Car. 134.

5. See *supra*, this title, *Seats*.



tions prescribed in the rules and regulations of the Exchange which constitute and define his contract of membership, and the proceeds of his seat may be applied first to the payment of his debts to fellow-members. Such a rule is not contrary to the established principles of law or opposed to public policy, and therefore may be enforced.<sup>1</sup> This rule has been enforced even against an outside creditor, who had furnished money to buy the seat and was in a sense the equitable owner of it, on the ground that the members of the Exchange knew no one in the transaction except the sitting member and gave him credit as the owner of the seat.<sup>2</sup> And if in the course of dealing which leads to a member's insolvency he is guilty of such misconduct as results in his expulsion under the rules of the Exchange, it has been held

1. In *Hyde v. Woods*, 94 U. S. 523, this question came before the Supreme Court of the United States. In the course of the opinion, Miller, J., said: "It is very ingeniously argued by counsel for the assignee, that, being property of the bankrupt, he had no right to make the disposition of it which he did, by preferring his creditors who were members of the board to those who were not. The answer to this, so far as Fenn's assignment to defendants is concerned, is, that the part of it which gives this direction to the proceeds of the sale was wholly unnecessary and nugatory; for if the article of the association which we have cited in full was effective, it controlled the disposition of those proceeds; if it is void, or for any other reason ineffectual, then it must be conceded that the assignment of Fenn was an unlawful preference within the meaning of the bankrupt law. The question turns solely upon the validity of that article of the association. There is no reason why the Stock Board should not make membership subject to the rule in question, unless it be that it is a violation of some statute, or of some principle of public policy. It does not violate the provision of the bankrupt law against preference of creditors, for such a preference is only void when made within four months previous to the commencement of the bankrupt proceedings. Neither the bankrupt law nor any principle of morals is violated by this provision, so far as we can see. A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is incumbered with conditions when purchased, without which it could not

be obtained. It never was free from the conditions of article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come. As the creators of this right—this property—took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition. The fundamental vice of plaintiff's argument is to treat the case as though Fenn, owning this property absolutely as his own without restriction, had then fettered it, of his own accord, with the condition that it must always stand incumbered by a preferred lien to his fellow members." The same rule is upheld in the courts of *Pennsylvania*. *Evans v. Wister*, 1 W. N. C. (Pa.) 181; *Leech v. Leech*, 3 W. N. C. (Pa.) 542, n.; *Singerly v. Johnson*, 3 W. N. C. (Pa.) 541; *Thompson v. Adams*, 93 Pa. St. 55; *Moxey v. Philadelphia Stock Exchange*, 9 W. N. C. (Pa.) 440.

2. In *Thompson v. Adams*, 93 Pa. St. 66, the court said: "The plaintiff below was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he was the equitable owner of the seat, and had title to what was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger, unknown to the association. The members gave credit to each other in part,

that neither he nor his assignee is entitled to receive even the surplus of the proceeds of his seat after payment of his debts to his fellow-members.<sup>1</sup> But if the Exchange wrongfully expels a member and disposes of his seat, it is liable for the proceeds thereof, and the payment of his debts to his fellow-members may not be shown in mitigation of damages.<sup>2</sup> Authority for this preference in favor of a fellow-member of an insolvent broker must be sought in the constitution and laws of the association, and where such laws make exceptions of certain classes of debts the courts will also exclude them in the application of the rule.<sup>3</sup>

no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in this regulation. The seat is not property in the eye of the law, it could not be seized in execution for the debts of the members. It is the mere creation of the board, and, of course, was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it."

1 In *Belton v. Hatch*, 109 N. Y. 503; 21 Am. & Eng. Corp. Cas. 365; 4 Am. St. Rep. 495, Gray, J., said: "The plaintiff, appellant, contends that in such a case as this of *Des Marets'* severance from membership, there was no power under the constitution to distribute the proceeds arising from the sale of his membership, and that, in the absence of some express reservation of the right to dispose of those proceeds, they are the property of the member. The vice in plaintiff's argument is in the assumption that a member has any absolute property of his own in such a case. As we have before seen, the rules of the association were an incident to the rights acquired by a person upon admission; and one of those rules was that for conviction of an offense against or under the laws of the Exchange, a suspended member might be deprived of right to readmission to membership. When expelled he ceases to have any interest in the association. His privilege to transact his business at that place has been lost. The association may fill the vacancy caused by his expulsion, or not, as they please. They cannot be compelled to do so; but if they elect to admit a new member, and can derive, from so doing, any profit, that is their unquestionable right, with the exercise of which others are not concerned. They may do with their own as they like. As I

construe section 2 of article 13, above cited, its effect is that of an express reservation of the right to deprive a member, found guilty of an offense under its provisions, of all rights, interest and claim whatever. The right is given to a member in good standing to propose for admission in his stead some one acceptable to the committee on admissions, and any profit he derives from his negotiations with the candidate is his. So if a member becomes honestly insolvent and fails to qualify under the rules for readmission, or if he dies, after the claims of the association are discharged, the proceeds may be paid to him or his legal representatives, as the case may be. But in the case of a member, who, by misconduct cognizable by the laws of the association, forfeits his right to continue to remain a member, there is reserved by the constitution the right to dispose of his membership. These rules are reasonable and do not contravene any rule of public policy, and having been consented to by the plaintiff's assignor, deprived him of any interest or rights in the association, of which he has ceased to be a member."

2. *Sewell v. Ives*, 61 How. Pr. (N. Y.) 54.

3. In *Weston v. Ives*, 97 N. Y. 222, the following provision of the *New York Stock Exchange* was before the court: "If any suspended member fails to settle with his creditors within one year from the time of his suspension, his membership shall be disposed of by the committee on admissions and the proceeds paid pro rata to his creditors in the Stock Exchange." This was qualified by an amendment which was passed before the suspension of the plaintiff's assignor as follows: "No difference growing out of a claim on a put or call notified for and reduced to a contract after failure, will be recog-

The rule by which members of the Exchange are preferred to outside creditors of a defaulting member, is not always confined to the application of the proceeds of such member's seat or membership. The fund arising from the closing of a defaulting member's transactions on exchange, and the payment of differences in his favor by his fellow-members with whom he has made winning contracts, may also, under the rules of the Exchange, be applied to the payment of his debts to his fellow-members in preference to those he owes to outside creditors.<sup>1</sup>

nized as entitled to a distributive share of the proceeds of a membership" The court said: "That provision seems to be a perfect answer to the defendant's claim. It forms part of the agreement of Weston's membership. It is not controverted that every debt in question grew out of transactions on 'puts and calls,' that none of them were notified or reduced to a contract before his failure, but all afterward and after notice of that failure to the Stock Exchange. We do not find it necessary to consider whether such contracts are valid or not. It is immaterial. The provisions of the constitution and the laws of the association are obligatory upon the parties as a contract. By their terms and his membership, Weston assented to the appropriation of his property in a particular way, and to certain debts to the exclusion of others. It is by that assent only that the defendant had power to convert his property into money, and no application can be made of it to which he has not in like manner assented."

1. In *Nicholson v. Gooch*, 5 El. & Bl. 999, 85 E. C. L. 999, it appeared that one Lodge was a member of the London Stock Exchange, and that he became insolvent and contemplated bankruptcy; that he was declared a defaulter on exchange and the official assignees of the Exchange proceeded to close his transactions and collected the differences due him from other members of the Exchange and paid out a large portion of the funds so collected to other members to whom he owed differences. He subsequently went into bankruptcy, and the assignees in bankruptcy sued to recover this fund as a part of the bankrupt estate. The court held that they could not recover, on the grounds that the official assignees had paid over a portion of the fund *bona fide* before the act of bankruptcy, and that as to the rest of the

funds it appeared that the transactions were illegal, and the assignees in bankruptcy could not have collected it if the official assignees of the Exchange had not done so. But Cotton, Lord Justice, took occasion to remark: "Without reference to the illegality of paying or receiving differences and treating the case as if the contracts were merely illegal and void, and assuming that the differences might legally be received for the use of the bankrupt, I am not satisfied by the evidence that the differences in question were so received in the present case as to fall within the principle contended for. The money seems to me rather to have been received under an adverse claim to receive and distribute according to the rules of the Stock Exchange by reason of the bankrupt having become a member subject to such rules, than by virtue of any such new directions or authority from the bankrupt to receive and distribute, as the plaintiff insists might be inferred from the evidence to have been the authority under which the defendant acted in receiving the differences. And if he received them under such adverse claim, then I should be disposed to think that the defendant would not be estopped from setting up that the bankrupt had no legal right to or property in the money by reason of illegality or otherwise. If it were necessary for the decision of the case, I should be disposed to think that the plaintiff's case failed on this ground also, and I quite agree that there should be judgment for the defendant."

*Ex parte Grant*, 13 Ch. Div. 667, is another case in which this question arose, and this time it was held by the court that the funds received by the official assignees of the Stock Exchange upon a settlement of differences due to the defaulting member, being an artificial fund created by the rules

But the application of this rule must be confined to the distribution of the proceeds of property of which the defaulting member's ownership is subject to the rules of the Stock Exchange, or to funds which owe their existence to the enforcement of such rules. The general estate of a bankrupt or insolvent member may not be distributed among his creditors on exchange in preference to his outside creditors.<sup>1</sup>

**3. The Arbitration Clause—*a*. IN GENERAL.**—The constitutions and by-laws of Stock Exchanges and other voluntary associations provide for domestic forums before which violations of their laws and regulations are inquired into and certain matters of dispute among the members are investigated and determined. Each member on joining the association agrees to support the constitution and abide by the rules and regulations of the body, and the

of the Stock Exchange, did not form part of the assets of the defaulter's estate and did not pass to the trustee in bankruptcy. Cotton, Lord Justice, said: "Many matters have been discussed upon which it would not be right to give an opinion, because all that we have to consider is whether the trustee in bankruptcy can obtain from the official assignee of the Stock Exchange, as he is called, the fund in question. And it seems to me that that question is shortly disposed of in this way: The fund was an artificial one which never belonged to the bankrupt but has been created by the rules of the Stock Exchange for a particular purpose, and only has an existence for the purpose of being dealt with in a peculiar way. What is to be done with any surplus after that purpose has been satisfied is another question. But the trustee wants to take from the official assignee of the Stock Exchange a fund created for a particular purpose without applying it to that particular purpose. In my opinion he is not entitled to do that."

1. In *Ex parte Saffery*, 4 Ch. Div. 555, it appears that one Cooke, was a member of the London Stock Exchange, and having become financially embarrassed he gave formal notice to the secretary of the Exchange that he could not fulfill his engagements, and his failure was announced in the room in the usual way. At a meeting of his Stock Exchange creditors he announced that he had no creditors off exchange, and his creditors on exchange agreed to accept a composition, and he gave to the official assignees of the Exchange a check on the bank of

England for five thousand pounds to be distributed among his Stock Exchange creditors, and the official assignees received the proceeds of the check. He was subsequently adjudged a bankrupt, and the trustee in bankruptcy moved that the official assignee might be ordered to pay to him the five thousand pounds received from the bankrupt. Mr. Registrar Pepys, on hearing the motion, held that the five thousand pounds was received before any act of bankruptcy; that the payment of it was not a fraudulent preference, and accordingly denied the motion with costs. The trustee in bankruptcy appealed to the high court of justice, and the decision of the Registrar was reversed. James, Lord Justice, said: "We are of opinion that that demand was lawfully and rightfully made by the trustee in bankruptcy, and upon this broad, general, and universal principle that any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such person otherwise than according to the provisions of the bankrupt law, is a plain and palpable fraud on the bankruptcy laws; a plain and palpable fraud upon the creditors who are excluded or disappointed or who are delayed or hindered thereby. . . . It was suggested that this was done merely in obedience to the rules and regulations of the Stock Exchange. My answer to that is, that the Stock Exchange is not an *Alsatia*. The Queen's laws are paramount there, and the Queen's writ runs even into the

decisions of the domestic forum having been provided for in the contract of membership are *quasi* judicial in their character and are analogous to awards made by arbitrators chosen by the parties.<sup>1</sup> As has been seen, when such a decision is arrived at after a fair and orderly trial in accordance with the laws of the association, and the matter investigated is within the jurisdiction of the domestic tribunal, the courts will generally refuse to interfere.<sup>2</sup>

*b. LIMIT OF JURISDICTION.*—But the jurisdiction of these bodies is confined to matters which arise out of transactions conducted by their members as members. They do not possess the power to compel the attendance of witnesses or to issue any compulsory process, and the law will not allow them to usurp the powers of the regularly constituted courts of justice. Therefore, if they assume to take cognizance of matters which the members have not agreed to submit to the arbitrament of the domestic forum, the courts may interfere by injunction to prevent their doing so,<sup>3</sup> or may declare their decisions of no binding effect when

sacred precincts of Capel Court." The official assignees of the Exchange appealed from this order to the House of Lords, and the case is reported *sub nom.* *Tomkins v. Saffery*, L. R., 3 App. Cas. 213. It was held that the rules of the Stock Exchange as to defaulting members of a body are the rules of a domestic forum which have no influence on the rights of those who are not amenable as members to the jurisdiction of that body, that they cannot therefore govern the rights of the general creditors of a defaulting member; and the order appealed from was affirmed with costs.

1. In *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 53, the court said: "While these proceedings are not to be governed by the strict rules which apply to actions at law or suits in equity, or even perhaps by the rules which obtain in regard to arbitrations, there is, I think, a strong analogy between the principles which govern in arbitrations and those which relate to proceedings of this character."

In *Heath v. Gold Exchange*, 7 Abb. Pr. N. S. (N. Y.) 251, the court said: "Assuming that the plaintiffs in this action assented to the constitution of the Gold Exchange in such a manner as to establish a valid contract between them and the other members of the association, the question arises what binding force or effect has this 7th article (the arbitration clause) upon them? In my opinion the most

that can possibly be claimed for it is that it should have the same force and effect as an agreement in writing made by persons to submit to the decision of one or more arbitrators a controversy existing between them."

In *Leech v. Harris*, 2 Brewst. (Pa.) 576, it is said: "It is like an award made by a tribunal of the party's own choosing, for he became a member under and subject to the articles and conditions of the charter and of course to the provisions on this subject as well as others."

2. *Lewis v. Wilson*, 121 N. Y. 284; *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 38; *Heath v. Gold Exchange*, 7 Abb. Pr. N. S. (N. Y.) 251; *Leech v. Harris*, 2 Brewst. (Pa.) 571. See *supra*, this title, *Expulsion of Members*, and cases cited.

3. *Leech v. Harris*, 2 Brewst. (Pa.) 571. Here a stock-broker of *New York* made complaint against the plaintiff to the board of brokers of Philadelphia that the plaintiff had sold him an interest in a tract of land and an interest in several leases of oil wells for sums largely in excess of their value; which sums he claimed to recover and required said board of brokers to take cognizance of his complaint, and through the aid of its machinery to coerce the plaintiff to pay the said sums to him on pain of suspension from the board. The board was proceeding to investigate the matter, and the court, on prayer of the

the matters they have assumed to decide come before the court for judicial determination.<sup>1</sup> And if the association is incorporated, a *mandamus* may issue, in such case, to compel the restoration of a member to his rights.<sup>2</sup>

c. MAY NOT OUST THE COURTS OF JURISDICTION.—It is a well established principle of law that the courts will not enforce an agreement to arbitrate, except as a condition precedent to bringing an action.<sup>3</sup> And a by-law of a voluntary association designed to enforce the arbitration of disputes among its members and prevent recourse to the courts of justice, being in the nature of such an agreement, is contrary to public policy, and void in so far as it is attempted to oust the courts of their jurisdiction.<sup>4</sup>

plaintiff, perpetually enjoined it from doing so. Peirce, J., said: "What the plaintiff really submitted to when he became a member of the board of brokers was that the board should take jurisdiction if he should refuse to comply with his stock contracts, not that they should have jurisdiction of his contracts touching houses, lands, leasehold estates, or farming interests. . . . I do not perceive that either by the law of the association, by the law of the land, or by submission to its jurisdiction, the board of brokers has acquired any right to arbitrate and settle the matters in dispute between the plaintiff and Reuben Manley, Jr. The courts of law are open to Mr. Manley to vindicate his rights and to reverse any wrongs done to him, but the board of brokers cannot erect itself into a tribunal for this purpose. The plaintiff has, in my opinion, a clear right to the protection of a court of equity. . . . Like every member of such an association, he (the plaintiff) is bound by the laws of the association to which he has assented in becoming a member and by the law of the land as affecting these associations, but not by an exercise of power on the part of his fellow-members to which he has not assented, or which is not derived from the law of the land." See also *Hurst v. New York Produce Exchange*, 100 N. Y. 605; 10 Am. & Eng. Corp. Cas. 362.

1. *Morris v. Grant*, 34 Hun (N. Y.) 377.

2. *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453; *State v. Union Merchants' Exchange*, 2 Mo. App. 96.

3. *Scott v. Avery*, 8 Exch. 487; 25 L. J. Exch. 308; in error, 6 H. L. Cas. 811; *Tredwen v. Holman*, 31 L. J.

Exch. 398; *Russell v. Pellegrini*, 6 El. & Bl. 1020; 25 L. J. Q. B. 75; *Hemans v. Picciotti*, 1 C. B. N. S. 646; 87 E. C. L. 645; *Braunstein v. Accidental Death Ins. Co.*, 31 L. J. Q. B. 17; *Westwood v. Secretary of India*, 1 W. R. 262; *Elliott v. Royal Exchange Assur. Co.*, L. R., 2 Ex. 237; *Sharp v. San Paulo R. Co.*, L. R., 8 Ch. 597; *Dawson v. Fitzgerald*, L. R., 1 Ex. Div. 257; *Edwards v. Aberayron Mut. Ship Ins. Soc.*, 1 Q. B. Div. 563; *Colons v. Locke*, L. R., 4 App. Cas. 674; *Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Rowe v. Williams*, 97 Mass. 163; *Heath v. Gold Exchange*, 7 Abb. Pr. N. S. (N. Y.) 251.

4. In *State v. Union Merchants' Exchange*, 2 Mo. App. 96, it appears that the relator had been suspended from the Union Merchants' Exchange of St. Louis in accordance with a by-law of that body, which compels members to submit their business controversies to arbitration on pain of suspension or expulsion. The court held the by-law unreasonable and void, and awarded a writ of *mandamus* to restore the relator to his rights and privileges in the Exchange. And after an elaborate review of authorities, the court said: "In view of the character and objects of this corporation and the manifest inconvenience to which every trader must necessarily be subject who is not permitted to join or is expelled from the chief mart of commerce in the place of which he is a citizen and a trader, we think a by-law compelling the members of the Union Merchants' Exchange to submit their controversies to arbitration on pain of suspension or expulsion, is unreasonable in the legal and technical sense of that term and that it cannot be sustained." And see *Player v. Archer*, 2

**XI. THE CLEARING HOUSE.**—An important feature of the Stock Exchange is the clearing house, through the agency of which much of the business of the brokers in respect to the delivery of shares of stock and payment for the same is carried on. At the close of each day, sheets, each of which contains the history of a broker's transactions on exchange for that day are sent to the clearing house. Each broker's clearing-house sheet contains a record of all the stocks bought and sold by him that day, together with the prices paid and received therefor. The clearing house acts as agent for all parties in making and accepting deliveries of stock, and also in the adjustment of the balances in cash to be paid and received by the members, respectively. If a broker's clearing-house sheet shows that he has bought and sold the same number of shares of any particular stock, his sheet is balanced as to that stock, and no actual delivery of the same is made by or to him. If it does not so balance, he delivers or accepts, as the case may be, an amount of the stock sufficient to make it balance. As in the delivery of shares, the clearing house acts also in the payment for them as a common and convenient agent. Each broker's transactions for the day are balanced on a cash basis, and if it appears that the aggregate price of his sales exceeds that of his purchases he is entitled to receive the amount of such excess in cash. If, on the contrary, the aggregate price of his purchases exceeds that of his sales, he must pay the amount of such excess in cash. Thus, it will be seen, that enormous transactions may be carried on with an actual manual delivery of but few stock certificates and the handling of comparatively small amounts of cash.<sup>1</sup>

Sid. 121; *London v. Bernardiston*, 1 Lev. 16; *Ballard v. Bennett*, 2 Burr. 778; *Middleton's Case*, Dyer 313a; *Dos Passos. Stock-brokers. etc.*, p. 78; note to *Austin v. Scaring*, 69 Am. Dec. 665.

**1. Stock Exchange Clearing Houses.**—In an article on "Stock Exchange Clearing Houses," by Alexander D. Noyes, in the *Political Science Quarterly*, vol. 8, No. 2, p. 252 *et seq.* (June, 1893), it is said: "The system of clearing houses for stocks is not new. It was adopted in the New York Stock Exchange only in the early months of 1892, but it has been in existence elsewhere for at least twenty-five years. . . . Ordinarily, in the first experiments, they took the form of the so-called 'ringing out' of contracts in the same security. By this plan if A had sold B a given amount of one security, and if B had presently sold the same amount to C, the series of trades could be personally adjusted between the three traders so that the only actual exchange required would be the

transfer of the securities from A to C. Of course, the number of the traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform. . . . The first official establishment of this kind in Europe was founded at the *Handelskammer* of Frankfort, May, 1867, principally for the purpose of dealing in government securities; United States bonds in particular. The Berlin Exchange adopted the system in 1869; Hamburg in 1870; Vienna in 1873, and London in 1876; The Paris Bourse, owing to its peculiar system of limitation on exchange membership, has never established a regular clearing house for stocks, but the same ends are attained by a voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearings. It should be noticed as the particular feature of the European stock clearing houses that their purpose is to

**STOCKHOLDERS.**—(See ASSOCIATION, vol. 1, p. 881; BENEFICIAL ASSOCIATIONS, vol. 2, p. 171; BUILDING ASSOCIATIONS, vol. 2, p. 604; COMPANY, vol. 3, p. 366; CORPORATION, vol. 4, p. 184; DISFRANCHISEMENT, vol. 5, p. 684; DIVIDEND, vol. 5, p. 725; FOREIGN CORPORATIONS, vol. 8, p. 329; JOINT-STOCK COMPANIES, vol. 11, p. 1036; MANUFACTURING CORPORATIONS, vol. 14, p. 269; MINING COMPANIES, vol. 15, p. 613; NATIONAL BANKS, vol. 16, p. 143; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39; PARTNERSHIP, vol. 17, p. 824; RAILROADS, vol. 19, p. 775; RELIGIOUS SOCIETIES, vol. 20, p. 773; SOCIETIES AND CLUBS, vol. 22, p. 803; STOCK, vol. 23, p. 582; STOCK EXCHANGE, vol. 23, p. 748; ULTRA VIRES.)

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deal with exchanges not of money but of securities. Their work is made up solely of a comparison of contracts to receive and to deliver securities between the brokers concerned. The principle is thus merely an extension of the 'ringing out' plan already described. In London, and in most of the continental cities, the scope of the clearing-house is made broader through the system of a fortnightly settlement of Stock Exchange accounts. . . . The clearing-house sheet of a broker comprises the record made up into 'receive' and 'deliver' columns of all his transactions for the day. As this sheet will ordinarily include trades in a considerable number of securities,

the transactions in each separate security are to be grouped together. All transactions having been entered in one or the other column, the balance is struck. If the sheet as drawn up by the clearing-house shows a debit balance, the difference is entered as 'balance cheque,' and the sheet presented at the clearing-house must be accompanied by a check for the balance on a clearing-house association bank near Wall street, drawn to the order of the Stock Exchange Clearing-House's own bank. If, on the other hand, the sheet shows a credit balance, it must have with it a draft on the clearing-house's own bank for the amount of the difference."



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**I. DEFINITION AND STATUS—1. Who Are Stockholders.**—A stockholder is one who holds membership in a corporation or joint-stock company by virtue of owning one or more shares of its stock.<sup>1</sup> In the *United States* the term is used synonymously

1. *State v. Ferris*, 42 Conn. 568; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newtown*, etc., *Turnpike Co.*, 3 Conn. 544; *Van Sands v. Middlesex County Bank*, 26 Conn. 144; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *In re Barker*, 6 Wend. (N. Y.) 509. These cases hold that the books and records of a corporation determine who are its stockholders for the time being and who have the right to vote on the stock, although the same may have been sold or pledged as collateral security; that in such cases the party who appears to be the owner on the books of the corporation, has the right to be treated as a stockholder, and to vote on whatever stock stands in his name.

In *Worrall v. Judson*, 5 Barb. (N. Y.) 210, the defendant had sold the stock and transferred to the vendee a certificate of stock with his name indorsed thereon, but the stock continued to stand upon the books of the company in the name of the defendant, and it was held that he was liable as a stockholder for a debt contracted by the company.

In *Ohio*, where by statute the equitable owner of shares is considered a stockholder, one for whose benefit stock is held by another is liable the same as a registered member, for corporate debts. *Lloyd v. Preston*, 146 U. S. 630. One who transfers stock to the president of a corporation so that it may be wound up, remains the equitable owner. *Thompson v. Stanley*, 20 N. Y. Supp. 317.

One who was to pay cash for his shares but did not, and received no certificate, is not shown to be the owner by the mere fact of subscription. *Bank of Yolo v. Weaver* (Cal. 1892), 31 Pac. Rep. 110.

In *Adderly v. Storm*, 6 Hill (N. Y.) 624, the court, by Bronson, J., observed: "The legislature has provided for the creation of the 'stock,' prescribed the mode in which it may be transferred, and conferred certain rights and liabilities upon the 'stockholders.' After the defendants had once become the legal owners they could only throw off the liabilities in-

cident to that relation by transferring the stock. Until that was done they continued to be 'stockholders' within the meaning of the statute. If we depart from the terms of the law, and inquire into the equities which may exist between the stockholder and some third person, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may be done by the corporation. If creditors must look beyond the legal title, they can never know against whom to proceed. If the stock has been fraudulently transferred for the purpose of avoiding responsibility, and at the same time securing all the advantages of a stockholder, I do not intend to say that the real owner cannot be reached."

In *Rosevelt v. Brown*, 11 N. Y. 151, Edwards, J., delivering the opinion of the court, said: "A corporation, although it is an artificial existence, must be composed of natural persons, who manage and administer its affairs and receive its benefits. These persons are not generally named in the charter of incorporation, and there must be some way of ascertaining who they are. In a joint-stock company they are, and they necessarily must be, those who hold the evidence that they are the owners of the stock—they are called the stockholders and not the stock-owners, and they are generally those who appear upon the transfer books of the company to be stockholders. This must be so in the case of corporations which are subject to the provisions of the revised statutes. (1 N. Y. Rev. St. 604, § 8.) As between himself and third parties, the person who appears on the transfer books to be a stockholder may have parted with all his interest in the stock, but as between himself and the corporation such person, and he only, is treated as a stockholder."

A finding that parties are "stockholders" includes a finding that they have complied with the conditions precedent of membership. *Arthur v. Clarke*, 46 Minn. 491.

**Instances.**—One who has not paid his subscription in full is none the less a shareholder. *Curry v. Scott*, 54 Pa.

St. 276. Under the Ontario Joint Stock Letters Patent Act, those only are shareholders who are named in the letters patent and to whom stock is allotted. *In re London S. P. Co.*, 16 Ont. App. 508.

The fact that a corporation recognizes a party as owner of stock and pays him dividends thereon, binds it to nothing in the future, and does not determine the right of the party in regard to the stock. *Cady v. Potter*, 55 Barb. (N. Y.) 463.

Where the corporation is rechartered and stockholders accept the new organization, they become stockholders therein. *Hammond v. Straus*, 53 Md. 1.

"The right to become a shareholder does not make its possessor a shareholder," per Welch, C. J., in *Burt v. Rattle*, 31 Ohio St. 116, holding that issue of so-called preferred stock, convertible into common, did not make its holders members.

One whose stock has been forfeited for non-payment of calls, is not a stockholder within the meaning of section 10 of the General *New York* Railway Act of 1850, so as to render him liable to the creditors of the company for amounts unearned on the forfeited stock, though the debt was contracted before forfeiture. *Miles v. Stewart*, 41 N. Y. 384.

Parties who meet, adopt a plan of organization, elect officers, subscribe for some of the shares, and sign articles, are stockholders, though the articles are not recorded as the statute requires. *Heald v. Owen*, 79 Iowa 23.

Purchasers of stock, received and treated by the corporation as stockholders, become such, although the transfer was irregular. *Murray v. Bush*, L. R., 6 H. L. 37.

The mere fact that one is a director in a corporation does not make him liable as a stockholder under Gross' *Illinois* Stats., ch. 25, § 14. *Steel v. Dunne*, 65 Ill. 298.

Where the constitution of a charitable corporation provided that any person could, after signing the constitution, vote and be eligible to office, it was held, that where one was duly elected and paid dues for several years, the corporation could compel payment of dues, although he had never signed the constitution. *United Hebrew Assoc. v. Benshimol*, 130 Mass. 325.

Parties become stockholders under a

contract to take stock though coupled with an option to resell to the corporation. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199.

One who has a mere option to take stock but refuses, is not a stockholder, though a vice-president and one of the incorporators. *Medler v. Albuquerque Hotel Co.* (N. Mex. 1892), 28 Pac. Rep. 551.

Under the *California* statute, a person to whom stock has been issued as trustee without knowledge, is not a *bona fide* holder, and not a stockholder. *Stuart v. Mahoney Min. Co.*, 54 Cal. 149.

But one who has received stock, and appears on the corporate books, will be held liable to creditors for the unpaid subscriptions, though in fact he is not the owner. *Baines v. Babcock*, 95 Cal. 581.

One who subscribes to an increase, which is never made, is not estopped to deny liability as a stockholder, because old stock has been transferred to him without his knowledge, and he has received dividends thereon. *Stephens v. Follett*, 43 Fed. Rep. 842; 31 Am. & Eng. Corp. Cas. 466.

The mere entry of a party's name on a list of stockholders by one authorized to subscribe for him, does not constitute such party a stockholder. *Granger's Market Co. v. Vinson*, 6 Oregon 172.

A stockholder is presumed to continue as such until the contrary is shown. *Barron v. Paine*, 83 Me. 312.

Where a corporation effects a loan by issuing stock indorsed "preferred," the contract stipulating that the holders, at the end of two years may become ordinary stockholders, or redeem their certificates, and they choose the latter plan, they are entitled to claim as *bona fide* creditors. *Totten v. Tison*, 54 Ga. 139.

Where one subscribed "subject always to the by-laws, rules and articles of incorporation," he was held to be a stockholder and liable to be called on for payment as the by-laws provided without regular assessment. *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121.

Where the directors transfer charter without authority, and the stockholders participate in the company's affairs under the new management, they are estopped from denying the transfer and are stockholders. *Upton v. Jackson*, 1 Flipp. (U. S.) 413.

One who loaned money to a corpo-

with "shareholder,"<sup>1</sup> though the latter is less common, but in *England* the word shareholder is almost exclusively employed.<sup>2</sup> The terms "corporator,"<sup>3</sup> "member,"<sup>4</sup> and "subscriber,"<sup>5</sup> are often used in senses closely approaching that of "stockholder," but are distinguishable from it by certain shades of meaning.

ration and received stock absolute on its face, was held to be liable as a stockholder. *Griswold v. Seligman*, 72 Mo. 110.

A gratuitous transferrer to trustees whose names he does not know, who pays the expenses of the transfer, the purpose of which is indefinite, is still a stockholder within the meaning of a statute authorizing service of process on such. *Colorado Iron Works v. Sierra Grande Min. Co.* (Colo. 1890), 32 Am. & Eng. Corp. Cas. 201.

One who accepts and retains a certificate after paying face value therefor, cannot be heard to say that he intended the payment as a gift to the company, but will be held as a subscriber. *McDowall v. Sheehan* (N. Y. 1891), 36 Am. & Eng. Corp. Cas. 137.

**Mere Pledges Are Not Stockholders.**— "If the shares of stock are merely pledged by the assignment of the certificates, the holders would not be entitled to the rights, nor subject to the liabilities of the owners of the shares; they could only become owners by a sale and purchase of the stock pledged on failure of the pledgee to pay the debt." *Nelson, J., in Becher v. Wells Flouring Mill Co., 1 McCrary* (U. S.) 62.

"Where a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation, or its officers as officials of such corporation." *Horton C. J., in Baker v. Woolston*, 27 Kan. 185. See also *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405; *Baldwin v. Canfield*, 26 Minn. 43; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *McHenry v. Jewett*, 26 Hun (N. Y.) 453; *Butterworth v. Kennedy*, 5 Bosw. (N. Y.) 143; *Prouty v. Prouty, etc., Shoe Co.* (Pa. 1893), 25 Atl. Rep. 1001; *Columbia Bank v. Rogers*, 10 Pa. Co. Ct. 61; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

But a pledgee to whom shares have

been transferred on the books is liable to creditors as a stockholder. *National Commercial Bank v. McDonnell*, 92 Ala. 387.

1. "A shareholder in this country means the same thing as a stockholder, and the terms are used interchangeably to indicate one who owns stock in a corporation and has been accepted as a stockholder by the corporation." *Cook on Stock and Stockholders* (2d ed.), § 4.

2. See English joint stock company cases, and text-books on Company Law *passim*.

3. "Corporators exist before stockholders, and do not exist without them. When stockholders come in, corporators cease to be." *Danforth, J., in Chase v. Lord*, 77 N. Y. 11; 6 Abb. N. Cas. (N. Y.) 258.

Under the *Illinois* statute of 1861, to regulate the liabilities of the stockholders, the words "trustees" and "corporators" mean also stockholders. *Shufeldt v. Carver*, 8 Ill. App. 545.

4. The terms "member" and "corporator" are each broader in meaning than stockholder, and apply, as the latter does, not to persons belonging to non-trading corporations, or those without capital stock. The use of these terms interchangeably is a survival of the time when corporations were mere associations without fixed shares, and definite liability of members. See 1 *Lindley on Partnership*, p. 6, *et seq.*

5. "Subscriber" means one who has stipulated to pay, not one who has paid. *Thames Tunnel Co. v. Sheldon*, 9 D. & R. 278; 6 B. & C. 341.

A statute making "stockholders and members" liable for employes' services, does not include mere subscribers. *Wheeler v. Thayer*, 121 Ind. 64.

An averment that defendant "subscribed," is not sufficient where the statute provides for an action only against a "shareholder." *Wolverhampton, etc., Co. v. Hawkesford*, 6 C. B., N. S. 336; 95 E. C. L. 336.

A subscriber is a *locus penitentiae* holder. The association has a right to file its articles and he to withdraw.

**2. Evidence and Criteria of Membership.**—The books of the corporation are *prima facie* evidence of its membership,<sup>1</sup> but they are not conclusive.<sup>2</sup> As authentications of membership certificates of stock are usual and proper,<sup>3</sup> but not essen-

Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465.

One who gives a promissory note for a certain number of shares and takes a receipt from a corporation officer, stating that the note when paid will be in full for such shares, does not become a stockholder until the note matures and the certificate is issued; and such party will not be liable under the *New York* Act of 1848 for corporate debts contracted before he became a stockholder. Tracy v. Yates, 18 Barb. (N. Y.) 152.

In *England* the terms "owners," "proprietors," and "subscribers" are sometimes used indiscriminately. See West London R. Co. v. Bernard, L. R., 3 Q. B. 873.

**1. Corporate Books Prima Facie Evidence.**—Semple v. Glenn, 91 Ala. 245; 24 Am. St. Rep. 894; Howard v. Glenn, 85 Ga. 238; 21 Am. St. Rep. 156; Coffin v. Collins, 17 Me. 440; Penobscot R. Co. v. Dummer, 40 Me. 172; 63 Am. Dec. 654; Whitman v. Granite Church, 24 Me. 236; Downing v. Potts, 23 N. J. L. 66; Lewis v. Glenn, 84 Va. 947; Vanderwerken v. Glenn, 85 Va. 9; *In re* St. Lawrence Steamboat Co., 44 N. J. L. 529; 1 Am. & Eng. Corp. Cas. 359; Hamilton, etc., Plank R. Co. v. Rice, 7 Barb. (N. Y.) 157; Hoagland v. Bell, 36 Barb. (N. Y.) 57; McHose v. Wheeler, 45 Pa. St. 32; Bank of Commerce's Appeal, 73 Pa. St. 59; Glenn v. Orr, 96 N. Car. 413; Haynes v. Brown, 36 N. H. 545; Pittsburgh, etc., R. Co. v. Applegate, 21 W. Va. 172; Glenn v. McAllister, 46 Fed. Rep. 883; Glenn v. Liggett, 47 Fed. Rep. 472; Turnbull v. Payson, 95 U. S. 418; Rockville Turnpike, etc., Co. v. VanNess, 2 Cranch (C. C.) 449; Stephens v. Follett, 43 Fed. Rep. 842; 31 Am. & Eng. Corp. Cas. 466; Taylor v. Hughes, 2 Jones & L. (Ir. Ch.) 55.

In *Rhode Island*, a book purporting to be the record book of the company, containing entries authenticated in part by the secretary's signature and in part identified by the bookkeeper who copied them, is admissible. Congdon v. Winsor, 17 R. I. 236; 36 Am. & Eng. Corp. Cas. 199.

But such books have been held inadmissible in an action by a corporate creditor against a stockholder, on the ground that corporate books purporting to contain subscriptions were not *per se* evidence thereof. Mudgett v. Horrell, 33 Cal. 25.

When books have been lost, a certified copy of the recorded list of stockholders is *prima facie* evidence as to the ownership of the stock. Cleveland v. Burnham, 64 Wis. 347; 10 Am. & Eng. Corp. Cas. 221.

A paper containing none of the essentials required by the act of incorporation, though styled a register of shareholders, is not a sufficient evidence of membership. Wolverhampton, etc., Co. v. Hawksford, 7 C. B., N. S. 795; 97 E. C. L. 795. But the register may be evidence, though not authenticated. Cornwall, etc., Min. Co. v. Bennett, 5 H. & N. 432. And a requirement that the register be sealed within a certain time is directory merely; without such sealing a subscriber may be held liable for calls. Wolverhampton, etc., Co. v. Hawksford, 11 C. B., N. S. 456; 103 E. C. L. 456. Where the company is required to keep two registers which are to be *prima facie* evidence of membership, production of both is necessary, though either contains the list of members; but where the defendant is properly registered, it is no objection to the sufficiency of the evidence that other members are not. London, etc., R. Co. v. Fairclough, 2 M. & G. 674.

**2. Mudgett v. Horrell.** 33 Cal. 25; Chaffin v. Cummings, 37 Me. 76; Brewer's F. Ins. Co. v. Burger, 10 Hun (N. Y.) 56; Stephens v. Follett, 43 Fed. Rep. 842; 31 Am. & Eng. Corp. Cas. 466; Waterford, etc., R. Co. v. Pidcock, 8 Exch. 279.

Under the *New York* statute the court is warranted in going behind the entries in the transfer book to determine membership. Strong v. Smith, 15 Hun (N. Y.) 222.

**3. Société Générale v. Walker.** L. R., 11 App. Cas. 20. A certificate issued in the ordinary form, but containing a promise of the corporation to pay interest thereon until the happen-

tial.<sup>1</sup> The relation of the stockholder may be proved by parol,<sup>2</sup> and slight evidence thereof will be accepted.<sup>3</sup> The admissions of a stockholder as to the number of shares held by him are competent,<sup>4</sup> and in the absence of the stock book the treasurer may testify as to certificates issued by him.<sup>5</sup>

**3. Status and Inter-relations.**—The stockholders of a corporation do not stand in the relation of co-partners,<sup>6</sup> nor of tenants in

ing of a specified event, constitutes the person to whom it is issued a stockholder. *McLaughlin v. Detroit*, etc., R. Co., 8 Mich. 100.

**1. Certificates Not Essential.**—*Mitchell v. Beckman*, 64 Cal. 117; 1 Am. & Eng. Corp. Cas. 49; *Fulgam v. Macon*, etc., R. Co., 44 Ga. 597; *Corwith v. Culver*, 69 Ill. 502; *Dows v. Naper*, 91 Ill. 44; *Helm v. Swiggett*, 12 Ind. 194; *Beckett v. Huston*, 32 Ind. 394; *First Nat. Bank v. Gifford*, 47 Iowa 575; *Baker v. Woolston*, 27 Kan. 185; *Agricultural Bank v. Burr*, 24 Me. 256; *Agricultural Bank v. Wilson*, 24 Me. 273; *Chaffin v. Cummings*, 37 Me. 76; *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 128; *Ellis v. Essex Merrimac Bridge*, 2 Pick. (Mass.) 243; *Boston*, etc., R. Co. *v. Pearson*, 128 Mass. 445; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Shaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300; *Wheeler v. Walker*, 45 N. H. 355; *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529; 1 Am. & Eng. Corp. Cas. 359; *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517; *Strong v. Smith*, 15 Hun (N. Y.) 222; *Buffalo*, etc., R. Co. *v. Dudley*, 14 N. Y. 336; *Johnson v. Albany*, etc., R. Co., 40 How. Pr. (N. Y.) 193; *Thorpe v. Woodhull*, 1 Sandf. Ch. (N. Y.) 411; *Downer v. Zanesville Bank*, *Wright* (Ohio) 477; *Com. v. Woodward*, 4 Phila. (Pa.) 124; *Galveston City Co. v. Sibley*, 56 Tex. 269; *Turnbull v. Payson*, 95 U. S. 418; *Hawley v. Upton*, 102 U. S. 314; *Cecil Nat. Bank v. Watson*, 105 U. S. 214; *Farrar v. Walker*, 3 Dill. (U. S.) 506, note; *Upton v. Burnham*, 3 Biss. (U. S.) 431; *Becher v. Wells Flouring Mill Co.*, 1 McCrary (U. S.) 62. Certificates are only secondary evidence of membership. *Bank of Commerce's Appeal*, 73 Pa. St. 59.

**2. Chaffin v. Cummings**, 37 Me. 76.

**In Haynes v. Brown**, 36 N. H. 545, it was held that the absence of the proper

documentary evidence being accounted for, parol evidence that the defendant was present at the organization of the corporation, was elected, and acted as president, was competent evidence of his being a stockholder.

**3. Upton v. Burnham**, 3 Biss. (U. S.) 431.

**4. Congdon v. Winsor**, 17 R. I. 236; 36 Am. & Eng. Corp. Cas. 199.

**5. Congdon v. Winsor**, 17 R. I. 236; 36 Am. & Eng. Corp. Cas. 199.

**6. Cook on Stock and Stockholders** (2d ed.), § 4; *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118; 42 Am. Dec. 103; *Baker v. Backus*, 32 Ill. 79 (holding that their liability is several, contingent, and does not extend to all matters); *Coburn v. Wheelock*, 34 N. Y. 440; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84.

Subscription by stockholders does not contemplate the conduct of the business as a partnership, nor authorize trustees to contract debts or make advances on the credit of the stockholders. *Shibley v. Angle*, 37 N. Y. 626.

But payment by subscribers before they were obliged, under a resolution promising them proportionate dividends on anticipated payments, is not a loan to the corporation, but constitutes a partnership agreement, the consideration being the sharing in the profits, and not interest; such subscribers are liable for losses to the extent of the payment, even in the face of an express stipulation. *Purton v. New Orleans*, etc., R. Co., 3 La. Ann. 19.

An agreement under which a joint stock association was formed for mining coal, provided that two stockholders should receive from the profits of the first coal sent to market, \$810 of the company's money, as compensation for excess in the value of the land contributed by them, over that given by others. Before any profits were realized all the lands were sold. It was held that the two were entitled to their \$810, but that the other stockholders were not individually liable,

common of the corporate property.<sup>1</sup> They occupy, however, a *quasi* trust relation which courts of equity will interfere to preserve. Thus, a majority will be restrained from oppressing a minority.<sup>2</sup>

The stockholders are not co-sureties for,<sup>3</sup> nor creditors of,<sup>4</sup> the corporation, nor does a fiduciary relation subsist between them.<sup>5</sup> But as between the directors and the stockholders, the relation of trustee and *cestui que trust* exists.<sup>6</sup> This doctrine, however, has reference only to the acts of the directors in connection with the

unless they had received either proceeds or profits. *Bainbridge v. Gehring*, 3 W. Va. 240.

1. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118; 42 Am. Dec. 103. But until the issue of certificates, members own the stock in common and are jointly and severally liable for the corporate debts. *Hawes v. Anglo Saxon Petroleum Co.*, 111 Mass. 200.

2. *In re Importers, etc., Exchange*, 2 N. Y. Supp. 257; *Ervin v. Oregon R., etc., Co.*, 20 Fed. Rep. 577; and see *infra*, this title, *Rights, Powers and Prerogatives*.

3. *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; 73 Am. Dec. 658; *Young v. Rosenbaum*, 39 Cal. 646; *Davidson v. Rankin*, 34 Cal. 503. But stockholders who give a note for money loaned to the corporation, are co-sureties for it as between themselves; payment by one entitles him to contribution from the others, and their liability is not to be measured by the amount of stock owned by them. *Coburn v. Wheelock*, 34 N. Y. 440. So where directors are makers, whether payment by one is compulsory or voluntary. *Slaymaker v. Gundacker*, 10 S. & R. (Pa.) 75.

An agreement between stockholders that notes should be made and indorsed by one or more of them from time to time, and that each should bear his proportion of any loss incurred thereby, is terminated as to any stockholder by his death, and his personal representatives are not liable. *Helmer v. St. John*, 8 Hun (N. Y.) 166.

An alternative agreement by certain stockholders to pay a corporate debt makes them sureties only, and does not cancel the debt. *Home Nat. Bank v. Waterman* (Ill. 1890), 29 N. E. Rep. 503.

4. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84.

A preservation, therefore, by legislation, of the assets of a dissolved bank for the benefit of the creditors of

the bank, does not operate in favor of stockholders, but indicates rather a legislative intent to exclude them and leave them to their fate at common law. *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168.

5. *Karnes v. Rochester, etc., R. Co.*, 4 Abb. Pr. N. S. (N. Y.) 107; *Gillett v. Bowen*, 23 Fed. Rep. 625.

In *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84, McCoun, Vice-Chancellor, said: "The latter (referring to the corporation) is merely a creature of the law; a political, not a natural body, made up of the compact entered into by the stockholders, each of whom becomes a corporator, identified with, and forming a constituent part of, the corporate body. And, therefore, when we speak of stockholders and the incorporated company of which they are the components, we refer to one and the same collection of persons. How, then, can the relation of trustee and *cestui que trust* exist, for such a relation requires separate and distinct persons, or separate and distinct bodies to constitute it."

6. *Williams v. Page*, 24 Beav. 661; *Benson v. Heathern*, 1 Y. & Coll. 326; *Robinson v. Smith*, 3 Paige (N. Y.) 222; 24 Am. Dec. 212; *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715; *Taylor v. Miami Exporting Co.*, 5 Ohio 162; 22 Am. Dec. 785; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Tippecanoe County v. LaFayette, etc., R. Co.*, 50 Ind. 85; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220.

"The directors," observed Romilly, M. R., in *York, etc., R. Co. v. Hudson*, 19 Eng. L. & Eq. 365; 16 Beav. 485, "are persons selected to manage



property held by the corporation itself, and to their management of its general affairs.<sup>1</sup>

the business of the company for the benefit of the shareholders. It is an office of trust which, if they undertake, it is their duty to perform fully and entirely."

In *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586, the Master of Rolls says: "He (referring to the director of a joint stock company) is in point of fact not merely a director, but also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into in their behalf, to be treated as an agent. Therefore, there attaches to a director for the benefit of the shareholders all the liabilities and duties which attach to a trustee or agent. Accordingly, if a director enter into a contract for the company he may not personally derive any benefit from it."

In *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513, it is said that persons who become directors or managers of the corporation place themselves in the situation of trustees, and the relation of trustees and *cestui que trust* is thereby created between them and the stockholders. The former are obliged to take the same care and use the same diligence as factors and agents. They are answerable not only for their own fraud and gross negligence, but also for all faults which are contrary to the care required of them.

In *Bayliss v. Orne*, Freem. ch. (Miss.) 161, the trust relation is asserted and applied to the case of an abuse of their trust by the directors, or waste or misapplication of the funds of the company.

Holding a fiduciary relation the directors cannot be permitted to acquire interests adverse to such relation. *European, etc., R. Co. v. Poor*, 59 Me. 277.

And any agreement to influence the action of the directors for the benefit of others, and to the prejudice of the corporation, cannot be upheld. *Bliss v. Matteson*, 45 N. Y. 22.

If the directors pay over the funds in their hands or in the treasury to an individual upon a pretended claim which they know, or must be presumed to know, is wholly unfounded in law, it is a breach of trust on their part. *Butts v. Wood*, 38 Barb. (N. Y.) 181; affirmed in 37 N. Y. 317.

The directors, not the corporate body, are the trustees, and should be parties to an action for the enforcement of the trust. *Karnes v. Rochester, etc., R. Co.*, 4 Abb. Pr. N. S. (N. Y.) 107.

In *Ex parte Bennett*, 18 Beav. 339, the directors permitted a class of dissentient shareholders in an embarrassed company to transfer their shares to the company, under a power in the deed, upon payment of a sum of money which it was arranged should be paid to one of the directors in discharge of a debt due from the company. It was held that the transaction was void, and on the winding up of the company that the dissentients still remained shareholders; the relation of trustee and *cestui que trust* was assumed in the case, and the decision was put upon the ground that the director had obtained an undue advantage in securing the payment of his debt from an embarrassed company.

**Mandataries—Not Technical Trustees.**—In *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684, it was held that directors as to the stockholders are not technically trustees, but mandataries, and are bound to use no more than ordinary skill and diligence. See also *Smith v. Hurd*, 12 Met. (Mass.) 371; 46 Am. Dec. 690; *Allen v. Curtis*, 26 Conn. 456.

**Bailees.**—In *Gardiner v. Pollard*, 10 Bosw. (N. Y.) 674, the court by Robertson, J., said: "There may be a confidential relation subsisting between a stockholder and a director creating a certain duty by the latter to the former, or certain rights in the former which gives the former a right to prevent, or sue for, malfeasance of the latter; but I think it will be found that neither 'trustee' nor 'agent' expresses such relation, and that bailee of the capital of the corporation to perform specific duties therewith comes much more near to it."

1. Accordingly a sale of stock by a stockholder to a director, or the stock itself, is not so far connected with, or the subject of, the trust or trust relation, which is admitted to exist, as to subject the director to, or give the seller the benefit of, the principle or equity applicable to the dealings and contracts by parties be-

**II. HOW STOCKHOLDERS BECOME SUCH: THE CONTRACT OF SUBSCRIPTION.**—Original subscription to shares of stock is the most important, from a legal standpoint, of the methods by which corporate membership arises.<sup>1</sup> The contract of subscription is governed by principles which obtain generally in the law of contracts.<sup>2</sup>

**1. Form—*a.* IN GENERAL.**—No particular form is essential to the validity of the contract of subscription; any form by which an intent to effect a contract of membership is manifest will suffice,<sup>3</sup> and even without a formal subscription, or where it is irreg-

ular between whom there is a trust or confidential relation, and to require the purchaser to prove not only that he paid a full and fair price for the stock, but also that he disclosed to the seller every fact or circumstance known to him and not known to the seller, material on the question of the value of the stock. *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581.

Where the president of a railroad company, who was also one of its directors, having knowledge, by reason of his official relation to the company, that the true value of the stock of the company was very largely in excess of its nominal market value, purchased at much less than its real worth, the stock of an unofficial stockholder who was ignorant of the company's financial condition and of facts giving an extraordinary value to the stock, without disclosing to the seller the facts and circumstances within his knowledge as to its real value, it was held that the relation of trustee and *cestui que trust* did not exist between the parties, and that the purchaser was not bound to communicate to the seller his knowledge of the worth of the stock, although the same was obtained by virtue of his official relation to the company. *Tippecanoe County v. Reynolds*, 44 Ind. 509.

**1.** For a discussion of the method of acquiring membership by purchase of shares, see *Stock—Transfer*, vol. 23, p. 582.

**2.** In *Blunt v. Walker*, 11 Wis. 349; 78 Am. Dec. 709, Dixon, C. J., speaking for the court, said: "It is well established, both upon natural reason and legal authority, that a stock subscription is a contract between the corporation on one side and the subscriber on the other; and that as such, courts of justice will enforce it for or against either. It was a contract which this company was fully authorized to enter into. Whatever diver-

sity of opinion may have been formerly entertained upon the subject, it is well settled by modern decisions, and the rational and sound rule no doubt is, that whenever a corporation has the power to make a contract, and is not restricted in the manner of so doing, as to such contract, it stands on the same footing as a natural person; and that in relation thereto it may adopt any of the modes immediately calculated to accomplish it which the individual could."

**The object of a subscription** in filling the stock book of a corporation is to furnish evidence of the subscriber's liability to pay up his shares, and to identify the persons who have become shareholders. *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39.

**3.** *Fry v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314; *Gill v. Kentucky, etc., Min. Co.*, 7 Bush (Ky.) 635; *Wellersburg, etc., Road Co. v. Young*, 12 Md. 476; *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583; *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39.

**Question of Intent.**—"Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intent. Formal rules are for the most part disregarded. And in general a contract of subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder, is sufficient to bind both him and the corporation." *Cook, Stock and Stockholders*, § 52.

**Instances of Forms Held Valid.**—The contract may be in form of a promissory note. *Magee v. Badger*, 30 Barb. (N. Y.) 262. The signature of the subscriber affixed to the certificate of incorporation opposite to the number of shares taken is sufficient. *Phoenix*

*Warehousing Co. v. Badger*, 6 Hun (N. Y.) 293. Subscription to any valid instrument may make one a stockholder; the instrument need not be articles of association, and acceptance of a stock certificate is a waiver of informality. *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Buffalo, etc., R. Co. v. Clark*, 22 Hun (N. Y.) 359. But see *contra*, *Bucher v. Dillsburg, etc., R. Co.*, 76 Pa. St. 306. A subscription to stock of a corporation incorporated as "B. & R. Railroad," is not invalidated by stating the name as the "B. & R. Horse Railroad," nor by omitting the name entirely. *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583. Where a statute prescribes a formula for subscriptions, but the form used omits the word "President" prescribed, it may nevertheless be binding on the subscribers. *Hagerstown R. Co. v. Creeger*, 5 Har. & J. (Md.) 122; 9 Am. Dec. 495. Where the form is prescribed in the charter and there is a further provision that the company should have common-law corporation powers, stipulations under this head added to the prescribed form and not inconsistent therewith are valid. *Fisher v. Evansville, etc., R. Co.*, 7 Ind. 407. Subscriptions are not invalid because made on separate paper in lieu of the books, nor because the company is not yet in existence. *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155. A subscription unexceptionable in other respects is valid, although made on a separate paper instead of in the books provided for by statute. *Woodruff v. McDonald*, 33 Ark. 97; *Brownlee v. Ohio, etc., R. Co.*, 18 Ind. 68; *Hamilton, etc., Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157; *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 328. In this last case it is said that "the opening of subscription books, though one, is not the exclusive mode in which a railroad company is authorized to dispose of its stock." Compare *Charlotte, etc., R. Co. v. Blakely*, 3 Strobb. (S. Car.) 247.

In *Buffalo, etc., R. Co. v. Gifford*, 87 N. Y. 294, it was held that a subscription entered in a pocket memorandum book was valid and binding. But in *McClelland v. Whiteley*, 11 Biss. (U. S.) 444, it was held that entering one's name in the personal memorandum book of the president of a stock company with the amount and number of shares which he orally

agreed to take upon a certain contingency, which book at the time had nothing about it to show that it was to contain a list of stock subscribers, could not be construed as a subscription of stock.

A contract to take stock, coupled with an option to resell to the corporation, is an actual subscription and not a mere security for a loan; the option being a right secured by the contract and in addition to the absolute title. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199.

A promise to pay to a railroad company upon the completion of a certain quantity of its construction, a certain sum in exchange for a certificate of stock, is a subscription and not a purchase. *Ottawa, etc., R. Co. v. Black*, 79 Ill. 262; *Hays v. Ohio, etc., R. Co.*, 61 Ill. 422.

A transfer of subscriptions to a company by one authorized so to do before its formation, binds subscribers as much as if they had signed articles of incorporation. *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155.

A certificate signed by individuals, stating that they have associated themselves according to statute to carry on the business of banking, and which complies with the statute in other respects, and declares that such individuals have subscribed, etc., is a sufficient subscription. *Cole v. Ryan*, 52 Barb. (N. Y.) 168.

**Stricter Rule.**—Some of the decisions announce a stricter rule as to form; unless the subscription is attached to articles of association the subscriber is not bound. *Bucher v. Dillsburg, etc., R. Co.*, 76 Pa. St. 306.

Where the statute requires subscriptions to a railroad company to be made "in the manner to be provided by its by-laws," subscriptions made before the by-laws are adopted create no rights or liabilities. *Carlisle v. Saginaw Valley, etc., R. Co.*, 27 Mich. 315.

When taken by those authorized, but in a manner exceeding the authority, the subscriber cannot enforce recognition as a stockholder. *Farmers, etc., Bank v. Nelson*, 12 Md. 35.

A provision requiring the acknowledgment of subscriptions is mandatory. *Coppage v. Hutton*, 124 Ind. 401.

The mere entry of a party's name on a list of stockholders by one who was authorized to subscribe for such party,

ular, the contract may be inferred from acquiescence and acceptance of the benefits of membership.<sup>1</sup> But the subscription must be for stock which the corporation owns at the time.<sup>2</sup> A purchase of stock from a bank without the signing of any contract is not a subscription.<sup>3</sup> Mere informal offers or promises to subscribe, pending corporate organization, will not constitute one a stockholder, nor support a note given for shares of stock.<sup>4</sup> On the

does not constitute a subscription. *Granger's Market Co. v. Vinson*, 6 Oregon 172.

1. *Boggs v. Olcott*, 40 Ill. 303; *Newell v. Rock River, etc., Co.*, 101 Ill. 57; *Chaffin v. Cummings*, 37 Me. 76; *Musgrave v. Morrison*, 54 Md. 161; *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 128; *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79; *Griswold v. Seligman*, 72 Mo. 110; *Haynes v. Brown*, 36 N. H. 545; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Wheeler v. Millar*, 90 N. Y. 353; *Hamilton, etc., Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 159; *Dorris v. French*, 4 Hun (N. Y.) 202; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Philadelphia, etc., R. Co. v. Cowell*, 28 Pa. St. 329; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Clark v. Farrington*, 11 Wis. 306; *Ex parte Besley*, 2 Mac. & G. 176; *Cheltenham, etc., R. Co. v. Daniel*, 2 Q. B. 281; 42 E. C. L. 475; *West Cornwall R. Co. v. Mowatt*, 15 Q. B. 521; 69 E. C. L. 521; *Spackman v. Evans*, L. R., 3 H. L. 197; *Harrison v. Heathorn*, 6 M. & G. 81; *Ness v. Angas*, 3 Exch. 305; *Ness v. Armstrong*, 4 Exch. 21; *Moss v. Steam Gondola Co.*, 17 C. B. 180; *Bailey v. Universal Prov. L. Assoc.*, 1 C. B. N. S. 557.

2. *Bates v. Great Western Tel. Co.*, 134 Ill. 536.

3. *Columbia Bank v. Rogers*, 10 Pa. Co. Ct. Rep. 61.

4. *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339; 41 Am. Rep. 517, where the court, per Johnson, J., says: "The criterion of liability is whether any act has been done by which the corporation is compelled to recognize the promisor as a stockholder. If the corporation was not bound, by what took place, to recognize Mrs. Fanning as a stockholder, neither is she bound to pay for stock. A careful consideration of the statutes authorizing the formation of such a corporation, as well as of the authorities cited, requires us to hold that a mere verbal agreement to take stock in a com-

pany whose promoters are engaged in securing the amount of stock required before it can organize, does not constitute the promisor a member of such corporation, and is without a sufficient consideration to support it."

See to the same effect, *Angell & Ames on Corp.*, ch. 15 *et seq.*; *Thompson on Liability of Stockholders*, §§ 105-110; *Valk v. Crandall*, 1 Sandf. Ch. (N. Y.) 179; *Tonica, etc., R. Co. v. Stein*, 21 Ill. 96; *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 128; *Spear v. Crawford*, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513; *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Phillips Limerick Academy v. Davis*, 11 Mass. 113; 6 Am. Dec. 162; *New Bedford, etc., Turnpike Corp. v. Adams*, 8 Mass. 138, 5 Am. Dec. 81; *Essex Turnpike Corp. v. Collins*, 8 Mass. 292; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188; *Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 340; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341; *California Sugar Mfg. Co. v. Schafer*, 57 Cal. 396; *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Dayton, etc., Turnpike Co. v. Coy*, 13 Ohio St. 84; *Sterling Coal Road Co. v. Little*, 14 Bush (Ky.) 429; *Starrett v. Rockland F., etc., Ins. Co.*, 65 Me. 374; *Andover, etc., Turnpike Corp. v. Hay*, 7 Mass. 102; *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Goff v. Winchester College*, 6 Bush (Ky.) 443; *Troy, etc., R. Co. v. Warren*, 18 Barb. (N. Y.) 310; *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220; 60 Am. Dec. 49; *Charlotte, etc., R. Co. v. Blakely*, 3 Strobb. (S. Car.) 245; *Stowe v. Flagg*, 72 Ill. 397.

But the failure to incorporate a mining company will not prevent recovery on a note given by the projectors for certain mining claims which were to constitute the capital

other hand, actual subscriptions, though made before incorporation, are binding.<sup>1</sup>

*b. STATUTE OF FRAUDS; WRITING OR PAROL.*—Where the

stock of the proposed company. *Smith v. Gillen*, 52 Ark. 442.

In *Ontario*, parties who merely sign a purported subscription to a proposed company, but are not named in the letters patent, nor allotted shares, are not liable. *In re London Speaker Printing Co.*, 16 Ont. App. 508.

A subscription conditioned upon the acceptance of a proposition by directors, is in fact but the basis of a contract, and when drawn up, but repudiated by the subscriber as being variant from the proposition, though the latter has been accepted, is invalid. *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571.

A legislature cannot provide that a promise to subscribe shall be deemed a subscription to the capital stock of a particular company. *Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 340.

*1. Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Maryville Electric Light Co. v. Johnson* (Cal. 1892), 36 Am. & Eng. Corp. Cas. 55; *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499; *West v. Crawford*, 80 Cal. 19; 26 Am. & Eng. Corp. Cas. 185; 71 Am. Dec. 337; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576; 5 Am. Dec. 638; *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4; 63 Am. Dec. 522; *Penobscot R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *International, etc., Assoc. v. Walker*, 83 Mich. 386; *Spear v. Crawford*, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110; 26 Am. & Eng. Corp. Cas. 61; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 337; *Milford, etc., Turnpike Co. v. Brush*, 10 Ohio 111; 36 Am. Dec. 78; *Ashuelot Boot, etc., Co. v. Hoit*, 56 N. H. 548; *East Tennessee R. Co. v. Gammon*, 5 Sneed (Tenn.) 567; *Mobile, etc., R. Co. v. Yandal*, 5 Sneed (Tenn.) 294; *Connecticut, etc., R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181.

In *Atthol Music Hall Co. v. Carey*, 116 Mass. 473, *Wells, J.*, said: "In

agreements of this nature entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee in whose name alone suit can be brought. The promise of each subscriber 'to and with each other' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association or individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to-wit, as a contract with the common representative of the several associates."

Subscription before incorporation is binding, though the subscriber makes no cash payment. *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451. And though all proceedings after incorporation are without notice to him. *Burke v. Lechmere, L. R.*, 6 Q. B. 297. And he is liable for calls even if he sells before incorporation, unless the purchaser is registered. *Midland, etc., R. Co. v. Gordon*, 16 M. & W. 804.

Members of a partnership formed for the purpose of incorporation acquire no undivided interests in the property of the concern, and cannot enforce partition; they have only an equitable right to stock to be issued. *Marseilles Land Co. v. Aldrich*, 83 Ill. 504.

If one agrees, before incorporation, to take certain shares, but fails to comply with the terms, he cannot sue the corporation after organization for refusal to deliver shares upon his tender of payment, though his name has been entered as a subscriber, and he is requested to pay, and his shares are issued to another without sale for non-payment. *Perkins v. Union Button-hole, etc., Co.*, 12 Allen (Mass.) 273.

contract of subscription is to be performed within the year, it is not within the Statute of Frauds.<sup>1</sup> On the question whether the contract must be in writing or may be by parol the authorities are not harmonious.<sup>2</sup>

c. SUBSCRIPTIONS DELIVERED IN ESCROW.—As to subscriptions thus delivered, the general rule applies that the delivery, to be good as an escrow, should be, not to the corporation or its

1. *Bullock v. Falmouth, etc., Road Co.*, 85 Ky. 184; *Straughan v. Indianapolis, etc., R. Co.*, 38 Ind. 185; *Miles v. Bough, L. R.*, 3 Q. B. 845. See on questions of the statute, *Stock—Statute of Frauds as Pertaining to Shares*.

2. In *Colfax Hotel Co. v. Lyon*, 69 Iowa 683; 15 Am. & Eng. Corp. Cas. 555, the court says: "It is said by Thompson, in his work on Liability of Stockholders (§ 108), that parol subscriptions for stock are not valid, and that contracts of that character can be proven only by written evidence. The following cases are cited in support of the text: *Pittsburgh, etc., R. Co. v. Gazam*, 32 Pa. St. 340; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 170. And *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339; 41 Am. Rep. 517, is cited by counsel as sustaining the same doctrine. It is to be observed, however, that the holding in each of these cases is based very largely upon provisions of the charters of the corporations, or of some general statute governing the question. It is not claimed, however, that there is any statute of this state which requires contracts of that character to be in writing, and we think there is no provision of plaintiff's articles of incorporation which has that effect. The provision quoted above, which is the only one at all relating to the subject, simply recites that the stock has all been subscribed, and is payable at the call of the directors, as provided in the subscription. It clearly does not create any limitation on the power of the corporation to contract for the disposal of its capital stock. When the articles of incorporation were adopted, it was not contemplated that the company would ever have occasion to contract for the disposal of any portion of its stock. The stock had then all been subscribed for, and there was apparently no necessity for making any pro-

vision on the subject, and accordingly none was made. The question presented by the case, then, is whether, in the absence of any provisions as to the manner in which such contracts shall be entered into, either in the charter or the general statutes of the state, a corporation may contract by parol for the disposal of its capital stock. In our opinion it may. There is nothing in the nature of the contract which requires it to be in writing. For the purpose of effecting the object of its organization, the powers of the corporation, unless restricted by statute, are as broad as those of a natural person. There can be no doubt that, under our general statute governing the organization of such bodies, they may, by express provision of their articles of incorporation, clothe themselves with power to contract in that manner, or they might provide that they should be bound only when the contract was entered into in writing. But when no provision or limitation on the subject is made, and the object is one concerning which they have power to contract, it follows necessarily, we think, that they may contract in either manner, as may be determined by the incorporators or directors." See also *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Galveston Hotel Co. v. Bolton*, 46 Tex. 633; *Fothergill's Case*, L. R., 8 Ch. App. 270.

Where subscription is to be paid by an interest in a ferry, requiring a transfer not only of the franchise, but of the landings appurtenant, it must be in writing; but a renunciation of the right granted by statute, to make such subscription, need not be in writing. *White v. Florence Bridge Co.*, 4 Ala. 464.

In *Cookney's Case*, 3 De G. & J. 170, it is held that one who makes an oral statement to a director that he will subscribe to a definite amount of stock, and gives his check for a part, is liable.

It is said in *Cook*, on Stock and Stockholders, § 52: "There have been

agent, but to a third person.<sup>1</sup> Parol evidence is admissible to show that a subscription was not intended to be binding until the performance of a specified condition.<sup>2</sup>

d. THE ENGLISH SYSTEM.—The system prevailing in *England* by which the contract of subscription is formed, is peculiar and technical,<sup>3</sup> and many of the cases which arise under it are wholly inapplicable in American jurisdictions.

2. Consideration and Payment—*a*. GENERAL DOCTRINE.—The consideration which will support a subscriber's promise is estimated by the same standards which determine the validity of a consideration elsewhere. It may be his right to receive any valuable thing or privilege, or the fact that, for his benefit, another has incurred a disadvantage. Thus, the consideration for the ordinary subscription has been variously viewed as the mutual promises of all the subscribers,<sup>4</sup> or of company and sub-

various *dicta* to the effect that a subscription cannot be entered into by parol, but the later and better opinion is that such a subscription is valid and binding." See also cases cited *supra*, this title, *The Contract of Subscription—Form—In General*.

1. In *Ottawa, etc., R. Co. v. Hall*, 1 Ill. App. 612, a delivery to a director was held good as an escrow, on the ground that the director did not occupy such a position in the service of the corporation as to prevent him from holding the contract of subscription as an escrow, it appearing that he was a mere volunteer having no authority from the company to receive subscriptions, and, therefore, should not be treated as its agent in the premises, but rather as a third person.

In *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31, the general rule that delivery of a deed as an escrow cannot be made to the grantee was recognized, but the delivery to an agent of a corporation engaged in taking subscriptions was deemed good as an escrow, on the ground that the subscription was not absolute, but imposed a burden on the company.

A delivery to a commissioner of a corporation appointed to receive subscriptions has been held bad as an escrow. *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4; 63 Am. Dec. 522. See also *Madison, etc., R. Co. v. Stevens*, 10 Ind. 1; *Price v. Pittsburg, etc., R. Co.*, 34 Ill. 36.

2. *Ottawa, etc., R. Co. v. Hall*, 1 Ill. App. 612; *Tonica, etc., R. Co. v. Stein*, 21 Ill. 96; *Bucher v. Dillsburg, etc., R. Co.*, 76 Pa. St. 306; *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31. But see

*Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4; 63 Am. Dec. 522.

3. The English System.—It includes a written application for a definite number of shares, acceptance by the company, notice of allotment, and allotment of shares. All these steps appear to be essential. *Hebbs' Case*, L. R., 4 Eq. 9; *Adams' Case*, L. R., 13 Eq. 474; *Pellatt's Case*, L. R., 2 Ch. 527; *Rogers' Case*, L. R., 3 Ch. 637; *Tucker's Case*, 20 W. R. 89. Compare *Bloxam's Case*, 33 Beav. 529, distinguished in *Pellatt's Case*, L. R., 2 Ch. 527; except (under the Companies' Act of 1862) allotment. *In re London, etc., Coal Co.*, 5 Ch. Div. 525; *Evans' Case*, L. R., 2 Ch. 427; *Sidney's Case*, L. R., 13 Eq. 228; *Levick's Case*, 30 L. J. Ch. 180; *Hall's Case*, L. R., 5 Ch. 707, distinguishing *Snell's Case*, L. R., 5 Ch. 22. Application for shares may be withdrawn and repudiated. *Ex parte Graham*, 7 Jur. N. S. 981; *Ex parte Miles*, 4 De G., F. & J. 71; *Ex parte Wilson*, 20 L. T., N. S. 962; *Adams' Case*, 20 W. R. 356; *Ritso's Case*, 4 Ch. Div. 774; *Ex parte Pentelow*, L. R., 4 Ch. 178; *Slattey's Case*, 7 Irish Eq. 245; *MacLagan's Case*, 51 L. J. Ch. 841; *Baily's Case*, L. R., 5 Eq. 428; and the withdrawal may be oral. *Ex parte Wilson*, 20 L. T., N. S. 962.

4. *Twin Creek, etc., Road Co. v. Lancaster*, 79 Ky. 552; 3 Am. & Eng. Corp. Cas. 58; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Cole v. Ryan*, 52 Barb. (N. Y.) 168; *Spear v. Crawford*, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513.

A modification of this doctrine ap-

scriber,<sup>1</sup> the advantages of membership,<sup>2</sup> or of the interest acquired by the subscriber in the corporation, and the right to stock and dividends.<sup>3</sup> Preliminary proceedings and partial execu-

appears in *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 236. It was an action to enforce a subscription to a church building fund. The building was erected, but the trial court did not decide the question whether the plaintiff had incurred any liability in reliance upon the promise sued for, and the court held that therefore no consideration was shown. *Gray, C. J.*, in delivering the opinion of the court, said: "The suggestion in *Pembroke Church v. Stetson*, 5 Pick. (Mass.) 508, substantially repeated in *Ives v. Sterling*, 6 Met. (Mass.) 316, and in *Watkins v. Eames*, 9 Cush. (Mass.) 539, that 'it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant,' was in each case but *obiter dictum*, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him."

1. *Maryville Electric Light Co. v. Johnson* (Cal. 1892), 36 Am. & Eng. Corp. Cas. 55.

2. In *Fort Edward, etc., Plank Road Co. v. Payne*, 17 Barb. (N. Y.) 567, the court, per Hand, J., says: "It is well settled that a subscription to the capital stock of any company, from the membership of which a shareholder may derive pecuniary advantage, gives to the subscriber such an interest as will support a promise to pay for the shares. Such an enterprise is a combination of means for mutual profit, and is in no sense a gift or promise without consideration."

And in *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 463, Judge Brown says: "The subscription of the defendant to the articles of association was, in effect, a contract to pay for and accept the twenty shares of stock. 'The advantage to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and where the agree-

ment secures that advantage to the subscriber, on the organization of the company, the objection of want of consideration cannot be made with success.' *Hamilton, etc., Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157; *Stanton v. Wilson*, 2 Hill (N. Y.) 153; *Barker v. Bucklin*, 2 Den. (N. Y.) 45; 43 Am. Dec. 726; *Schenectady, etc., Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Barnes v. Perine*, 12 N. Y. 18. If the contract to pay for and take the stock was a valid contract, made upon a sufficient consideration, then his subscription was not open to revocation. Until the incorporation of the company was perfected, the other subscribers had an interest in its execution and performance of which they could not be deprived by the act of the defendant; and after the articles were filed and recorded in the secretary's office, and the corporation had a legal existence, it acquired a vested interest in the defendant's agreement." See also *Bullock v. Falmouth, etc., Road Co.*, 85 Ky. 184; *Osborn v. Crosby*, 63 N. H. 583; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Stewart v. Hamilton College*, 2 Den. (N. Y.) 403; *Hamilton College v. Stewart*, 1 N. Y. 581; *Dutcher's Mfg. Cotton Co. v. Davis*, 14 Johns. (N. Y.) 238; 7 Am. Dec. 459; *Whittlesey v. Frantz*, 74 N. Y. 456.

3. *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Smith v. Gillen*, 52 Ark. 442; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Bish v. Bradford*, 17 Ind. 490; *New Albany, etc., R. Co. v. Fields*, 10 Ind. 187; *Fry v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314; *St. Paul, etc., R. Co. v. Robbins*, 23 Minn. 439; *Union Turnpike Co. v. Jenkins*, 1 Cai. (N. Y.) 381; *Goshen, etc., Turnpike Road v. Hurin*, 9 Johns. (N. Y.) 217; 6 Am. Dec. 273; *East Tennessee, etc., R. Co. v. Gammon*, 5 Sneed (Tenn.) 567.

In *Union Turnpike Co. v. Jenkins*, 1 Cai. (N. Y.) 381, the subscription was as follows: "We, whose names are hereunto subscribed, do for ourselves and our legal representatives, promise to pay to the president, directors and company of the Union Turnpike Road, the sum of 25 dollars for every share of stock in said company,



tion of the corporate design<sup>1</sup> may form a sufficient consideration, and likewise the selection of a particular route for a plank road,<sup>2</sup> or other concession to the subscriber.<sup>3</sup> The consideration has even been held to be conclusively implied from the subscription itself,<sup>4</sup> but where it does not appear that the corporation does, or becomes bound to do, anything, there is no showing of consideration.<sup>5</sup>

set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said president, directors and company." And the court, per Radcliff, J., said: "We cannot discover any ground on which this promise ought to be considered as void. The subscription was taken by commissioners who were authorized to receive it, and in the form prescribed by the act. That form contains an absolute promise to pay the money to the president, directors and company. On the one side, the interest of the company in selling the shares, and the public advantage to be derived from the success of the institution; and on the other, the expected profits to accrue from the stock were sufficient considerations to uphold the promise. By force of the act itself, also, it must have intended that it should be obligatory, for else the formal manner in which it was prescribed to be taken would be senseless and nugatory. We cannot imagine that a contract in terms so express and complete should be designed to mean nothing."

1. In *Amherst Academy v. Coles*, 6 Pick. (Mass.) 427, which was an action of assumpsit on a promissory note given for a subscription, Parker, C. J., after carefully reviewing the authorities, says: "We have then in the present case a subscription to a charitable fund made after the incorporation of the body who were its trustees, and more than a year after that a promissory note, made for value received, payable to the same party, referring expressly to the subscription and the purposes of it as the consideration of the note. And we find that those purposes are in process of execution, the funds being needed for and applied to the faithful execution of the trust. We cannot doubt that the note is valid, and that the defense is maintainable, neither in law nor in conscience. The party bound admits by his contract the consideration to be good and valuable, and he has shown nothing to au-

thorize us to deny the justice or legality of the construction which he chose to put on his own antecedent engagement."

*Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20, was an action upon an agreement to make donations to a certain educational corporation. Scott, J., after determining that the subscription was one authorized by law, says: "It was evidently intended by the maker that the managing officers of the corporation should rely upon it as a part of the means and resources of the institution. It was but reasonable that they should rely upon the solemn pledge thus given, and incur liabilities upon the faith of it. And that such liabilities were, in fact, so incurred the petition distinctly avers. By accepting this subscription or written promise of defendant's testator, the corporation took upon itself the obligations of a trustee, and became bound faithfully to execute the trust by applying the proceeds, when paid, in furtherance of the objects for which the corporation had become incorporated. All these facts, when viewed in connection with the provisions of the statute to which reference has been made, will not permit the plaintiff's action to be defeated by an alleged want of a legal or valuable consideration."

2. *Rhey v. Ebensburg Plank Road Co.*, 27 Pa. St. 261. But compare *Bish v. Bradford*, 17 Ind. 490; *Miller v. Wild Cat, etc., Road Co.*, 52 Ind. 64.

3. Postponement of payment of part of a conditional subscription, which has become due by performance, is a sufficient consideration, for unconditional note for payment of the whole at a future time, and before the residue would have been due by the original terms of the subscription. *Henderson, etc., R. Co. v. Moss*, 2 Duv. (Ky.) 242.

4. *East Tennessee, etc., R. Co. v. Gammon*, 5 Sneed (Tenn.) 567.

5. In *New York, etc., Min. Co. v.*

b. WHAT MAY BE RECEIVED IN PAYMENT—(1) *In General.*—Independent of statute,<sup>1</sup> payment for stock need not be required in cash,<sup>2</sup> but may be made in property, labor and services,

Martin, 13 Minn. 417, the court, by Wilson, C. J., said: "It is true that the changing of the stock from the hands of one officer or servant of the company into the hands of another, or even the accepting or holding of the defendant's written agreement, may strictly be said to be an inconvenience or detriment to the plaintiff—but it is not in the eye of the law of any value. It is too shadowy a consideration to support a contract. But let it be supposed that the stock was owned by the 'original proprietors,' and not by the company, and we will inquire whether in that view the complaint states facts sufficient to constitute a cause of action. The stockholders do not appear to have done, or agreed to do anything, so far as the complaint shows; they did not deliver or agree to deliver the stock to the trustees. The allegation in the complaint of performance on the part of the plaintiff, is not equivalent to an allegation that they performed, nor does it imply performance on their part. It does not appear that they would be under any obligation to deliver to the defendants the stock on payment therefor to the plaintiff."

In *Parker v. Northern, etc., R. Co.*, 33 Mich. 25, the court, by Campbell, J., said: "It has been held uniformly that the subscribers were only bound when the company was bound, and that no unilateral subscription could be upheld. And as the statute did not create any obligation on the corporation, unless upon subscriptions regularly made, no others could be enforced unless they were made upon some actual consideration or agreement binding the company. See *Carlisle v. Saginaw Valley, etc., R. Co.*, 27 Mich. 315; *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 269."

1. **Payment—Statutory Provisions.**—Under the statutes of *Alabama, Colorado, Delaware, Michigan, Mississippi, New Jersey, and Pennsylvania* payment for stock may be made in property.

Under *Georgia* Code 1882, § 1689, subscriptions to railroads may be paid in property, and so under *Indiana* Rev. Stat. 1887, § 3901.

Under the *Nevada* Gen. Stat. 1885,

ch. 8, § 819, subscriptions to mining corporations may be paid for in mines.

Under *Maryland* Gen. Laws 1888, p. 301, payment may be made in property on a subscription at a valuation agreed upon and authorized by stockholders.

Under the *Massachusetts* statute a subscriber's note or obligation cannot be accepted for stock; property may be accepted only when the president, treasurer and a majority of the directors sign a sworn statement that the property at a fair valuation is worth the amount named, and the commissioner of corporations certifies that he believes the valuation to be fair and reasonable.

Where the act of incorporation requires payment in cash, cancellation of a debt due from the company for services is not sufficient. *Cleland's Case*, L. R., 14 Eq. 387. Nor is a receipt for newspaper advertising. *Andress' Case*, 8 Ch. Div. 126; *Pagin & Gill's Case*, 6 Ch. Div. 681. Nor a transfer of lands. *Appleyard's Case*, 49 L. J. Ch. 290; *White's Case*, 12 Ch. Div. 511. But any *bona fide* transaction between the company and the stockholder, which, in an action for calls, would support a plea of payment, is sufficient. *Spargo's Case*, L. R., 8 Ch. 407. So amounts credited to a director in consideration of his surrender of certain benefits. *Ex parte Bentley*, L. R., 12 Ch. 850.

2. In *New Haven Nail Co. v. Linden Spring Co.*, 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 71, it is said: "That in the absence of fraud, an agreement may ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines or other property, to which it is not easy to assign a determinate value, appears to be well settled."

"There is a long line of cases sustaining the validity of an issue of stock for money's worth instead of money itself. So well established has this principle of law become that the few cases holding to the contrary can no longer be considered good law." *Cook, Stock & Stockholders*, § 13, note 4. See also *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736; 19 Am. & Eng. Corp. Cas. 231; *Coffin v. Ransdell*, 110

negotiable paper, or by way of satisfaction of debts due from the corporation to the subscriber.<sup>1</sup>

(2) *Property*.—Property which the corporation is authorized to purchase, or the ownership of which promotes the objects of its organization may be received.<sup>2</sup> Thus, a plank road or railroad company may accept materials for use in the construction of its line;<sup>3</sup> and corporations empowered to purchase land may take

Ind. 417; 16 Am. & Eng. Corp. Cas. 432; Ashuelot Boot, etc., Co. v. Hoit, 56 N. H. 548; Brant v. Ehlen, 59 Md. 1; Foreman v. Bigelow, 4 Cliff. (U. S.) 544; East New York, etc., R. Co. v. Lighthall, 5 Abb. Pr. N. S. (N. Y.) 458; 36 How. Pr. (N. Y.) 481; Searight v. Payne, 6 Lea (Tenn.) 283; Steacy v. Little Rock, etc., R. Co., 5 Dill. (U. S.) 348; Forbes & Judd's Case, L. R., 5 Ch. 270; *Ex parte* Drummond, L. R., 4 Ch. 772; Spargo's Case, L. R., 8 Ch. 412; Maynard's Case, L. R., 9 Ch. 60.

Some of the older American cases incline to a different doctrine. See Neuse River Nav. Co. v. Comm'rs, 7 Jones (N. Car.) 275; Henry v. Vermilion, etc., R. Co., 17 Ohio 187.

Specie or its equivalent only can be received for the amount required down on subscription. Crocker v. Crane, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228. And an equivalent does not mean property of equal value, where the incorporating act requires the stock to be paid in money. People v. Troy House Co., 44 Barb. (N. Y.) 625.

1. See *infra*, the following subdivisions of this title.

2. Coffin v. Ransdell, 110 Ind. 417; 16 Am. & Eng. Corp. Cas. 432; Liebke v. Knapp, 79 Mo. 22; 49 Am. Rep. 212; 6 Am. & Eng. Corp. Cas. 520; Kehlör v. Lademann, 11 Mo. App. 50; Brant v. Ehlen, 59 Md. 1; Van Cott v. Van Brunt, 2 Abb. N. Cas. (N. Y.) 283; American Silk Works v. Solomon, 4 Hun (N. Y.) 135; Carr v. LeFevre, 27 Pa. St. 413; Philadelphia, etc., R. Co. v. Hickman, 28 Pa. St. 318; Bedford County v. Nashville, etc., R. Co., 14 Lea (Tenn.) 525; Clark v. Farrington, 11 Wis. 306; Phelan v. Hazard, 5 Dill. (U. S.) 45; Green's Brice's Ultra Vires (2d ed.) 145; Angell & Ames Corporations (11th ed.), § 517.

A stockholder who consents to payment by another in property cannot afterward compel him to pay in cash. Knoop v. Bohmrich (N. J. 1891), 36 Am. & Eng. Corp. Cas. 315.

3. Haywood, etc., Plank Road Co. v. Bryan, 6 Jones (N. Car.) 82; Ohio, etc., R. Co. v. Cramer, 23 Ind. 490; Phillips v. Covington, etc., Bridge Co., 2 Metc. (Ky.) 219; Van Cott v. Van Brunt, 2 Abb. N. Cas. (N. Y.) 283; Philadelphia, etc., R. Co. v. Hickman, 28 Pa. St. 318; Bedford County v. Nashville, etc., R. Co., 14 Lea (Tenn.) 525; Cincinnati, etc., R. Co. v. Clarkson, 7 Ind. 595; Peck v. Coalfield Coal Co., 11 Ill. App. 88; Brant v. Ehlen, 59 Md. 1; Goodin v. Evans, 18 Ohio St. 150; Jones' Case, L. R., 6 Ch. 48; Maynard's Case, 22 W. R. 110. Compare Brown v. Duluth, etc., R. Co., 53 Fed. Rep. 889.

In Clark v. Farrington, 11 Wis. 306, the court said: "It is not true, as seems to be assumed, that the great primary object of the charter is to raise an amount of money equal to the capital stock. The primary object is to build and equip a railroad. Money is necessary as a means, but it is not the end. And we can see no objection whatever to a railroad company issuing stock and taking in payment materials, or labor, or land necessary for its road. So far as it can build and equip its road for stock, it is the most simple and direct method of accomplishing it. It gets the object, then, by a single transaction, when it would require two, if the subscriber must first pay the money and then receive it back again for whatever he furnished. And we think it might be safely asserted, that no railroad was ever built in the country without disposing of more or less stock in payment for labor, materials or land. And there are but few cases where the propriety of this course, or the power of the companies so to dispose of it, was ever called in question, and in those the power was sustained, while there are many cases where such contracts have been enforced, without question, disputes having arisen on other points. The following may be referred to as illustrations: Vermont Coal R. Co. v. Claves, 21 Vt. 30; Boody v. Rutland,

the land in payment.<sup>1</sup> Patent rights,<sup>2</sup> and even prospective patents,<sup>3</sup> good will,<sup>4</sup> and stock<sup>5</sup> in other corporations, have all been approved as valid equivalents for the issue of shares. But it seems that the possibility of obtaining a patent is not a valid consideration under a constitutional clause authorizing the issue of stock for property only when "actually received."<sup>6</sup>

(3) *Labor and Services.*—So labor and services may be received in payment for stock under conditions similar to those which authorize the acceptance of property.<sup>7</sup>

(4) *Negotiable Paper.*—In most states promissory notes may be taken, where the power is inferable from the corporate charter;<sup>8</sup>

etc., R. Co., 24 Vt. 660. These are cases where a large proportion of the payments to contractors were to be made in stock. *Moore v. Hudson River R. Co.*, 12 Barb. (N. Y.) 156; *Porter v. Buckfield Branch R. Co.*, 32 Me. 539; *Barker v. Troy, etc., R. Co.*, 27 Vt. 767, and many others that might be referred to are of the same character."

A subscription made payable in materials to be used in operation becomes demandable in money, if the materials are not furnished. *Haywood, etc., Plank Road Co. v. Bryan*, 6 Jones (N. Car.) 82.

1. *Peck v. Coalfield Coal Co.*, 3 Ill. App. 619; *Cincinnati, etc., R. Co. v. Clarkson*, 7 Ind. 595; *Brant v. Ehlen*, 59 Md. 1; *Goodin v. Evans*, 18 Ohio St. 150; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508; *Jones' Case*, L. R., 6 Ch. 48; *Maynard's Case*, 22 W. R. 119. And in such case the corporation is a *bona fide* purchaser. *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736; 19 Am. & Eng. Corp. Cas. 231; *In re Barrow, etc., Land Co.*, 14 Ch. Div. 400.

Where one conveys land to a corporation in consideration of a specific number of shares of stock, and afterwards conveys the same to another party, the latter is entitled to the shares, and equity will not aid the grantor to recover them from the corporation. *O'Meara v. North American Min. Co.*, 2 Nev. 112.

2. *Edwards v. Bringier Sugar, etc., Co.*, 27 La. Ann. 118. But payment in patent rights of unascertained value, is not a compliance with a statute requiring payment in money. *Tasker v. Wallace*, 6 Daly (N. Y.) 364 (where the cases are reviewed).

3. *Whitehill v. Jacobs*, 75 Wis. 476, where the statute authorizes the issue of stock for "property."

4. *Pell's Case*, L. R., 5 Ch. 11.

5. *East New York, etc., R. Co. v. Lighthouse*, 6 Robt. (N. Y.) 407, where the other corporation was conducting a similar branch of business. In such case payment is made when the certificates are delivered. *Leathers v. Janney*, 41 La. Ann. 1120; 31 Am. & Eng. Corp. Cas. 399.

6. *State v. Webb* (Ala. 1893), 12 So. Rep. 377.

7. *Stock Paid for in Labor and Services.*—*Cincinnati, etc., R. Co. v. Clarkson*, 7 Ind. 595; *Phillips v. Covington, etc., Bridge Co.*, 2 Metc. (Ky.) 219; *Van Cott v. Van Brunt*, 2 Abb. N. Cas. (N. Y.) 283; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Liebke v. Knapp*, 79 Mo. 22; 6 Am. & Eng. Corp. Cas. 520; 49 Am. Rep. 212. In the latter case the services consisted in newspaper advertising of the corporate enterprise.

After payment in labor and services a stockholder will not be liable further. *Woodfall's Case*, 3 De G. & Sm. 63. Even if a transfer be made to directors. *Ex parte Currie*, 11 W. R. 675. But an allotment to a director of paid-up shares for services does not relieve him from liability thereon. *Daniell's Case*, 1 De G. & J. 372. See also *Jackson v. Traer*, 64 Iowa 469; 54 Am. Rep. 449; *Reed v. Hayt*, 51 N. Y. Super. Ct. 121; *Clark v. Farrington*, 11 Wis. 306; *Branch v. Jesup*, 106 U. S. 468; *Western Bank v. Tallman*, 17 Wis. 530.

A representation by an agent that subscriptions might be paid in provisions or labor will not bar a recovery in money, unless the subscriber had offered to pay in that way and been refused, and was damaged by the refusal. *Walker v. Mobile, etc. R. Co.*, 34 Miss. 245.

8. *New York Rev. Stats.*, ch. 18, § 2, prohibits payment by the subscriber's own note. So in *Tennessee*, such pay-

and so generally in payment of a subscription to corporate stock, bonds may be taken,<sup>1</sup> and checks.<sup>2</sup>

(5) *Satisfaction of Debts*.—The satisfaction of debts due from the corporation is a lawful equivalent for the issue of stock.<sup>3</sup>

ment is not legal, but the subscriber will be credited with the amount collected on notes so given by him. *Moses v. Oconee Bank*, 1 Lea (Tenn.) 398.

**Payment in Promissory Notes.**—As supporting the proposition that subscriptions may be paid in promissory notes, see *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Hardy v. Merriweather*, 14 Ind. 203; *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542; *Ogdensburg, etc., R. Co. v. Wooley*, 3 Abb. App. Dec. (N. Y.) 398; *Magee v. Badger*, 30 Barb. (N. Y.) 246; *Vermont Cent. R. Co. v. Clayes*, 21 Vt. 30; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55; 15 Am. & Eng. Corp. Cas. 539; *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, 11 Wis. 349; 79 Am. Dec. 709; *Cornell v. Hichens*, 11 Wis. 353; *Lyon v. Ewings*, 17 Wis. 61; *Andrews v. Hart*, 17 Wis. 297; *Western Bank v. Tallman*, 17 Wis. 530. But compare *Leighty v. Susquehanna Turnpike Co.*, 14 S. & R. (Pa.) 434; *Farmers, etc., Bank v. Nelson*, 12 Md. 35.

Where notes and mortgages have been given in payment for stock, the stock must be regarded as paid in, and the notes and mortgages given as for money loaned or invested by the company. *Union Cent. L. Ins. Co. v. Curtis*, 35 Ohio St. 343.

A note given to a corporation in payment for stock is valid in the hands of a *bona fide* indorsee; *Magee v. Badger*, 30 Barb. (N. Y.) 246; even though the statute forbids acceptance of notes in payment of installments actually required to be paid. *Willmarth v. Crawford*, 10 Wend. (N. Y.) 341.

A corporation that has become the successor of a co-partnership, to which the corporation is indebted for the business that it purchased, may receive the notes of the co-partnership which one of its stockholders holds, in payment of his shares of the stock of the company. *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542.

Promissory notes given as payment of first twenty per cent. of subscription to capital stock are founded on a sufficient consideration. *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *Mc-*

*Dowell v. Chicago Steel Works*, 124 Ill. 491; 21 Am. & Eng. Corp. Cas. 633.

Distribution of stock by less than the authorized number of commissioners is void; and any instrument given in payment therefor is unenforceable. *Crocker v. Crane*, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228.

In *England*, while payment by note is irregular it is not fraudulent, so as to entitle the debtor to repudiate it. *Power v. Hoey*, 19 W. R. 916.

Giving a worthless note is not payment. *Bouton v. Dement*, 123 Ill. 142. But confederate bonds agreed to be taken must be accepted at their face value, though they have since become worthless. *Schroeder's Case*, L. R., 11 Eq. 131.

1. **Bonds.**—As to payment in municipal bonds, see *MUNICIPAL SECURITIES*, vol. 15, p. 1259; *Southern L. Ins., etc., Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448; *Valk v. Crandall*, 1 Sandf. Ch. (N. Y.) 179; *Leavitt v. Peil*, 27 Barb. (N. Y.) 322.

Where stock is not taken up, the corporation may issue certificates thereof and take in payment its own money bonds. *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39.

Bonds given in payment of a subscription on which the corporation embarked in business and subscribers received their certificates of stock, cannot be repudiated, even if the capital stock was not *bona fide* paid in. *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467.

2. **Checks.**—*In re Staten Island Rapid Transit R. Co.*, 37 Hun (N. Y.) 422, where the statute required payment in cash. In *Crocker v. Crane*, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228, it is held to be a question of law whether payment by check is a compliance with the statute. Where the subscriber pays by check, he cannot be heard to object that it is not an equivalent to specie. *Thorp v. Woodhull*, 1 Sandf. Ch. (N. Y.) 411.

But payment in checks previously given by one of the stockholders to the party paying, to qualify him as a director, is not a valid payment. *In re Disderi*, 19 W. R. 175.

3. **Satisfaction of Debts.**—*Lohman v.*

**3. Parties to the Contract—*a.* IN GENERAL.**—The contract of subscription may be entered into by those competent to form any ordinary contract.<sup>1</sup> Treatment of the legal principles governing subscriptions by persons under disability should be sought under titles where the general law applicable to such parties is treated.<sup>2</sup>

***b.* OTHER CORPORATIONS.**<sup>3</sup>—A municipal corporation is a competent subscriber under legislative permission.<sup>4</sup> State subscriptions were formerly not uncommon, and in an action thereon the state appears in court, not as a sovereign, but as a stockholder.<sup>5</sup> One private corporation cannot subscribe to stock in another unless authorized by its charter,<sup>6</sup> or unless from the nature of the

New York, etc., R. Co., 2 Sandf. (N. Y.) 39; *Reed v. Hayt*, 51 N. Y. Super. Ct. 121; *Carr v. Le Fevre*, 27 Pa. St. 413; *Woodhull's Case*, 3 De G., J. & Sim. 63; *Ex parte Thomas*, 42 L. J. Ch. 781; *Ex parte Manchester Finance Corp.*, 29 L. T., N. S. 441; 22 W. R. 41; *Bennett's Case*, 15 W. R. 1058; 16 L. T., N. S. 475; *In re Baglan Hall Colliery Co.*, L. R., 5 Ch. 346; *Jones' Case*, L. R., 6 Ch. 48. But see *Fothergill's Case*, L. R., 8 Ch. 270. So where debts are not yet due. *Appleyard's Case*, 49 L. J. Ch. 290.

Liability for damages, etc., may be extinguished by issue of stock to the claimant. *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318.

1. See *CONTRACTS*, vol. 3, p. 823.

2. See *INFANTS*, vol. 10, p. 613; *MARRIED WOMEN*, vol. 14, p. 589. For principles applicable to subscriptions by agents and partners, see *AGENCY*, vol. 1, p. 331; *PARTNERSHIP*, vol. 17, p. 824.

3. For a discussion of the right of a corporation to acquire its own stock, see *STOCK*, vol. 23, p. 582.

4. See *MUNICIPAL CORPORATIONS*, vol. 15, p. 949; *MUNICIPAL SECURITIES*, vol. 15, p. 1259.

5. **State Subscriptions.**—*Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 904; *Curran v. Arkansas*, 15 How. (U. S.) 304; *Brady v. State*, 26 Md. 302. But where the state becomes a stockholder in a corporation, it does not divest itself of its sovereign right as a creditor, nor does it impart to that corporation any of its privileges or prerogatives. Hence where a state subscribed to the stock of a bank and subsequently an act was passed extending the charter and providing that no calls should be made for additional installments upon the stock taken by the state, although unpaid capital

stock may be a trust fund for the payment of corporate debts, yet the right to call in the unpaid state installments is taken away by the statute; the corporation, not the stockholders, is responsible for unpaid installments as a fund for creditors.

Where a dividend is guaranteed on state subscription, it is not payable in gold unless expressly so stated. *Baltimore, etc., R. Co. v. Maryland*, 36 Md. 519.

**6. Corporations as Subscribers.**—“There would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to become such is clearly conferred by statute.” *Boydton, J.*, in *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; 38 Am. Rep. 594.

In *Pearson v. Concord R. Corp.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 102; 13 Am. St. Rep. 590, the court, by *Smith, J.*, said: “A corporation cannot become a stockholder in another corporation unless such power is given by its charter or is necessarily implied in it (*Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; 28 Am. Rep. 9; *Mechanics' Sav. Bank, etc., Assoc. v. Meriden Agency Co.*, 24 Conn. 159; *Green Bri. Ult. V.* 91, and cases cited, *Mor. Corp.*, § 229, and cases cited), especially if the purchase be for the purpose of controlling or affecting the management of the other corporation. *Sumner v. Marcy*, 3 Woodb. & M. (U. S.) 105; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Great Northern R. Co. v. Eastern Counties R. Co.*, 21 L. J. Ch. 837; *Booth v. Robinson*, 55 Md. 439. Dealing in stocks is not expressly

business conducted by the corporations the existence of such power may be implied.<sup>1</sup> Thus a banking corporation cannot, in general, take stock in another concern.<sup>2</sup> A manufacturing corporation cannot subscribe to the stock of a bank,<sup>3</sup> or of a railroad,<sup>4</sup> but may, in payment of a debt, take the shares of another corporation,<sup>5</sup> and is not to be presumed incapable of holding them.<sup>6</sup> A steamship company has been held incompetent to subscribe to the stock of a dry-dock company,<sup>7</sup> but a lawful purchaser of stock in a rival line.<sup>8</sup> So an insurance company cannot take stock in a bank,<sup>9</sup> or even in another insurance company,<sup>10</sup> nor can one rail-

prohibited in the act of congress providing for the organization of a national bank (U. S. Rev. St., § 5136, par. 7); but such prohibition is implied from the failure to grant the power. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 128. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental or necessary to carry into effect the purposes for which they were established. *Downing v. Mt. Washington Road Co.*, 40 N. H. 232; *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 330; *Beaty v. Knowler*, 4 Pet. (U. S.) 152; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. (U. S.) 172; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 636." See also *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Booth v. Robinson*, 55 Md. 439; *Talmage v. Pell*, 7 N. Y. 328; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122; *Royal Bank of India's Case*, L. R., 4 Ch. 252; *Joint Stock, etc., Co. v. Brown*, L. R., 8 Eq. 381; *Great Northern R. Co. v. Eastern Counties R. Co.*, 21 L. J. Ch. 837.

But a corporation cannot be prevented by the owner of land from condemning the same, because another corporation has subscribed to its stock. *In re Rochester, etc., R. Co.*, 110 N. Y. 119; 36 Am. & Eng. Corp. Cas. 552.

1. *Pearson v. Concord R. Corp.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 102; 13 Am. St. Rep. 590; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; 28 Am. Rep. 9; *Mechanics' Sav. Bank, etc., Assoc. v. Meriden Agency Co.*, 24 Conn. 159. For a full exposition of this subject, see **ULTRA VIRES**.

2. **Banks.**—*Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; 28 Am. Rep. 9; *Talmage v. Pell*, 7 N. Y. 328;

*Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Nassau Bank v. Jones*, 95 N. Y. 115; 47 Am. Rep. 14; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122; *Royal Bank of India's Case*, L. R., 4 Ch. 252. And see **BANKS AND BANKING**, vol. 2, p. 89.

In *Pearson v. Concord R. Co.*, 62 N. H. 537, there is a *dictum* to the effect that a savings bank may invest its surplus in the stock of other corporations.

3. **Manufacturing Companies.**—*Sumner v. Marcy*, 3 Woodb. & M. (U. S.) 105. See *Pearson v. Concord R. Corp.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 102; 13 Am. St. Rep. 590.

4. *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44.

5. *Howe v. Boston Carpet Co.*, 16 Gray (Mass.) 493; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624.

6. *Evans v. Bailey*, 66 Cal. 112. In this case it is said: "The question of *ultra vires* raised by The People's Ice Co. is not tenable. It does not appear that it was not within the scope of the powers of The People's Ice Company to acquire or hold stock in the California Fruit and Meat Shipping Company, under any circumstances or for any purpose; and it does not appear under what circumstances the stock was acquired or held. (*Miner's Ditch Co. v. Zellerbach*, 37 Cal. 578.)"

7. *New Orleans, etc., Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90.

8. *Booth v. Robinson*, 55 Md. 419.

9. **Insurance Companies.**—*Mechanics' Sav. Bank, etc., Assoc. v. Meriden Agency Co.*, 24 Conn. 159; *State v. Butler*, 86 Tenn. 614.

10. *Berry v. Yates*, 24 Barb. (N. Y.) 199; *Pierson v. McCurdy*, 33 Hun (N. Y.) 530; *In re Liquidator British Nation L. Assoc.*, 8 Ch. Div. 679.

But subscription by one insurance

road corporation, as a rule, purchase the shares of another.<sup>1</sup> But a construction company engaged in building a railroad may subscribe to the stock of the railroad company.<sup>2</sup>

c. WHO MAY RECEIVE SUBSCRIPTIONS.—Statutory provisions for taking subscriptions have sometimes been held exclusive,<sup>3</sup> and sometimes cumulative<sup>4</sup> only. The power to receive subscriptions before organization is usually conferred upon special commissioners, and those received in such cases, by others, are, by the preponderance of authority, invalid,<sup>5</sup> though the corporation may

company to another will not be pronounced void without introduction of evidence of its charter. *New York Exch. Co. v. DeWolf*, 5 Bosw. (N. Y.) 593.

1. *Railroads*.—*Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 57; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 5; 9 Am. & Eng. R. Cas. 590; *Millbank v. New York, etc., Co.*, 64 How. Pr. (N. Y.) 20; *Mackintosh v. Flint, etc., R. Co.*, 34 Fed. Rep. 582; *Pearson v. Concord R. Corp.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 102; 13 Am. St. Rep. 590; *Woods v. Memphis, etc., R. Co.*, 5 R. & Corp. L. J. 372; *Green's Brice's Ultra Vires*, 91 (2d ed.); *Maunsell v. Midland, etc., R. Co.*, 1 H. & M. 130; *Great Northern R. Co. v. Eastern Counties R. Co.*, 21 L. J. Ch. 837; *Great Western R. Co. v. Metropolitan R. Co.*, 32 L. J. Ch. 382. And see generally *RAILROADS*, vol. 19, p. 810; *ULTRA VIRES*.

In *Kansas*, a railroad company may purchase stock in another company for purposes connected with the road or with a view to consolidation. And where both corporations are under the same control, stockholders in one can bring an action against the other corporation when funds have been misapplied. *Ryan v. Leavenworth, etc., R. Co.*, 21 Kan. 365. See also *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236; 24 Am. & Eng. R. Cas. 34.

2. *In re Rochester, etc., R. Co.*, 45 Hun (N. Y.) 126.

*Non-Trading Corporations*.—There is a dictum in *Pearson v. Concord R. Corp.*, 62 N. H. 537; 13 Am. & Eng. R. Cas. 590; 13 Am. Rep. 102, to the effect that certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may invest their moneys in the stock of other corporations; that

the power, if not expressly mentioned in their charters, is necessarily implied for the preservation of the funds with which such institutions are endowed, and to render their funds productive. See also 2 *Beach Priv. Corp.*, § 522.

3. In *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 270, the court, per Campbell, J., said: "The statute requires a majority of the commissioners to determine when and where subscriptions are to be taken, and their duty continues until the whole amount of stock is subscribed and distributed. The subscription in question, not being made under their auspices, is not binding on them, and could not prevent other parties from taking the whole amount not subscribed by the original articles, whenever the commissioners should see fit to proceed and perform their duty." See also *Parker v. Northern, etc., R. Co.*, 33 Mich. 23; *Unity Ins. Co. v. Cram*, 43 N. H. 636; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 207.

4. *Crocker v. Crane*, 21 Wend. (N. Y.) 211; 24 Am. Dec. 228; *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146; *Buffalo, etc., R. Co. v. Gifford*, 87 N. Y. 294.

5. In *Essex Turnpike Corp. v. Collins*, 8 Mass. 292, the court said: "It is certain that to every valid contract there must be parties. Aggregate corporations cannot contract without vote, because there is no other way in which they can express their assent. Such corporations may contract by their agents; but such agents must have authority given them for that purpose. In this case no such authority was given to Mr. Foster. And, admitting that the corporation might be bound by subsequent assent, there is no evidence that any such assent was given." See also *Carlisle v. Saginaw Valley, etc., R. Co.*, 27 Mich. 315; *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 269; *Walker v. Mobile, etc., R. Co.*, 34 Miss. 245; *Troy, etc., R. Co. v. War-*



ratify them.<sup>1</sup> Subscriptions must be thrown open to the public,<sup>2</sup> but the commissioners themselves may subscribe.<sup>3</sup> Failure to take a prescribed oath will not invalidate the acts of commissioners,<sup>4</sup> but their powers<sup>5</sup> terminate upon organization.<sup>6</sup>

**4. Enforcement of the Contract—*a*. SUBSCRIBER'S LIABILITY TO PAY.**—By the great weight of authority, the contract of subscription, irrespective of its language, implies a liability on the part of the subscriber to pay.<sup>7</sup> There is, however, a line of earlier and,

ren, 18 Barb. (N. Y.) 310; Granger's Market Co. v. Vinson, 6 Oregon 174; Howard's Case, L. R., 1 Ch. 561; Taggart v. Western Md. R. Co., 24 Md. 563; 89 Am. Dec. 760; Melvin v. Hoitt, 52 N. H. 61; Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223; Mobile, etc., R. Co. v. Yandal, 5 Sneed (Tenn.) 294.

A subscription has been held to be valid when made to one not a commissioner, but having an interest in the company, who went about soliciting subscriptions in order to secure the charter. *Northeastern R. Co. v. Rodrigues*, 10 Rich. (S. Car.) 278.

1. Walker v. Mobile, etc., R. Co., 34 Miss. 245. Also *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333; *Bufalo, etc., R. Co. v. Gifford*, 87 N. Y. 294; *Mobile, etc., R. Co. v. Yandal*, 5 Sneed (Tenn.) 294.

2. *Brower v. Passenger R. Co.*, 3 Phila. (Pa.) 161.

3. *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18. Where one appointed to receive subscriptions himself subscribes, he cannot release himself by taking his name from the subscription paper before returning the same. *Cheraw, etc., R. Co. v. White*, 14 S. Car. 51.

4. *Hollman v. Williamsport, etc., Turnpike Co.*, 9 Gill & J. (Md.) 462.

5. **Powers of Commissioners.**—Commissioners act judicially in allotting shares, but ministerially in taking subscriptions. *Crocker v. Crane*, 21 Wend. (N. Y.) 211. Independent of statute they may fix the limit of subscriptions. *Saugatuck, etc., R. Co. v. Westport*, 39 Conn. 348. But the corporation may reject subscriptions by those not qualified. *Union Bank v. McDonough*, 5 La. 63.

6. *James v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 261; *Smith v. Bangs*, 15 Ill. 399; *Wellersburg, etc., Road Co. v. Hoffman*, 9 Md. 559; *Peninsular, etc., R. Co. v. Duncan*, 28 Mich. 130; *Hardenburgh v. Farmers', etc.,*

*Bank*, 3 N. J. Eq. 68; *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Crocker v. Crane*, 21 Wend. (N. Y.) 211; 34 Am. Dec. 228; *State v. Lehre*, 7 Rich. (S. Car.) 234.

After organization, all subscriptions are to be regarded as received by the directors and not by the stockholders, and an agreement with the former will be considered binding on the corporation. *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86.

The reception of subscriptions by the president is no more out of the line of his duty than receiving payment for any other debts. *East New York, etc., R. Co. v. Lighthall*, 5 Abb. Pr. N. S. (N. Y.) 458; 36 How. Pr. (N. Y.) 481.

7. *Beene v. Cahawba, etc., R. Co.*, 3 Ala. 660; *Mitchell v. Beckman*, 64 Cal. 117; 1 Am. & Eng. Corp. Cas. 40; *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 500; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Miller v. Wild Cat, etc., Road Co.*, 52 Ind. 51; *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121; *Nulton v. Clayton*, 54 Iowa 425; 37 Am. Rep. 213; *Fry v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314; *Gill v. Kentucky, etc., Min. Co.*, 7 Bush (Ky.) 635; *Mt. Sterling Coal-road Co. v. Little*, 14 Bush (Ky.) 429; *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Kennebec, etc., R. Co. v. Palmer*, 34 Me. 366; *Buckfield Branch R. Co. v. Irish*, 39 Me. 44; *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Dexter, etc., Co. v. Millerd*, 3 Mich. 91; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Rensselaer, etc., Plank R. Co. v. Barton*, 16 N. Y. 457n.; *Dayton v. Borst*, 31 N. Y. 435; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 268; *Fort Edward, etc., Plank R. Co. v. Payne*, 17 Barb. (N. Y.) 567; *Troy, etc., R.*

it is believed, less authoritative decisions requiring an express promise, either in the subscription or the charter, in order to hold the subscriber.<sup>1</sup> When the contract is once formed the subscriber

*Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Ogdensburg, etc., R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Hartford, etc., R. Co. v. Croswell*, 5 Hill (N. Y.) 383; 40 Am. Dec. 354; *Spear v. Crawford*, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513; *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *Chase v. East Tennessee, etc., R. Co.*, 5 Lea (Tenn.) 415; 4 Am. & Eng. R. Cas. 349; *Gibbons v. Grinsel*, 79 Wis. 365; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *Hawley v. Upton*, 102 U. S. 314; *Connecticut, etc., R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Ex parte Tothill*, 35 L. J. Ch. 120; *Levick's Case*, 30 L. J. Ch. 180; *Ex parte Tooth*, 10 L. T., N. S. 599; *Sidney's Case*, L. R., 13 Eq. 228; *In re London, etc., Coal Co.*, 5 Ch. Div. 525; *Ex parte Palmer*, 2 Ir. Eq. 573.

Subscribers promising to pay \$25 "for each share of stock opposite each of our names" are severally liable, each for the amount opposite his own name. *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 138.

A subscriber to a prospective corporation is liable for the amount of stock opposite his name, and the corporation, when organized, can enforce the liability. *Ashuelot Boot, etc., Co. v. Hoit*, 56 N. H. 548.

A corporation may receive subscriptions and sue thereon before being fully organized. *Oregon Cent. R. Co. v. Scoggin*, 3 Oregon 161.

A subscriber to a company chartered but not organized, where the charter provides for subscription before organization, is bound, unless he expressly dissents before the acceptance of the charter. *Gleaves v. Brick Church Turnpike Co.*, 1 Sneed (Tenn.) 491.

A resolution to drop delinquent subscribers from the rolls, never enforced, will not release from liability on his subscription one who has since claimed the benefits of membership. *Hayes v. Franklin County Lumber Co.* (Neb. 1892), 53 N. W. Rep. 381.

A private agreement with a third party that the latter shall pay for the stock does not release the subscriber. *Williams v. Benet*, 34 S. Car. 112.

But in *Pennsylvania*, a husband is not liable upon a subscription made by him for his wife in her name. *Shields v. Casey* (Pa. 1893), 25 Atl. Rep. 619.

1. In *Belfast, etc., R. Co. v. Moore*, 60 Me. 561, it was held that a joint subscription by which the signers agreed to take the amounts set opposite their names agreeable to foregoing conditions, imposed no obligation to pay therefor; that the conditions which contained no words of promise did not change the force of the agreement in this particular, and that the latter was not affected by the condition in the charter purporting to render a subscriber liable for the unpaid balance after sale of his shares. The court, in reaching its conclusion, reviewed the authorities as follows: "It is held by many courts that a subscription to stock like the one signed by the defendant, or indeed any subscription, creates an obligation of actual payment unless such an obligation is excluded by its terms. *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297. On the other hand, by a series of decisions commencing as early as the case of *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 40, when this state was a part of *Massachusetts*, and continuing through our own reports down to the present time, it has been uniformly held that such a subscription as the present imposes no personal obligation to pay, and that the only remedy for the collection of assessments is that provided by the charter. Many of these decisions, and sufficient for our purpose, here are referred to in the case of *Kennebec, etc., R. Co. v. Kendall*, 31 Me 470. The same principle is also recognized in *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 594; and in many other cases, both in this and other states, which it is unnecessary to cite." See also *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; *White Mountains, etc., R. Co. v. Eastman*, 34 N. H. 124; *Essex Bridge Co. v. Tuttle*, 2 Vt. 393; *Connecticut, etc., R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Boston, etc., R. Co. v.*

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cannot relieve himself from its obligations without the consent of the corporation,<sup>1</sup> and not then if the rights of creditors would be prejudiced.<sup>2</sup> In *Pennsylvania*, subscriptions may be withdrawn at any time before the articles of incorporation are filed,<sup>3</sup> but it has elsewhere been held that there can be no withdrawal after acceptance by the company.<sup>4</sup>

*b. CALLS AND ASSESSMENTS*—(1) *Definition*.—The terms "calls" and "assessments" are often used indiscriminately to denote the exercise by the corporation of its right to declare due and to collect subscriptions or a part thereof.<sup>5</sup> The word "calls,"

Wellington, 113 Mass. 79; Buckfield Branch R. Co. v. Irish, 39 Me. 44; Russell v. Bristol, 49 Conn. 251.

"It is to be noticed," says Mr. Cook in his work on Stock and Stockholders (p. 88), "that this rule was established before the announcement of that great principle of American law, that the capital stock of a corporation is a trust fund for the benefit of its creditors."

1. A subscriber cannot release himself from liability to pay unless with the consent of the corporation. The subscription is a contract, which cannot be dissolved at the option of one party. Gaff v. Flesher, 33 Ohio St. 107, citing Muskingum Valley Turnpike Co. v. Ward, 13 Ohio 120; 42 Am. Dec. 191; Graff v. Pittsburgh, etc., R. Co., 31 Pa. St. 489; Upton v. Tribilcock, 91 U. S. 48.

A subscriber to the stock of a corporation in process of organization can neither withdraw nor be released by directors without consent of all the subscribers. Hughes v. Antietam Mfg. Co., 34 Md. 316.

While a subscriber may, perhaps, refuse to sign articles of association, the corporation, having come into legal existence, may collect his subscription. Johnson v. Wabash, etc., Plank Road Co., 16 Ind. 389.

2. Carter v. Union Printing Co. (Ark. 1891), 36 Am. & Eng. Corp. Cas. 257; Farnsworth v. Robbins, 36 Minn. 369; Putnam v. New Albany, 4 Biss. (U. S.) 365. Compare Glenn v. Hackett, 91 Ala. 316; Bates v. Great Western Tel. Co., 134 Ill. 536.

But a subscription may be modified while the corporation is solvent, according to the terms of a condition, and such modification acquiesced in for fifteen years will not be set aside. Putnam v. New Albany, 4 Biss. (U. S.) 365.

But the cancellation of a percentage

upon each subscription may be valid as between company and subscriber. Glenn v. Hatchett, 91 Ala. 316.

3. Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465; Muncy Traction Engine Co. v. De La Green (Pa. 1888), 21 Am. & Eng. Corp. Cas. 328; Auburn Bolt, etc., Works v. Schultz (Pa. 1891), 22 Atl. Rep. 904; Cook v. Chittenden, 25 Fed. Rep. 544. Compare Phipps v. Jones, 20 Pa. St. 260; 59 Am. Dec. 708; Edinboro Academy v. Robinson, 37 Pa. St. 210; 78 Am. Dec. 421; Strasburg R. Co. v. Echternacht, 21 Pa. St. 220; 60 Am. Dec. 49; Shober v. Lancaster Co. Park Assoc., 68 Pa. St. 429.

4. Gulf, etc., R. Co. v. Neely, 64 Tex. 344.

5. See Braddock v. Philadelphia, etc., R. Co., 45 N. J. L. 363; Cook, Stock & Stockholders, § 104.

A call is an application to the shareholders for money. Newry, etc., R. Co. v. Edmonds, 2 Exch. 119.

A call or assessment has been defined as a rating or fixing of the proportion by the board of directors, which every subscriber is to pay of his subscription, when notified of it and when called in. Spangler v. Indiana, etc., R. Co., 21 Ill. 276.

In *Re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425, Fry, L. J., said: "I scarcely know what the making of a call is, except the fixing of a time at which the money is to be paid."

"A company call is but a step in the process of collection." Strong, J., Hatch v. Dana, 101 U. S. 205.

In *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363, a call is said to be nothing more than an official declaration that the sums subscribed are required to be paid.

A circular sent to every stockholder, stating that the directors had resolved on making a call, constitutes

however, has other meanings,<sup>1</sup> while the term "assessments" is said to refer more properly to "amounts levied upon shareholders after their subscriptions have been fully paid."<sup>2</sup>

(2) *When Calls Are Necessary.*—The levy of a call or assessment is usually the first step in the enforcement of the contract of subscription, and, in the ordinary form of subscription, such a levy is a condition precedent to collection.<sup>3</sup>

But calls are unnecessary where the charter<sup>4</sup> or arti-

one. *Shaw v. Rowley*, 16 M. & W. 810.

An order from the board of directors to the president to collect subscriptions is a call. *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363.

An order appointing a receiver and authorizing him to prosecute actions, does not amount to a call from which prescription will run. *Glenn v. Macon*, 32 Fed. Rep. 7.

1. *Reg. v. Londonderry, etc., R. Co.*, 13 Q. B. 998; 66 E. C. L. 997. In *Ambergate R. Co. v. Mitchell*, 4 Exch. Rep. 542, Baron Parke, says: "The word 'call' is capable of three meanings. It may either mean the resolution or its notification, or the time when it becomes payable. It must mean either one of these three." And see *CALLS*, vol. 2, p. 714.

2. 2 *Beach on Corporations*, § 590, where the author also says: "The correct use of the word is shown by cases holding that while stock issued as 'non-assessable,' cannot be assessed beyond the full par value, yet that these words do not exempt the holder from the payment of calls until the full face value has been paid. *Price's Appeal*, 106 Pa. St. 421; *Upton v. Tribilcock*, 91 U. S. 45; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Taylor on Corporations*, § 522."

3. *Calls Necessary.*—Alabama, etc., *R. Co. v. Rowley*, 9 Fla. 508; North, etc., *R. Co. v. Spullock*, 88 Ga. 283. *Banet v. Alton, etc., R. Co.*, 13 Ill. 504, where the court says: "No action can be maintained against a stockholder for an installment on his subscription until the board has directed the call to be made." *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276; Ohio, etc., *R. Co. v. Cramer*, 23 Ind. 490; *Grosse Isle Hotel Co. v. L'Anson*, 42 N. J. L. 10; 43 N. J. L. 442; *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363; *Williams v. Taylor*, 120 N. Y. 244; *Cheraw, etc., R. Co. v. Garland*, 14 S. Car. 63; *Chandler v. Siddle*, 10 Nat. Bankr.

*Reg.* 236; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178. In *Bank of South Australia v. Abrahams, L. R.*, 6 P. C. 262, the court says: "The capital not paid up is, according to the usual forms of deeds of settlement (the form in this case), only *sub modo* the property of the company. The company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if, and when, calls are made by the directors in the exercise of a discretion within limits both of time and amount prescribed by the deed. The due making of the call by the resolution of a board of directors is an essential condition precedent." See also *Grissell's Case, L. R.*, 1 Ch. 535; *Granite Roofing Co. v. Michael*, 54 Md. 65.

The rule applies though stock is fictitiously paid up. But a call does not affect stock subsequently subscribed. *Pike v. Bangor, etc., Shore Line R. Co.*, 68 Me. 445. The subscriber cannot be garnished for unpaid installments until after a call has been made. *Teague v. Le Grand*, 85 Ala. 493; 7 Am. St. Rep. 64; *Parks v. Heman*, 7 Mo. App. 14.

4. In *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, the court, by *Rapallo, J.*, said: "This action was properly brought upon the original subscription and it was not necessary to aver calls. By his subscription, to which no condition or stipulation as to the time of payment was attached, the defendant undertook to pay for his shares, according to the conditions of the charter. (*Rensselaer, etc., Plank R. Co. v. Barton*, 16 N. Y. 457, note; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451.) The act under which this company was incorporated, requires that the whole capital stock be paid in within two years. Without intimating that this is a limitation upon the right of the company or the receiver to require immediate payment, it may be observed that the two

cles<sup>1</sup> make the amount payable at a time certain, or where the corporation has passed into the hands of a receiver,<sup>2</sup> even though the charter requires calls to be made by the directors.<sup>3</sup>

(3) *Who May Levy Calls*—(a) *The Directors*.—In the absence of charter provisions to the contrary, the directors have implied power to levy calls,<sup>4</sup> and it has been held that such power may be delegated to them by the stockholders, even where it is vested in the latter.<sup>5</sup> But the directors themselves cannot delegate their power to make calls,<sup>6</sup> though they may authorize another to fix

years had elapsed, and upon any theory the subscription was past due when this action was commenced."

1. *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121. In this case it is said: "The object of an assessment, where one is necessary, is to fix the amount that may be called for, and the time when it may be called for. But in the case at bar both amount and time of payment were fixed by the articles of incorporation. Nothing remained to be determined but the needs of the company resulting from the expenditures. When the company notified defendant, as the petition avers, that, we think, was a sufficient determination that the expenditures required payment of the stock."

2. *Hatch v. Dana*, 101 U. S. 205. In *Henry v. Railroad Company*, 17 Ohio, 187, it was said: "'When a company becoming insolvent, as in this case, abandons all action under its charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand.' This means, of course, as between the debtor and the creditor of the corporation. After all, a company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor." See also *Curry v. Woodward*, 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 159; 60 Am. Rep. 92; *Scovill v. Thayer*, 105 U. S. 143.

3. *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466. See also *Glenn v. Saxton*, 68 Cal. 353; *Crawford v. Rohrer*, 59 Md. 599; 1 Am. & Eng. Corp. Cas. 81.

But in *Louisiana Paper Co. v. Waples*, 3 Woods (U. S.) 34, a charter of the company prescribed in what installments forty per cent. of the stock should be paid, and then declared: "The balance on each share, or any portion of such balance, shall not be

called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the company." It was held, that after payment by a stockholder of forty per cent. of his stock, he was not liable to the company, or its creditors, for the residue or any part thereof, unless the same had been called for by a vote of three-fourths of the stockholders.

4. *Budd v. Multnomah St. R. Co.*, 15 Oregon 413; 40 Am. & Eng. R. Cas. 551; 3 Am. St. Rep. 169; *Ambergate R. Co. v. Mitchell*, 4 Ex. 540; *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180.

5. *Rives v. Montgomery, etc., Plank R. Co.*, 30 Ala. 92. In this case the charter of an incorporated plank road company authorized the stockholders to make calls for payment on subscriptions and to appoint a board of directors consisting of stockholders "to manage the business of the corporation." It was held that the stockholders might delegate to the board of directors the power to call in stock.

But, under the *Massachusetts Act of 1809*, the power to assess was vested in the corporation, and it was held that authority to delegate it could not be inferred from a by-law giving the directors general managing powers. *En parte Winsor*, 3 Story (U. S.) 411.

6. *Power Cannot be Delegated by Directors*.—In *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 554, the court, by Aldis, J., said: "The charter provides that the directors shall give notice, etc. When the charter requires the directors to do some specific act there seems to be a stronger reason why they should be held incapable of delegating such authority, than when mere general powers are conferred upon them. The charter of this, as of most corporations, authorizes the directors 'to transact the general business of the company,' and there is no doubt that as to the ordinary routine business of

the amounts and times of payment,<sup>1</sup> and may ratify calls made by others without authority.<sup>2</sup> When the power is conferred upon the board, there must be a quorum in order to exercise it.<sup>3</sup> By the weight of American authority, *de facto* directors may levy calls.<sup>4</sup>

the corporation they can transact it, as most companies do, through sub-committees. The duty here specified is of a class requiring some exercise of judgment and discretion, though not, perhaps, so important, or partaking so much of the judicial function as many others; but when the words thus expressly point to a particular duty to be performed by the directors, and not to general business or a class of duties, we think the fair intent of the law is that they should act as a body in regard to the particular matter, and not delegate their discretion or duty to a sub-committee." See also *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504; *Pike v. Bangor, etc., Shore Line R. Co.*, 68 Me. 445; *Farmer's F. Mutual Ins. Co. v. Chase*, 56 N. H. 341; *Silver Hook Road v. Greene*, 12 R. I. 164.

1. *Banet v. Alton, etc., R. Co.*, 13 Ill. 504. See also *Hayes v. Pittsburgh, etc., R. Co.*, 38 Pa. St. 81.

2. *Read v. Memphis, etc., Gas Co.*, 9 Heisk. (Tenn.) 545; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

A call made by less than a quorum of directors is valid if subsequently ratified by the proper number. *Austin's Case*, 24 L. T., N. S. 932.

Payment on calls is a waiver of irregularities in number and qualifications of the directors issuing them. *Macon, etc., R. Co. v. Vason*, 57 Ga. 314.

3. *Bottomley's Case*, 16 Ch. Div. 681; *Price v. Grand Rapids, etc., R. Co.*, 13 Ind. 58; *Hamilton v. Grand Rapids, etc., R. Co.*, 13 Ind. 347.

A call by directors, whom an irregularly called meeting has attempted to discharge, is valid. *Swansea Dock Co. v. Levien*, 20 L. J. Ex. 447.

A requisition for payment is binding if made by the directors under authority of by-laws, though without assent of each individual director. *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479.

But a call made by one stockholder is invalid, though he alone was present at the time and place for the meeting, and there was no rule as to a quorum. *Sharpe v. Dawes*, 2 Q. B. Div. 26.

4. *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 184. See also *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Macon, etc., R. Co. v. Vason*, 57 Ga. 314; *Johnson v. Crawfordsville R. Co.*, 11 Ind. 280; *Steinmetz v. Versailles, etc., R. Co.*, 57 Ind. 457; *Atherton v. Sugar Creek, etc., Turnpike Co.*, 67 Ind. 334; *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Vernon Society v. Hills*, 6 Cow. (N. Y.) 23.

But in *Moses v. Tompkins*, 84 Ala. 613, the fact that the directors were illegally chosen was held ground for enjoining a call.

In *People's Mut. Ins. Co. v. Westcott*, 11 Gray (Mass.) 442, the court, by Hoar, J., said: "It is urged on behalf of the plaintiffs that these were directors *de facto*, actually holding and exercising the office at the time the assessment was made, and that it is not open to the defendants to object collaterally to the legality of their election. But we think the doctrine of the validity of acts done *colore officii*, although well established by the authorities cited, is not applicable to this case. In *Baird v. Bank of Washington*, 11 S. & R. (Pa.) 411, which is the case most relied on, a director of the bank was chosen at a meeting at which less than a quorum was present; and it was held that his acts as an agent and officer of the bank were valid as between the bank and third persons. But these defendants are not to be regarded as third persons in their relation to the insurance company. They are not debtors absolutely to the corporation. By the terms of their contract, their liability can only be created by an assessment or call made by the directors, officers in whose selection they are entitled to a vote. No vote to increase the number had been passed at any meeting held for such a purpose. They were not bound to recognize as directors persons who were never lawfully chosen, and who were usurping the functions of an office already filled."

So in *England* it is a defense to an action to enforce a call, that it was not made by legally elected directors. *Swansea Dock Co. v. Levien*, 20 L. J. Ex. 447; *Garden Gully, etc., Co. v. McLister*, L. R., 1 App. Cas. 39; *How-*

(b) *The Courts.*—A court of equity will levy a call, where the corporate authorities fail in their duty or cannot act;<sup>1</sup> so the

beach Coal Co. *v.* Teague, 5 H. & N. 151.

A call cannot be enforced when made by less than a quorum of subscribers, no directors having been duly appointed. *Howbeach Coal Co. v. Teague*, 5 H. & N. 151.

A majority of a quorum must concur in levying the call. *Hamilton v. Grand Rapids, etc.*, R. Co., 13 Ind. 347; *Price v. Grand Rapids, etc.*, R. Co., 13 Ind. 58; *Cowley v. Grand Rapids, etc.*, R. Co., 13 Ind. 61; *Pike v. Bangor, etc.*, Shore Line R. Co., 68 Me. 445; *Silver Hook Road v. Greene*, 12 R. I. 164.

1. *Calls by the Court.*—In *Scovill v. Thayer*, 105 U. S. 155, the court by Woods, J., said: "It is well settled that when stock is subscribed to be paid upon the call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. *Curry v. Woodward*, 53 Ala. 371; *Robinson v. Bank of Darien, etc.*, 18 Ga. 65; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment."

In *Hatch v. Dana*, 101 U. S. 205, this subject underwent discussion. Here, a bill in the nature of a creditor's bill sought to establish the liability of the stockholders of a corporation on unpaid subscriptions. By the terms of the subscriptions stockholders were to pay as called for by the company; but the court held that it was not necessary that a formal call should be made before the bill could be filed, and said that the filing of the bill was equivalent to a call. The court cited and relied upon *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Milwaukee Constr. Co.*, 38 Wis. 253; *Marsh v. Burroughs*, 1 Woods (U. S.) 468; *Henry v. Vermillion, etc.*, R. Co., 17 Ohio 189; *Dalton, etc.*, R. Co. *v.* McDaniel, 56 Ga. 191; and distinguished the cases of *Wood v. Dummer*, 3 Mason (U. S.)

308; *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *Terry v. Tubman*, 92 U. S. 156. It was contended by the defendants that the bill would not lie without an account being taken of their indebtedness and without bringing in all the stockholders for contribution. It was insisted also that by the terms of the subscriptions subscribers were to pay for their shares "as called for by the said company," and that a court of equity should not enforce the contract otherwise than as contemplated in the subscription; but the court, Strong, J., delivering the opinion, declared that these decisions were not supported by the authorities, certainly not by the more modern ones, and that they were not in harmony with reason when considered with reference to the facts of the case. The opinion adverted to the practice sometimes adopted by the English courts to award a *mandamus* to compel directors to make necessary calls, and referred to *Reg. v. Victoria Park Co.*, 1 Ad. & El., N. S. 288; 41 E. C. L. 544; *Reg. v. Ledgard*, 1 Ad. & El., N. S. 614; 41 E. C. L. 697; *Rex v. St. Katharine Dock Co.*, 4 B. & Ad. 360; 24 E. C. L. 73; but said that the remedy in equity was more complete and well recognized, referring to *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593. See also *Curry v. Woodward*, 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 159; 60 Am. Rep. 92; *Glenn v. Saxton*, 68 Cal. 353; *Glenn v. Dodge* (D. C. 1885), 3 Cent. Rep. 283; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Great Western Tel. Co. v. Gray*, 122 Ill. 630; 19 Am. & Eng. Corp. Cas. 260; *Chandler v. Keith*, 42 Iowa 99; *Shockley v. Fisher*, 75 Mo. 498; *Glenn v. Williams*, 60 Md. 93; *Boeppler v. Menown*, 7 Mo. App. 447; *Ogilvie v. Knox Ins. Co.*, 22 How. Pr. (N. Y.) 380; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 10 Am. & Eng. Corp. Cas. 203; 3 Am. St. Rep. 797; *Henry v. Vermillion, etc.*, R. Co., 17 Ohio 187; *Franklin Sav. Bank v. Fatzinger* (Pa. 1886), 4 Atl. Rep. 912; *Citizens', etc., Sav. Bank v. Gillespie*, 115 Pa. St. 564; 19 Am. & Eng. Corp. Cas. 316; *Hatch v. Dana*, 101 U. S. 205; *Scovill v. Thayer*, 105 U. S. 143; *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411; *Wilber v. Stockholders, etc.*, 18 Nat. Bankr. Reg. 178; *Marsh v. Burroughs*,

power to make and enforce calls may be exercised by receivers,<sup>1</sup> or trustees,<sup>2</sup> or assignees,<sup>3</sup> as ministers of the courts and representatives of the directors.

(4) *How Formulated.*—In the *United States* no particular formula is necessary in declaring a call.<sup>4</sup> Even where a resolution is passed it need not be recorded;<sup>5</sup> and, at most, an entry on the minute book of the meeting of the directors will suffice.<sup>6</sup> In *England*, a formal resolution appears to be usual, if not necessary, and it must state the amount and date of maturing of the call.<sup>7</sup> Such a resolution is valid, though a similar one has been rejected at the same meeting.<sup>8</sup>

(5) *Requisites and Validity.*—Calls must be impartial, must bear equally upon all stockholders,<sup>9</sup> and be made as the purposes of

1 Woods (U. S.) 463; *Adler v. Milwaukee Brick Mfg. Co.*, 13 Wis. 57; *Miller's Case*, 54 L. J. Ch. 141; *Hawkins v. Glenn*, 131 U. S. 319; 26 Am. & Eng. Corp. Cas. 318; *Glenn v. Liggett*, 135 U. S. 533.

In *Glenn v. Saxton*, 68 Cal. 358, the court, per Ross, J., says: "The call made by the chancery court was the same in effect as if it had been made by the president and directors of the corporation, and when made, the contract of the defendant to pay became absolute, and a cause of action against him for the amount of his assessment accrued in favor of the trustee appointed by the court."

1. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484; *Mann v. Pentz*, 3 N. Y. 415; *Seymour v. Sturgess*, 26 N. Y. 134; *Rankine v. Elliott*, 16 N. Y. 377.

Assessments by a receiver upon an *ex parte* order of the court are not conclusive. *Cuykendall v. Corning*, 88 N. Y. 129; *Story v. Furman*, 25 N. Y. 215; *Walker v. Crain*, 17 Barb. (N. Y.) 128.

A receiver before making calls must show the amount of corporate indebtedness and liability of each share, where the subscription provides that the unpaid balance shall be subject to the call of the directors, as instructed by the stockholders. *Chandler v. Keith*, 42 Iowa 99.

2. *Lewis v. Glenn*, 84 Va. 947.

3. *Germantown, etc., R. Co. v. Fittler*, 60 Pa. St. 124; 100 Am. Dec. 546. In this case the corporation became embarrassed, and an assignment was made for the benefit of creditors. By the procurement of the assignee the brokers made a call which but for the assignment it would have been

within their power to make. It was held that the call was valid.

4. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 10 Allen (Mass.) 112. All that is really necessary is that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part of all the unpaid subscription. *Budd v. Multnomah St. R. Co.*, 15 Oregon 418; 40 Am. & Eng. R. Cas. 551; 3 Am. St. Rep. 169.

5. *Hayes v. Pittsburgh, etc., R. Co.*, 38 Pa. St. 81.

6. *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31.

7. *In re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425.

8. *Ex parte Faris*, 3 Kay & J. 408; *In re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425. In this case it was further held that a resolution may be made the first business of a meeting in order to prevent a transfer to escape liability.

9. *Calls Must be Impartial and Uniform.*—*Pike v. Bangor, etc., Shore Line R. Co.*, 68 Me. 445; *Preston v. Grand Collier Dock Co.*, 11 Sim. 327; *Cannon v. Trask, L. R.*, 20 Eq. 669.

An assessment of 35 per cent. upon one who had already paid 40 per cent. while some of the stockholders had paid but 20 per cent., is unequal and void, and will be so treated though made by a court of another state. *Great Western Tel. Co. v. Burnham*, 79 Wis. 47; 24 Am. St. Rep. 698.

Where the complainant does equity by paying installments already assessed, and costs of action at law, equity will protect him against any assessment not levied on other stockholders. *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467.



the business require.<sup>1</sup> The number of shares must first be fixed,<sup>2</sup> and the required amount subscribed for.<sup>3</sup> Levy may be made before incorporation,<sup>4</sup> but the terms of a conditional subscription

A by-law that any stockholder paying fifty per cent. on his shares shall be discharged from future calls, is valid, and relieves those who comply with it from liability to creditors of the company after dissolution. *Slee v. Bloom*, 19 Johns. (N. Y.) 456; 10 Am. Dec. 273.

Collusive prepayment by the directors of an insolvent company of calls which they at once drew upon for their fees, is valid, though articles of association provide for payment in advance. *Sykes' Case*, L. R., 13 Eq. 255.

Prepayment after filing of a petition for dissolution, but before the making of an order, will be treated as a loan and not payment. *Pennington's Case*, 45 L. T. 433. But payment after admitted insolvency, though before filing a petition, is a valid payment in advance. *Ramwell's Case*, 50 L. J. Ch. 827.

1. *Williams v. Taylor*, 120 N. Y. 244.

2. **Number of Shares Must be Fixed.**—*Somerset*, etc., R. Co. v. Cushing, 45 Me. 530; *Cabot*, etc., *Bridge Co. v. Chapin*, 6 Cush. (Mass.) 50; *Somerset R. Co. v. Clarke*, 61 Me. 384; *Worcester*, etc., R. Co. v. Hinds, 8 Cush. (Mass.) 110; *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277; *Troy*, etc., R. Co. v. Newton, 8 Gray (Mass.) 596; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142. And where the number of shares within certain limits is left to the directors to fix, they must do so before levying assessments. *Worcester*, etc., R. Co. v. Hinds, 8 Cush. (Mass.) 110; *following* *Portland*, etc., R. Co. v. Graham, 11 Met. (Mass.) 1; *Lexington*, etc., R. Co. v. Chandler, 13 Met. (Mass.) 312; and cases *infra*, next note.

3. *Maxwell, J.*, says in *Hale v. Sanborn*, 16 Neb. 3: "The case, therefore, is similar to that of *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, in which it was held that where the capital stock is fixed at a given sum, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments levied on the shares of stock, unless there is a clear provision in the contract to proceed with the accomplishment of the main design with a

less subscription than the whole amount of capital specified, or there is a waiver of the condition precedent. *Salem Milldam Corp. v. Ropes*, 6 Pick. (Mass.) 23; 9 Pick. (Mass.) 195; *Cabot*, etc., *Bridge v. Chapin*, 6 Cush. (Mass.) 53; *Shurtz v. Schoolcraft*, etc., R. Co., 9 Mich. 269; *Topeka Bridge Co. v. Cummings*, 3 Kan. 76; *Somerset R. Co. v. Clarke*, 61 Me. 384; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 404; 64 Am. Dec. 304; *Peoria*, etc., R. Co. v. Preston, 35 Iowa 118; *Fox v. Clifton*, 8 Bing. 776; *Pitchford v. Davies*, 5 M. & W. 2; *Fry v. Lexington*, etc., R. Co., 2 Metc. (Ky.) 323; *Estabrook v. Omaha Hotel Co.*, 5 Neb. 76; *Boehme v. Omaha Hotel Co.*, 5 Neb. 80."

Subscriptions must be taken by those apparently able to pay. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Penobscot R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257; *Read v. Memphis*, etc., Gas Co., 9 Heisk. (Tenn.) 545.

A subscription for preferred stock to draw ten per cent. interest at once cannot be reckoned as part of the capital stock subscribed. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236.

But where such shares are required to be taken by responsible parties, the fact that some turn out to be worthless will not invalidate subscriptions if obtained in good faith. *Penobscot R. Co. v. Dummer*, 40 Me. 172. And see *infra*, this title, *Defenses*.

4. **Calls Before Incorporation.**—*Mar-seilles Land Co. v. Aldrich*, 86 Ill. 504.

A company cannot enforce assessments levied before its incorporation by a joint stock association whose members afterwards incorporated. *Richmond Factory Assoc. v. Clarke*, 61 Me. 351.

Subscribers who sign an agreement after the act of incorporation is passed to pay all legal assessments that may be made after the corporation shall be organized, are personally liable for an assessment laid to defray preliminary expenses. *Salem Mill Dam. Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 147.

must be performed before assessment.<sup>1</sup> The expediency of calls cannot be questioned by the stockholders,<sup>2</sup> and irregularities in the levy may be waived by implication.<sup>3</sup>

(6) *Notice*—(a) *Necessity*.—Where the subscription itself, or the charter, or by-laws, or a statute requires it, notice of a call is a condition precedent<sup>4</sup> to suit for the collection thereof; and the notice must comply substantially with the requirements.<sup>5</sup> A re-

1. *Calls Where Subscription is Conditional*.—*Ticonic Water Power, etc., Co. v. Lang*, 63 Me. 480.

But error in making a call before liability accrues may be corrected by a subsequent call after condition fulfilled and before suit brought. *Philadelphia, etc. R. Co. v. Hickman*, 28 Pa. St. 318. A subscription providing that not more than five dollars per share should be assessed at one time, two assessments laid at the same time, but requiring not more than five dollars at one payment, are binding. *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587.

Where the terms of subscription required that no more than five dollars be assessed at the same time, it was held that if no more be required to be paid at one time, other assessments might be voted at the same time. *Penobscot R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654.

Calls payable March 1, '54, Dec. 1, '54, and March 1, '55, do not violate a provision forbidding more than two calls in twelve months. *Dinkgrave v. Vicksburg, etc., R. Co.*, 10 La. Ann. 514.

2. *Expediency*.—The question of expediency is a matter for the determination of the board of directors. *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286. See also *Budd v. Multnomah St. R. Co.*, 15 Oregon 413; 40 Am. & Eng. R. Cas. 551; 3 Am. St. Rep. 169; *New Albany, etc., R. Co. v. Fields*, 10 Ind. 187; *Bailey v. Birkenhead, etc., R. Co.*, 12 Beav. 433; *Yetts v. Norfolk R. Co.*, 3 De G. & Sm. 293; *Ex parte Stanley*, 33 L. J. Ch. 535; *Judah v. American L. S. Ins. Co.*, 4 Ind. 333. In the case last cited it was said that if every stockholder in an insurance company like that in question (a live stock insurance company), might be allowed to dispute the necessity of every assessment upon his stock, the right of those insured to obtain a speedy reimbursement of losses would be placed too much at hazard.

A subscriber to stock in a park association who fails to attend a duly advertised meeting of subscribers, which

appointed a committee to buy lands, to procure a charter and call for subscriptions, etc., such a provision being in accordance with the subscription, is liable to suit by the corporation, it being the legal trustee to receive and administer the subscription funds. *Shober v. Lancaster County Park Assoc.*, 68 Pa. St. 429.

It is sufficient to show a lawful levy that written notice was given of the meeting, and that the latter was regularly held and the assessment made. *Younglove v. Steinman*, 80 Cal. 375.

3. *Waiver of Informalities*.—*Macon, etc., R. Co. v. Vason*, 57 Ga. 314; *York Tramways v. Willows*, 8 Q. B. Div. 685. But the acts constituting waiver must be clearly proved. *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

Denial of membership is a waiver of calls. *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31. But part payment of a subscription is not. *Grosse Isle Hotel Co. v. L'Anson*, 43 N. J. L. 442. Nor does the vote of a city to pay a call waive its invalidity. *Pike v. Bangor, etc., Shore Line R. Co.*, 68 Me. 445.

4. *Notice—When Essential*.—*Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Scarlett v. Academy of Music*, 43 Md. 211; *Granite Roofing Co. v. Michael*, 54 Md. 65; *Dexter, etc., Plankroad Co. v. Millerd*, 3 Mich. 91; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536. *Contra Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

5. *Macon, etc. R. Co. v. Vason*, 57 Ga. 314. where fifty-nine days' notice was held insufficient, sixty being required.

Where the subscription provides for payment in installments within twenty days after a call, a subscriber is entitled to twenty days' notice of each call, before he can be sued thereunder. *Cole v. Joliet Opera House Co.*, 79 Ill. 96.

But notice required to be at least sixty days before call need not be during sixty consecutive days prior; it is sufficient if given once sixty days before the time of payment. *Muskingum*

spectable number of authorities supports the rule that notice is essential even if not expressly required,<sup>1</sup> but the majority of the cases appears to hold that under such conditions notice is unnecessary.<sup>2</sup> Where notice is given, no further demand is necessary before suit.<sup>3</sup>

(b) *Form*.—The form of the notice is not material.<sup>4</sup> Personal

Valley Turnpike Co. v. Ward, 13 Ohio 120; 42 Am. Dec. 191.

Where subscriptions were to be called for in installments it must appear that they were called for periodically; not that assessments were all made at one time, without notice of previous ones. Spangler v. Indiana, etc., R. Co., 21 Ill. 276.

Where the amount of a call was limited to 15 per cent. per annum, and 10 per cent. had been paid, a subsequent call need not specify the amount or place of payment, the latter being fixed by notice. Andrews v. Ohio, etc., R. Co., 14 Ind. 169.

1. Dexter, etc., Plankroad Co. v. Millerd, 3 Mich. 91; Alabama, etc., R. Co. v. Rowley, 9 Fla. 508; Spangler v. Indiana, etc., R. Co., 21 Ill. 275; Wear v. Jacksonville, etc., R. Co., 24 Ill. 593; Granite Roofing Co. v. Michael, 54 Md. 65; Braddock v. Philadelphia, etc., R. Co., 45 N. J. L. 363; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536; Essex Bridge Co. v. Tuttle, 2 Vt. 393; Miles v. Bough, L. R., 3 Q. B. 845.

Notice held necessary because "the times, amount of installments and manner of payment were all to be prescribed by the president and directors of the corporation, depended upon their volition and action, and consequently were more properly within their knowledge." Carlisle v. Cahawba, etc., R. Co., 4 Ala. 70.

In Hughes v. Antietam Mfg. Co., 34 Md. 316, it was said: "To say that it (notice) is unnecessary, because the subscribers, who may be living in different parts of the county, and perhaps the state, are presumed in law to know all that is done by the directors, seems to us to be raising a presumption against the truth itself."

"It is a well-established principle of law that when the facts or circumstances upon which the performance of a contract depends, lie more particularly in the knowledge of the promisee than the promisor, the former must give the latter notice. Hence it would seem that since a subscription is not due absolutely, but only on call,

and the time, place and amount of the call is fixed by persons other than the subscribers, the better and more reasonable rule would be that notice of the call should be required and must be given." Cook, Stock and Stockholders, § 118.

2. Grubbs v. Vicksburg, etc., R. Co., 50 Ala. 398; Alabama, etc., R. Co. v. Rowley, 9 Fla. 508; Wilson v. Wills Valley R. Co., 33 Ga. 466; Tomlin v. Tonica, etc., R. Co., 23 Ill. 429; Unthank v. Henry County Turnpike Co., 6 Ind. 125; Fisher v. Evansville, etc., R. Co., 7 Ind. 407; New Albany, etc., R. Co. v. McCormick, 10 Ind. 499; 71 Am. Dec. 337; Johnson v. Crawfordsville, etc., R. Co., 11 Ind. 280; Beckner v. Riverside Turnpike Co., 65 Ind. 468; Penobscot R. Co. v. Dummer, 40 Me. 172; 63 Am. Dec. 654; Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536.

These decisions rest upon the ground that the contract to pay by installments is in effect a promise to pay on demand, and the demand involved in the suit itself is alone sufficient. Smith v. Indiana, etc., R. Co., 12 Ind. 61.

Subscribers are chargeable with notice of all assessments made during their membership. Spellier Electric Time Co. v. Geiger (Pa. 1892), 23 Atl. Rep. 547.

Notice is necessary only to authorize forfeiture; not to support an action on a subscription, specifying no condition or time of payment. Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451.

3. Penobscot R. Co. v. Dummer, 40 Me. 173; 63 Am. Dec. 654. And see also Winter v. Muscogee R. Co., 11 Ga. 438; Spangler v. Indiana, etc., R. Co., 21 Ill. 275; Goodrich v. Reynolds, 31 Ill. 491; 83 Am. Dec. 240.

One demand for several assessments is sufficient. Spangler v. Indiana, etc., R. Co., 21 Ill. 276.

4. *Form of Notice*.—Notice need not be in writing. Smith v. Tallahassee Plank R. Co., 30 Ala. 650. The only question is, whether the notice gives the shareholder to understand that a

notice will suffice, though publication or letter is required.<sup>1</sup> Where notice is sent by mail, the fact of its receipt is a question for the jury,<sup>2</sup> and in case of newspaper publication it must be shown to have been brought to the stockholder's knowledge.<sup>3</sup>

(e) **Proof of Notice.**—Publication should be proved by introducing in evidence the printed notice,<sup>4</sup> and where there have been several insertions, a copy of the first with the testimony of the publisher as to the others will suffice.<sup>5</sup> But an affidavit of a newspaper clerk has been held sufficient,<sup>6</sup> though a mere certificate of the secretary of the corporation is not.<sup>7</sup> The person who mails a notice should be called to prove that fact.<sup>8</sup> The time, and not the mere fact of sending, must be proved when notice is required to be given a specified number of days beforehand.<sup>9</sup>

(d) **Specifications as to Payment—Time, Place, etc.**—The authorities are divided on the question whether the notice must show the time

call has been made, and that he is required to pay the amount on a given day. *Shackleford v. Dangerfield*, L. R., 3 C. P. 407.

1. In *Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455, it was said: "One of the criterions by which to determine whether the requirements of a statute are imperative or merely directory, is that those acts which are of the essence of the thing required to be done are imperative, while those which are not of the essence are directory. . . . The giving of sixty days' notice is imperative and must be strictly complied with, because it is of the essence of the thing to be done; the mode of doing so is directory, because not of the essence, and may either be by publication in the manner prescribed by the charter or by actual personal notice." See also *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102. But compare *Tomlin v. Tonica, etc., R. Co.*, 23 Ill. 374. And when no form of notice is prescribed, notice by newspaper publication is sufficient. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484. In this case it was said that the substitution of newspaper notice in lieu of personal notice has so long been in universal usage, and of notoriety equal to that of newspapers themselves, that the custom of doing so has become a part of the law of the land.

Constructive notice by mail is not a personal notice, although in some cases by express statutory provision it is sufficient to bind parties. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

When notice is authorized to be given by mail to the shareholder's

registered address, it need be only substantially followed. *Liverpool Marine Ins. Co. v. Haughton*, 23 W. R. 93.

2. *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363; *Jones v. Sisson*, 6 Gray (Mass.) 288; *Eastern R. Co. v. Symonds*, 6 Ry. Cas. 578.

3. *Alabama, etc., R. Co. v. Rowley*, 9 Fla. 508; *Tomlin v. Tonica, etc., R. Co.*, 23 Ill. 429; *Unthank v. Henry County Turnpike Co.*, 6 Ind. 125; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

But it has been held that notice is sufficient if published at residence of subscriber. *Dinkgrave v. Vicksburg, etc., R. Co.*, 10 La. Ann. 514. See generally on the subject of notice, *NOTICE*, vol. 16, p. 787.

4. *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 546. In this case, an action to recover unpaid subscriptions, *Aldis, J.*, for the court, said: "The newspaper which contains the notice is clearly the best evidence of its publication and contents, the very evidence which the law and the contract provided as the proper proof to the subscriber of the calls. Its production in the first instance is required by the ordinary principles of the law of evidence."

5. *Unthank v. Henry County Turnpike Co.*, 6 Ind. 125; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

6. *Andrews v. Ohio, etc., R. Co.*, 14 Ind. 169.

7. *Tomlin v. Tonica, etc., R. Co.*, 23 Ill. 429.

8. *Jones v. Sisson*, 6 Gray (Mass.) 288.

9. *Cole v. Joliet Opera House Co.*, 79 Ill. 96.

and place of payment, the amount and the person to whom it is payable. The weight of authority appears to favor the rule that such statements are not essential,<sup>1</sup> but there are cases which require them to be made, either in the resolution<sup>2</sup> or notice of the call;<sup>3</sup> and at all events, notice of the time of payment must be reasonable.<sup>4</sup>

(7) *Maturity*.—A call dates from the passage of the resolution<sup>5</sup> and not from the time fixed for payment,<sup>6</sup> or from the time of giving the notice.<sup>7</sup>

(8) *Interest*.—Interest on calls made by directors runs from the maturity thereof.<sup>8</sup> In *England* a provision as to interest does not

1. *Fox v. Allensville, etc.*, Turnpike Co., 46 Ind. 31; *Andrews v. Ohio, etc.*, R. Co., 14 Ind. 169; *Marsh v. Burroughs*, 1 Woods (U. S.) 463; *London, etc.*, R. Co. v. Fairclough, 2 M. & G. 674; *Newry, etc.*, R. Co. v. Edmonds, 2 Exch. 119.

Where articles of incorporation require the notice to designate place of payment, a notice directing payment to A residing in B is sufficient. *Troy Turnpike, etc.*, R. Co. v. M'Chesney, 21 Wend. (N. Y.) 206.

A notice requiring one to pay to the corporate treasurer, implies payment at his office, and is sufficient as to place. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120; 42 Am. Dec. 191. But see *Dexter, etc.*, R. Co. v. *Millard*, 3 Mich. 91; *Danbury, etc.*, R. Co. v. *Wilson*, 22 Conn. 435.

2. *In re Cawley*, 42 Ch. Div. 209; 31 Am. & Eng. Corp. Cas. 425. See the "Law Times" for 1890, p. 166, which contains an editorial discussion of the above case.

3. *Rutland, etc.*, R. Co. v. *Thrall*, 35 Vt. 536. This case has been cited by text-book writers in support of the statement that the place of payment need not be stated. But the opinion certainly announces the opposite rule. While it is true that the charter there required specification of the place of payment, yet the decision is not based entirely on that ground, as the following will show: "We have already said we deem it material that the notice should specify the place of payment. This seems to us very plain upon consideration of the reason which doubtless led to the insertion of such a provision in the charter. The subscribers resided in various towns in the state, from Burlington to Bellows Falls. They would naturally be in doubt as to who was the proper officer to receive

payments, and where he resided, and at what place they might make payment. They might judge erroneously as to where, by implication of law, they should pay their subscriptions. To remove all uncertainty the charter provided that it should not be left to implication—that the notice should express the place of payment. The provision seems to us too important to be disregarded, or held as merely directory. And when the contract itself includes by reference this provision within its terms, it must be held a substantial part of the contract, and to be construed in the plain and ordinary sense in which common minds would look at it, and that is a condition which must be performed before the subscriber can be sued."

Where the charter merely requires place of payment to be stated, it may be omitted from the resolution providing for a call, if mentioned in published notice. *Great North of England Co. v. Biddulph*, 7 M. & W. 243; *Sheffield, etc.*, R. Co. v. *Woodcock*, 7 M. & W. 574.

4. *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173; *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484.

5. *Maturity of Call*.—*Reg. v. Londonderry, etc.*, R. Co., L. R., 13 Q. B. 998.

In *Beckner v. Riverside Turnpike Co.*, 65 Ind. 468, where the subscription became due on the call of the company, and such call was made, *Biddle, J.*, said: "The money thus became due according to the terms of the call, which the stockholders were bound to notice, without either publication or demand made."

6. *Ex parte Dawes*, 38 L. J. Ch. 512.

7. *Reg. v. Londonderry, etc.*, R. Co., L. R., 13 Q. B. 998.

8. *Interest on Calls*.—*Rikhoff v. Brown's Rotary, etc.*, Co., 68 Ind. 388; *Gould v. Oneonta*, 71 N. Y. 298; *Barr*

apply to calls by the official liquidator,<sup>1</sup> an officer somewhat resembling the American receiver. Calls by a court draw interest from the time of demand and notice.<sup>2</sup>

(9) *Limitations*.—There must be a call or an abandonment of business by the corporation before the Statute of Limitations begins to run on the call and in favor of the stockholders.<sup>3</sup> Where shares have been assigned the statute runs from the date of the call and not the date of the assignment.<sup>4</sup> The statute of the state where the corporation is organized governs.<sup>5</sup> On calls by the court, the statute, according to the weight of authority, runs only from the date of the decree,<sup>6</sup> but it has been adversely held that the liability accrues when the corporation ceases to do business, and that the statute begins to run from that time.<sup>7</sup> Refusal to pay the first of a series of calls is not such

*v. Wilcox*, 22 N. Y. 551; *Casey v. Galli*, 94 U. S. 673; *Stocken's Case*, L. R., 5 Eq. 6.

Interest is not collectible on forfeited shares where articles provide that all interest in the company is extinguished by forfeiture; though they contain another provision for interest on all overdue calls. *Stocken's Case*, L. R., 3 Ch. 412.

In *England*, by statute, where the notice states that calls shall draw interest if not paid by a certain day, interest may be collected. *Ex parte Barrow*, L. R., 3 Ch. 784.

The following are the provisions of the English Companies Clauses Act of 1845, relative to interest: "If before or on the day appointed for payment, any shareholder does not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for the payment thereof to the time of actual payment."

In *England* a claim for interest need not be inserted in the pleadings. *Southampton Dock Co. v. Richards*, 1 M. & G. 448. But the amount claimed should cover interest. *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674.

1. *In re Welsh Flannel, etc., Co.*, L. R., 20 Eq. 360.

2. *Hambleton v. Glenn* (Md. 1890), 31 Am. & Eng. Corp. Cas. 505; *citing Scovill v. Thayer*, 105 U. S. 155, and *criticising Hawkins v. Glenn*, 131 U. S. 332; 26 Am. & Eng. Corp. Cas. 318. The case construes the *Virginia* statute.

3. *Curry v. Woodward*, 53 Ala. 371; *Williams v. Taylor*, 120 N. Y. 244.

4. *Priest v. Glenn*, 51 Fed. Rep. 400.

5. *Glenn v. Liggett*, 135 U. S. 548. See also *Andrews v. Bacon*, 38 Fed. Rep. 777; *Butler v. Poole*, 44 Fed. Rep. 586.

6. *Glenn v. Semple*, 80 Ala. 159; 60 Am. Rep. 92; *Lehman v. Glenn*, 87 Ala. 618; *Glenn v. Howard*, 81 Ga. 383; 12 Am. St. Rep. 318; *Glenn v. Williams*, 60 Md. 95; *Vanderwerken v. Glenn*, 85 Va. 9; *Morgan County v. Allen*, 103 U. S. 498; *Hawkins v. Glenn*, 131 U. S. 319; 26 Am. & Eng. Corp. Cas. 318; *Glenn v. Liggett*, 135 U. S. 533.

7. In *Glenn v. Dorsheimer*, 23 Fed. Rep. 695, *Brewer, J.* says: "In 1866 this corporation (the National Express and Transportation Co.) ceased to do business. It ceased to be a going concern. It turned over its property, including its debts due from its stockholders, to the assignees, to collect its debts, dispose of its property and pay its creditors. Whenever such a cessation of business occurs, it seems to me fair to say that the liability of the stockholder becomes absolute—a fixed, unconditional obligation. And, although no call be made by the company, or by the assignees, yet these debts from the stockholders could have been reached by the creditors. That seems to be settled by the decision in *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380, where the supreme court held that the creditors who had reduced their claims to judgment against the corporation, might proceed directly by bill against one or more stockholders."

In *Glenn v. Howard*, 81 Ga. 383; 12 Am. St. Rep. 318, the court, in commenting on the above, said: "We are aware there is a decision to the contrary by Judge Brewer, of the United

denial of liability upon the remainder as to set the statute running against them.<sup>1</sup>

(10) *Evidence*.<sup>2</sup>—Where calls are necessary they must be clearly proved.<sup>3</sup> The best evidence is the official record of the resolution or order,<sup>4</sup> but an entry by the secretary in the minute book is competent.<sup>5</sup> So the corporate books are admissible to prove the mode of payment as well as the call itself,<sup>6</sup> and proof that a certain call is authorized is competent to show the validity of a previous one.<sup>7</sup> A mere declaration to that effect in the notice, is not sufficient to prove that a call was made by the proper authority.<sup>8</sup>

(11) *Calls After Transfer*.—Where stock has been sold, but the corporate requirements as to transfer have not been complied with, the corporation may treat the seller and original subscriber as still liable to a call.<sup>9</sup> But as between the parties, the transferee is under an implied obligation to reimburse the transferor for calls paid by him after he has actually parted with his ownership.<sup>10</sup>

States circuit, *Glenn v. Dorsheimer*, 23 Fed. Rep. 695, in which it was held that where an insolvent corporation ceases to do business and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the Statute of Limitations begins to run in their favor and against such creditors and trustees immediately. And this is the only decision to the contrary that we have been able to find directly upon the question. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction—and I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer; but the weight of authority is unquestionably against the ruling of the court below in this case."

1. *Dorsheimer v. Glenn*, 51 Fed. Rep. 404.

2. See also *supra*, this title, *Notice—Proof*.

3. *South Georgia, etc., R. Co. v. Ayres*, 56 Ga. 230; *Scarlett v. Academy of Music*, 43 Md. 203.

4. *Guadalupe, etc., Assoc. v. West*, 70 Tex. 391.

5. *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31.

6. *Bavington v. Pittsburgh, etc., R. Co.*, 34 Pa. St. 358; *Comfort v. Leland*, 3 Whart. (Pa.) 81.

7. *Bavington v. Pittsburgh, etc., R. Co.*, 34 Pa. St. 358.

8. *New Jersey, etc., R. Co. v. Strait*, 35 N. J. L. 322.

9. *Brinkley v. Hambleton*, 67 Md. 169; *Humble v. Langston*, 7 M. & W. 517; *Sayles v. Blanc*, L. R., 14 Q. B. 205. See also *Stock*, vol. 23, p. 582, *infra*, this title, *Liability*.

But in *Chouteau Spring Co. v. Harris*, 20 Mo. 382, it was held that assessments could be levied on one who had transferred his stock, though the corporation was empowered by charter to regulate such transfer, and it was made without its consent.

10. *Transferee Reimbursing Transferor*.—*Kellogg v. Stockwell*, 75 Ill. 68; *Cormac v. Western White Bronze Co.*, 77 Iowa 32; *Hutzler v. Lord*, 64 Md. 534; *Brinkley v. Hambleton*, 67 Md. 169; *Brigham v. Mead*, 10 Allen (Mass.) 245; *Johnson v. Underhill*, 52 N. Y. 203; *Treadway v. Johnson*, 33 Mo. App. 122; *Tripp v. Apleman*, 35 Fed. Rep. 19; 21 Am. & Eng. Corp. Cas. 544; *Castellan v. Hobson*, L. R., 10 Eq. Cas. 47; *Kellock v. Enthoven*, L. R., 9 Q. B. 241; L. R., 8 Q. B. 458; *Bowring v. Shepherd*, L. R., 6 Q. B. 309; *Davis v. Haycock*, L. R., 4 Ex. 373; *Grissell v. Bristowe*, L. R., 3 C. P. 112; *Chapman v. Shepherd*, L. R., C. P. 228; *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 845; *Humble v. Langsdon*, 7 M. & W. 517; *Shaw v. Fisher*, 5 De G. M. & G. 596. The opinion of Chief Justice Alvey, in the case of *Brinkley v. Hambleton*, 67 Md. 169, contains a discussion of this point: "The liabil-

This obligation is confined, according to American authority, to those who own the stock when the call is levied,<sup>1</sup> but there are English cases to the effect that the original transferrer may hold any one of several successive transferees.<sup>2</sup> The latter have also been held liable for calls made before, but payable after, transfer,<sup>3</sup> though such liability depends largely upon the circumstances, statutes, and the agreement of the parties.<sup>4</sup> Under proper conditions, one who has contracted to purchase stock may be compelled to indemnify the prospective transferrer for calls made since the agreement.<sup>5</sup>

ity to pay the calls made upon the stock after the transfer, is shifted from the outgoing to the incoming stockholder, the transfer of stock working a complete novation of the contract of membership, the transferee being substituted to the place of the transferrer, with all the rights and liabilities incident to the holding of the shares. This is well established by the decisions of this court, as it is by the decisions of other courts of the highest authority. *Bend v. Susquehanna Bridge, etc., Co.*, 6 Harr. & J. (Md.) 119; 14 Am. Dec. 261; *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484; *Webster v. Upton*, 91 U. S. 68; *Cape's Case*, 2 De G. M. & G. 562. . . . Also in those cases where there has been an assignment of stock, but from neglect, or omission from any cause, to have the actual transfer made on the books of the corporation to the assignee, and the assignor remains the nominal owner merely, and because of that fact, is required to pay calls upon the stock, there is an implied obligation on the part of the assignee to indemnify such nominal owner of the shares against calls made during the time that the former remains virtually and potentially the owner of the shares, though not registered on the books. This is the principle of the cases of *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 845; *Johnson v. Underhill*, 52 N. Y. 203, and the recent case, decided by this court, of *Hutzler v. Lord*, 64 Md. 534. In such cases, and, indeed, in all cases, the assignee takes the shares subject to all the burdens and liabilities attached to or growing out of the beneficial ownership of the shares, and the law implies an obligation or promise on his part that those burdens and liabilities, incumbent upon himself while he holds the stock, shall not be imposed upon

the assignor. And such is the implied obligation of every assignee of stock."

One who sells shares before the issue of certificates, agreeing to give the purchaser a certificate when he receives one, is not bound, as between the purchaser and himself, to pay an assessment on such shares after the sale and before the issue of the certificate. *Brigham v. Mead*, 10 Allen (Mass.) 245.

Where the seller has done all in his power to convey, the purchaser is under an implied contract to indemnify him against calls. *Walker v. Bartlett*, 18 C. B. 845; 86 E. C. L. 845. And under a guaranty of registration, the purchaser is liable to the seller's executor, though the purchaser is a stock-jobber and has resold. *Cruse v. Paine*, L. R., 6 Eq. 641.

1. *Brinkley v. Hambleton*, 67 Md. 169.

2. *Nickalls v. Eaton*, 23 L. T., N. S. 699; *Hawkins v. Maltby*, L. R., 3 Ch. 188.

3. *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Pa.) 188; *Aylebury R. Co. v. Mount*, 4 M. & G. 651; *Scott*, N. R. 127.

4. *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 113; *North American, etc., Assoc. v. Bentley*, 19 L. J. Q. B. 427.

5. *Wynne v. Price*, 3 De G. & S. 310; *Cruse v. Paine*, L. R., 6 Eq. 641; L. R., 4 Ch. 441; *Peppercorne v. Clench*, 26 L. T., N. S. 656; *Evans v. Wood*, L. R., 5 Eq. 9; *Hodgkins v. Kelley*, L. R., 6 Eq. 496; *Shepherd v. Gillespie*, L. R., 3 Ch. 764, *affirming* L. R., 5 Eq. 293; *Castellan v. Hobson*, L. R., 10 Eq. 47; *Pender v. Fox*, 20 W. R. 966; *Brown v. Black*, L. R., 8 Ch. App. 939; *Sheppard v. Murphy*, L. R., 2 Eq. 544; *Paine v. Hutchinson*, L. R., 3 Ch. 388; *Hawkins v. Maltby*, L. R., 3 Ch. 200. But the transferrer cannot claim indemnity from jobbers who have furnished the names of purchasers to whom



(12) *Assessments Proper*.—It has already been stated<sup>1</sup> that the term assessments strictly applies only to amounts levied beyond par value. The rule is now general that corporations have no implied power to make such levies,<sup>2</sup> and even when the power is expressly conferred, it will receive a strict construction.<sup>3</sup> In *California* the statute provides for assessments to meet corporate expenses, and this has been construed to authorize levies after stock is paid up.<sup>4</sup> But assessments of this class are most com-

transfers have been executed. *Coles v. Bristowe*, L. R., 4 Ch. 3.

1. *Supra*, this title, *Calls and Assessments*.

2. *Spense v. Iowa Valley, etc., Co.*, 36 Iowa 410; *Cincinnati, etc., R., Co. v. Clarkson*, 7 Ind. 595; *Ohio, etc., R. Co. v. Cramer*, 23 Ind. 490; *Great Falls, etc., R. Co. v. Copp*, 38 N. H. 124; *Beach v. Smith*, 30 N. Y. 116; *American Silk Works v. Solomon*, 4 Hun (N. Y.) 135; *Atlantic, etc., Co. v. Mason*, 5 R. I. 463; *Middletown, etc., Turnpike Co. v. Watson*, 1 Rawle (Pa.) 330.

Assent to an illegal assessment, so as to make it valid, is not to be presumed from an assent to former illegal assessments of a less amount; nor can it be effected by the assignor of stock after assignment and notice of the same to the corporation; even when authorized it can be made at a special meeting only when notice is duly given. *Atlantic, etc., Co. v. Mason*, 5 R. I. 463.

A fine imposed upon a member of a corporation in his absence and without due form is without effect. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670.

In *England*, it seems that where directors are empowered to increase the funds, they may do so by assessing the shareholders after their stock is paid up; and the fund so raised may be treated as a loan to the company. *Peninsular Co. v. Fleming*, 27 L. T., N. S. 193.

3. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236.

Where the legislature gives power to raise a fund in addition to capital stock, by assessments on stockholders, directors cannot levy such assessments without authority from the stockholders. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

And even when conferred by statute or charter the power may be restricted

by the corporate by-laws. *Price's Appeal*, 106 Pa. St. 421.

4. *California Statute*.—Civil Code *California*, § 331, reads: "The directors of any corporation formed or existing under the laws of the state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein."

In *Santa Cruz, etc., R. Co. v. Spreckles*, 65 Cal. 193; 5 Am. & Eng. Corp. Cas. 55; 9 Am. & Eng. R. Cas. 679, commenting on the section above quoted, *Ross, J.*, says: "From this section these things at least are clear: (1) That no assessment for any purpose can be levied until at least one-fourth of the capital stock of the corporation has been subscribed; (2) that assessments may be levied in the manner and form and to the extent provided by the statute, for the purpose of paying the expenses, conducting the business, or paying the debts of the corporation; and (3) that the assessment authorized to be levied shall be levied only upon the subscribed capital stock;" and again: "Nor is it easy to believe that, had the legislature intended by the provisions of the code in question to authorize assessments only to the extent of the par value of the stock subscribed for—in other words, to provide only for the calling in of the sums subscribed—it would not have expressed that intention in appropriate language. It would have been an easy matter to have done so, and, as we shall presently see, when the codes were adopted there was standing upon the statute books an old act providing for that very thing. 'There are two classes of assessments,' says *Potter on Corporations*, vol. 1, p. 323, 'made by corporations or the directors thereof, one of which is more

mon among mutual stock companies,<sup>1</sup> non-trading corporations, and voluntary associations.<sup>2</sup>

c. ACTIONS AND REMEDIES—(1) *In General*.—For compelling payment of subscriptions, the corporation usually has its choice of several methods. *Assumpsit*, or, under the reformed procedure, an action corresponding to it, lies to recover the amount unpaid.<sup>3</sup> So an action for damages may be brought for the difference between the market value and the agreed price of the shares,<sup>4</sup> or the stock may be levied on to satisfy a judgment obtained in a suit on the subscription.<sup>5</sup>

(2) *Forfeiture*—(a) *Nature, Origin, and Authority*.—The method most peculiar to the enforcement of the contract of subscription is for the corporation to declare the unpaid shares forfeited. This remedy is statutory,<sup>6</sup> and the power to exercise it must be ex-

properly distinguished as 'calls' made upon the subscriptions for shares within the amount of the unpaid sums upon the number of shares subscribed; the other, an assessment made upon the corporators not merely as a part of their subscriptions, but to raise a sum of money beyond the amount of subscription for the use of the corporation to sustain its existence, to carry into use its corporate powers and to enable it to exercise its corporate duties."

In *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285, an assessment was held proper when made for the purpose of repaying a loan by a stockholder to the corporation to enable it to purchase adjoining property and transfer its own property to a new corporation receiving stock therefor.

So an assessment was upheld for the purpose of repairing machinery to carry on the corporate business. *Younglove v. Steinman*, 80 Cal. 375.

1. See *BENEFICIAL ASSOCIATIONS*, vol. 2, p. 171.

2. See *SOCIETIES AND CLUBS*, vol. 22, p. 803.

3. In *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 346, it was said: "As long as the contract remains in force an action to recover for the amount of stock taken may be maintained by the corporation against a subscriber. And it makes no difference whether the promise to pay is express or implied. The legal consequences of the undertaking to pay must be the same, whether it is express or such as the law implies merely. Several cases decided in other states were cited upon the argument to sustain the position that the

corporation must resort to the remedy by forfeiture, in the case of an implied promise to pay for the stock subscribed, and could maintain an action only upon an express promise to pay. I am unable to perceive any solid grounds upon which such a distinction can rest. It has never obtained in this state, and I cannot see how it can be maintained upon principle. For aught I can see, the rights of the subscriber and of the corporation are precisely the same in either case. This point was fully considered in *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260, in the able and elaborate opinion of Mr. Justice Willard, and the distinction shown to be entirely destitute of foundation."

It is said in *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 304, "Where the subscription for shares contains a promise to pay the assessments, and the conditions of the subscription have been performed, there is no doubt that an action of *assumpsit* can be maintained, in the first instance, for all legal assessments. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; 32 Am. Dec. 514; *Glover v. Tuck*, 24 Wend. (N. Y.) 153; *Dutchess Cotton Mfg. Co. v. Davis*, 14 Johns. (N. Y.) 238; 7 Am. Dec. 459."

4. *Rand v. White Mountains R. Co.*, 40 N. H. 79.

5. *Chase v. East Tennessee, etc., R. Co.*, 15 Lea (Tenn.) 415; 4 Am. & Eng. R. Cas. 349.

6. See the statutes of the various states. Forfeiture is authorized some-

pressly conferred.<sup>1</sup> A mere by-law will not authorize it,<sup>2</sup> nor, where the statute contemplates a by-law, is the statute operative without a by-law.<sup>3</sup> That forfeiture is a cumulative remedy, is announced by a formidable array of authorities; even where it exists, the corporation may resort to the common-law action of *assumpsit* or its equivalent.<sup>4</sup> Mere notice or threats of forfeiture

times by charter. *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37; 32 Am. Dec. 429, or by the articles of association. *Wescott v. Minnesota Min. Co.*, 23 Mich. 163.

1. **Forfeiture Not an Implied Power.**—*In re Long Island R. Co.*, 19 Wend. (N. Y.) 37; 32 Am. Dec. 429, appears to be the earliest case in this country upon the subject; and Nelson, C. J., in an elaborate and exhaustive opinion, traces the doctrine back to early English authority. *Hill v. Nisbet*, 100 Ind. 341; *Williams v. Lowe*, 4 Neb. 382; *Perrin v. Granger*, 30 Vt. 595; *Dixon v. Evans*, L. R., 5 H. L. 606; *Clarke v. Hart*, 6 H. L. Cas. 633; *Campbell's Case*, L. R., 9 Ch. 1; *Barton's Case*, 4 De G. & J. 46.

Cooley, J., in *Wescott v. Minnesota Min. Co.*, 23 Mich. 163, observed: "The right to forfeit shares in any joint-stock undertaking must come from the law, and can only be exercised in the manner prescribed by the law." And cites with approval *In re Long Island R. Co.*, 19 Wend. (N. Y.) 40; 32 Am. Dec. 429.

In *Budd v. Multnomah St. R. Co.*, 15 Oregon 413; 40 Am. & Eng. R. Cas. 551; 3 Am. St. Rep. 169, Strahan, J., said: "A corporation has no inherent power to forfeit or sell the shares of stock owned by delinquent stockholders. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute."

2. **By-Law Will Not Authorize Forfeiture**—*Kennebec, etc. R. Co. v. Kendall*, 31 Me. 470; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. (N. Y.) 495; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37; 32 Am. Dec. 429; *Kirk v. Nowill*, 1 T. R. 118. But stockholders alone can object to a forfeiture as having been made by a mere by-law. *Detweiler v. Breckenkamp*, 83 Mo. 45. And even they cannot where they have assented thereto. *Lesseps v. Architects' Co.*, 4 La. Ann. 316.

3. *Budd v. Multnomah St. R. Co.*, 15 Oregon 413; 40 Am. & Eng. R.

Cas. 551; 3 Am. St. Rep. 169, where the statute authorized corporations to "make by-laws" providing for forfeiture.

4. **Forfeiture a Cumulative Remedy.**—*Beene v. Cahawba, etc., R. Co.*, 3 Ala. 660; *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 500; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 447; *Hightower v. Thornton*, 8 Ga. 486; *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Klein v. Alton, etc., R. Co.*, 13 Ill. 514; *Ryder v. Alton, etc., R. Co.*, 13 Ill. 516; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Spangler v. Indiana, etc., R. Co.*, 21 Ill. 276; *Raymond v. Caton*, 24 Ill. 123; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576; 5 Am. Dec. 638; *Mexican Gulf R. Co. v. Viavant*, 6 Rob (La.) 305; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79; *Carson v. Arctic Min. Co.*, 5 Mich. 288; *Freeman v. Winchester*, 10 Smed. & M. (Miss.) 577; *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Rensselaer, etc., Plank R. Co. v. Barton*, 16 N. Y. 457 n.; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Rensselaer, etc., Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56; *Dayton v. Borst*, 31 N. Y. 435; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Fort Edward, etc., Plank R. Co. v. Payne*, 17 Barb. (N. Y.) 567; *Ogdensburgh, etc., R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Goshen Turnpike Road v. Hurtin*, 9 Johns. (N. Y.) 217; 6 Am. Dec. 273; *Troy Turnpike, etc., Co. v. McChesney*, 21 Wend. (N. Y.) 296; *Greenville, etc., R. Co. v. Cathcart*, 4 Rich. (S. Car.) 89; *Greenville, etc., R.*

do not constitute an exercise of that remedy;<sup>1</sup> but when applied in good faith the rights acquired under it are superior to the rights of creditors.<sup>2</sup>

(b) **How Exercised.**—The modern decisions exact, in the exercise of the right of forfeiture, a strict compliance with charter and statutory requirements.<sup>3</sup> Thus, forfeiture must be declared by duly appointed directors,<sup>4</sup> and by the number required to conduct the business of the corporation.<sup>5</sup> So where the charter requires an order of sale from the directors to the treasurer, this duty cannot be delegated to a committee,<sup>6</sup> nor can the right itself be availed of by a mere subscriber.<sup>7</sup> A resolution which fails to designate the stock sought to be forfeited by it is invalid,<sup>8</sup> but one which declares a forfeiture of all shares remaining delinquent by a certain day, is effective.<sup>9</sup> Forfeiture for non-payment of sev-

Co. v. Smith, 6 Rich. (S. Car.) 91; Charlotte, etc., R. Co. v. Blakely, 3 Strobb. (S. Car.) 245; Stokes v. Lebanon, etc., Turnpike Co., 6 Humph. (Tenn.) 241; Connecticut, etc., R. Co. v. Bailey, 24 Vt. 465; 58 Am. Dec. 181; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536. And the remedy is cumulative even though the subscription expressly declares that the promise is "upon pain of forfeiting." Troy Turnpike, etc., Co. v. McChesney, 21 Wend. (N. Y.) 296; and whether the stock is held by the original subscriber or his assignee. Mann v. Currie, 2 Barb. (N. Y.) 294.

**1. Notice Not Equivalent to Forfeiture.**—Macon, etc., R. Co. v. Vason, 57 Ga. 314; Water Valley Mfg. Co. v. Seaman, 53 Miss. 655; Cockerill v. Van Dieman's Land Co., 26 L. C. P. 203; *Ex parte* Bigg, L. R., 1 Eq. 309; 13 L. T., N. S. 627.

But the fact that the minutes show no resolution of forfeiture or notice thereof, is not conclusive, if the secretary has entered the shares as forfeited. Knight's Case, L. R., 2 Ch. 321.

**2. Mills v. Stewart,** 62 Barb. (N. Y.) 444.

**3. Forfeiture Must be Strictly Exercised.**—Portland, etc., R. Co. v. Graham, 11 Met. (Mass.) 1; Lexington, etc., R. Co. v. Staples, 5 Gray (Mass.) 522; Alabama, etc., R. Co. v. Rowley, 9 Fla. 508; Wescott v. Minnesota Min. Co., 23 Mich. 163; Occidental, etc., Assoc. v. Sullivan, 62 Cal. 394; Portland, etc., R. Co. v. Graham, 11 Met. (Mass.) 1; Downing v. Potts, 23 N. J. L. 66; Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 155; York, etc., R. Co. v. Ritchie, 40 Me. 425;

Lewey's Island R. Co. v. Bolton, 48 Me. 451; 77 Am. Dec. 236; Mitchell v. Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406; *In re* Long Island R. Co., 19 Wend. (N. Y.) 37; 32 Am. Dec. 429; Johnson v. Albany, etc., R. Co., 40 How. Pr. (N. Y.) 193; Germantown, etc., R. Co. v. Fitler, 60 Pa. St. 124; 100 Am. Dec. 546; Rutland, etc., R. Co. v. Thrall, 35 Vt. 536; Perrin v. Granger, 30 Vt. 595; Clarke v. Harte, 6 H. L. Cas. 633; Johnson v. Lytle's Iron Agency, 46 L. J. Ch. 786; Knight's Case, L. R., 2 Ch. 321; Garden Gully, etc., R. Co. v. McLister, L. R., 1 App. Cas. 39; London, etc., R. Co. v. Fairclough, 2 M. & G. 674.

Where regulations by law are made essential to the exercise of the right of forfeiture, a sale is not valid if made without such regulations. Mitchell v. Vermont Copper Min. Co., 40 N. Y. Super. Co. 406.

**4. Garden Gully, etc., Co. v. McLister,** L. R., 1 App. Cas. 39; Moses v. Tompkins, 84 Ala. 613.

**5. Bottomley's Case,** 16 Ch. Div. 681. In this case one of the directors became insolvent. The articles declared that business should be conducted by not less than five. There was also a provision that insolvency should disqualify and one that directors might determine the quorum.

**6. York, etc., R. Co. v. Ritchie,** 40 Me. 425.

**7. Klein v. Alton, etc., R. Co.,** 13 Ill. 514.

**8. Johnson v. Albany, etc., R. Co.,** 40 How. Pr. (N. Y.) 195.

**9. Rutland, etc., R. Co. v. Thrall,** 35 Vt. 536; Knight's Case, 15 L. T., N. S. 546; Woollaston's Case, 4 De G. & J. 437.

eral calls, one of which is illegal, is void.<sup>1</sup> The grounds of forfeiture vary, of course, with different charter provisions, but they must be reasonable.<sup>2</sup>

(c) *Notice*.—Like other prescribed formalities, those regarding notice must in general be strictly followed,<sup>3</sup> though provisions of this class have sometimes been held merely directory,<sup>4</sup> and satis-

1. *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277. Where a maximum assessment is fixed at \$100, any amount beyond that sum is void *in toto* and invalidates forfeiture therefor. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236.

2. *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

Where the deed of settlement (corresponding to a charter) provides in a general way for forfeiture and also for increase of stock, the failure of stockholders to send in their certificates, in order to effect the increase, may be made a ground for forfeiture. *Kelk's Case*, L. R., 9 Eq. 107.

But a clause in the articles authorizing forfeiture of shares of one who commences or threatens an action against the company is invalid. *Hope v. International Financial Soc.*, 4 Ch. Div. 327.

A company was formed under an arrangement that each subscriber on engaging to render his personal services, should be entitled to another share. C became a stockholder, but did not subscribe for personal services. He, however, authorized W to act as his substitute, who was permitted to do so, but never subscribed and soon deserted. Thereupon C's interest was declared forfeited by W's desertion. It was held, that it was not forfeited, and C recovered the value of his share. *Cox v. Bodfish*, 35 Me. 302.

3. See also *supra*, this title, *Calls and Assessments—Notice*.

**Provisions as to Notice Usually Mandatory.**—*Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 151; *Knight's Case*, L. R., 2 Ch. 321; *Portland, etc., R. Co. v. Graham*, 11 Met. (Mass.) 1; *Lexington, etc., R. Co. v. Staples*, 5 Gray (Mass.) 522.

The court says, in *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236, by Kent, J.: "The by-laws of the company require that the notices of the time and place of sale shall be posted in 'two conspicuous public places' in the city of Calais. The testimony is that they were posted in two

public places in that city. It was decided in *Bearce v. Fossett*, 34 Me. 575, that an officer's return that he posted the notices in a public place, without saying in a public and conspicuous place, as required by the statute, is insufficient. Perhaps, if it had been shown that a notice properly signed had been given in hand to defendant, that fact, as to him, might have been sufficient, notwithstanding the defect in proof as to the posting."

Where a stockholder has gone abroad and his place of business has been closed, notice left with a third party, and never reaching the stockholder, is not a compliance with a requirement of service at his usual or last place of abode. *Cockrell v. Van Diemen's Land Co.*, 1 C. B., N. S. 732; 26 L. J., C. P. 203; 3 Jur. N. S. 241.

Personal notice required by the act under which the company is incorporated, is not complied with by written notice sent through the mails. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316.

4. **But Sometimes Directory.**—*Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455, where personal notice was held sufficient, though newspaper publication was required by charter.

In *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 315, Shaw, C. J., in discussing the question, said: "It appears that a written notice, signed by the treasurer, was delivered to the defendant, or left at his dwelling house, but that no notice of such sale was sent through the post office. The court decided that the notice given was sufficient, provided the jury were satisfied, that it was in fact received by the defendant as soon as he was entitled to receive it by mail. We think this was right. The by-law intended to provide an easy, convenient, and, under ordinary circumstances, a certain mode of giving and proving notice; but it was directory to the treasurer, and not a condition precedent. The by-law contains no negative words, and neither expressly, nor by implication, declares no other notice sufficient. The mode indicated by

fied by substantial compliance.<sup>1</sup> Notice must be given a reasonable period before the sale,<sup>2</sup> and must be fairly definite as to time<sup>3</sup> and place.<sup>4</sup>

(a) *Effect of Forfeiture—Deficiency.*—As has been stated above, the mere existence of the remedy by forfeiture does not preclude a resort to other methods. But the question arises what are the rights of a corporation which has forfeited shares the avails of which are insufficient to extinguish the debt, and whether it may still sue at law for the deficiency. The solution of this problem has caused at least an apparent conflict in the cases. One class holds that the forfeiture of his shares relieves the subscriber from all further liability,<sup>5</sup> while on the other hand, the doctrine is well supported that the company may recover a deficiency due it after

the by-law would be only constructive notice, and was not, we think, intended to take away the effect of actual personal notice." See also *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102.

1. Where notice of sale of shares for nonpayment is required in by-laws, any description showing clearly what shares were intended is sufficient. *York, etc., R. Co. v. Pratt*, 40 Me. 454.

Forfeiture three years after default and notice has been held proper, though the deed of settlement required immediate forfeiture. *Woollaston's Case*, 4 De G. & J. 437.

2. Three days' notice is unreasonably short if the shareholder resides at a distance. *Lexington, etc., R. Co. v. Staples*, 5 Gray (Mass.) 520.

Thirty days' notice was regarded as sufficient in *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

3. A notice that stock will be forfeited on "Monday, the 9th of Feb.," when in fact Friday is the 9th, is insufficient. *Watson v. Eales*, 23 Beav. 294.

As to what will constitute due notice, and at what meeting shares may be forfeited, in *England*, see *Graham v. Van Diemen's Land Co.*, 1 Hurl. & N. 541; 26 L. J. Exch. 73.

4. A notice of sale of shares for nonpayment on a certain day, merely naming an auctioneer, whose place of business is, and long has been, at the place where the notice bears date, does not sufficiently designate the place of sale. *Lexington, etc., R. Co. v. Staples*, 5 Gray (Mass.) 522.

5. *Subscriber's Liability For Deficiency.*—*Rutland, etc., R. Co. v. Thrall*, 35 Vt. 552; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 338. In this case, Gardiner, J., delivering the opinion of the

court, said: "It was contended that the remedies by action and by forfeiture were cumulative. If by this, nothing more is understood than that the plaintiffs had the right to sue, or the right to forfeit at their election; or that they might proceed to judgment upon the subscription, and then forfeit the stock for the same delinquency, I have nothing to object. But the converse of this proposition, that they might exercise the right of forfeiture and then maintain an action or enforce a judgment, is denied. It presents the distinction between different remedies for the same demand, and a double satisfaction. A remedy, if we choose to give it that name, which, when adopted, involves a satisfaction of the debt, is never concurrent. It is in its own nature exclusive. The argument that by the former law a mortgagee could sue on his bond, bring ejectment, and foreclose the mortgage, overlooked the distinction to which I have adverted. The object of all those concurrent remedies was to obtain payment of the money due from the mortgagor. When that object was attained, the right farther to prosecute either was extinguished with the demand to which it was incident. The illustration would have some application if the mortgagee, after obtaining possession by ejectment, could keep the land, as owner, and recover the debt also. A majority of the court are of the opinion, for these reasons, among others, that the forfeiture extinguished all the rights, legal and equitable, of the defendant under the subscription to the stock, or the proceeds of the stock therein mentioned; that the forfeiture was recognized by the contract; that its effect was rightfully to annul

forfeiture.<sup>1</sup> Some of these authorities may be reconciled, however, by preserving the distinction between strict forfeiture, consisting merely in acquisition by the company, and which is gen-

the relation of vendor and vendee, established by the agreement of the parties, and to discharge the defendant from all existing liability, founded upon that relation. That consequently, no action can be maintained for the consideration agreed to be paid for the stock, or any part of it; and that the defendant is entitled to judgment upon the demurrer."

In *Mechanic's, etc., Co. v. Hall*, 121 Mass. 273. Gray, C. J., said: "It has long been settled law in this commonwealth, that a subscription for a certain number of shares in a corporation subjects the subscriber to those liabilities only which are imposed by the statute under which the corporation is organized; and that when the corporation is authorized by law to lay assessments upon shares, and to sell the shares for non-payment of such assessments, and a subscriber has not expressly promised to pay assessments, no such promise can be implied, so as to enable the corporation to maintain an action against him personally for the amount of an assessment or any part thereof, even if the sum received from a sale of his shares according to the statute has not satisfied the assessment due upon them." *Citing*, *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 40; *Franklin Glass Co. v. White*, 14 Mass. 286; *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 128; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Cutler v. Middlesex Factory Co.*, 14 Pick. (Mass.) 483; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Troy, etc., R. Co. v. Newton*, 1 Gray (Mass.) 544; *Low v. Blanchard*, 116 Mass. 272. See also *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Macon, etc., R. Co. v. Vason*, 57 Ga. 314; *Macauly v. Robinson*, 18 La. Ann. 619; *Athol, etc., R. Co. v. Prescott*, 110 Mass. 213; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Fort Miller, etc., R. Co. v. Payne*, 17 Barb. (N. Y.) 577; *Ogdensburg, etc., R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Mills v. Stewart*, 41 N. Y. 384; *Ashton v. Burbank*, 2 Dill. (U. S.) 435; *King's Case*, L. R., 2 Ch. 714; *Knight's Case*, L. R., 2 Ch.

321; *Snell's Case*, L. R., 5 Ch. 22; *Great Northern, etc., R. Co. v. Kennedy*, 4 Exch. 417; *Inglis v. Great North, etc., R. Co.*, 1 Macq. H. L. Cas. 112; *Birmingham, etc., R. Co. v. Locke*, L. R., 1 Q. B. 256; *Edinburgh, etc., R. Co. v. Hibblewhite*, 6 M. & W. 715; *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674.

Under the *California* statute there is no personal liability for assessments; they can be collected only by selling the stock. *In re South Mountain Consolidated Co.*, 7 Sawy. (U. S.) 30.

One whose stock has been forfeited for non-payment of calls, is not liable to the creditors of the corporation under the *New York General Railway Act* of 1850. *Mills v. Stewart*, 41 N. Y. 384.

1. *Carson v. Arctic Min. Co.*, 5 Mich. 300.

In *Great Northern, etc., R. Co. v. Kennedy*, 4 Exch. 417, Parke, B., says: "Until the company have finally disposed of the shares, and satisfied the debt and costs, they may continue the action; for I think they have a right to go on until they have also been paid the costs. When they have sold the shares, and converted them into money, the defendant would be entitled to credit to the extent of the amount for which the shares sold. Mr. Maynard asks, what is to be done if the forfeited shares have been converted into other shares? In that case the defendant would be entitled to the benefit, in satisfaction *pro tanto*; so that, on applying to the court to stay proceedings, on payment of the portion of the debt and costs beyond the value of the new shares, the court would stay the proceedings accordingly. But until actual satisfaction, there is no bar to an action for the amount of calls." And in the same case Rolfe, B., says: "It is clear from the language of the 34th and 35th sections, that the declaration of forfeiture is in the nature of a mortgage. The company are not to sell more of the shares than will be sufficient, as nearly as can be ascertained, to pay the arrears of calls, together with interest and expenses; and if there be any surplus, it is to be paid to the defaulter, who has a right to redeem at the last

erally held to be its final remedy, and forfeiture with sale to others, which, by the second class of cases noticed above, does not bar an action at law.<sup>1</sup> This additional remedy is not infrequently provided by statute or charter,<sup>2</sup> and where it does exist, not only the original subscriber, but, after transfer, his assignees, are liable.<sup>3</sup> So the purchaser at a forfeiture sale must pay delinquent installments in order to prevent a second forfeiture of the shares.<sup>4</sup> If, instead of a deficiency, the proceeds of a sale afford a surplus, it belongs to the company.<sup>5</sup>

(c) *Stockholder's Protective Remedies.*—Impending forfeiture may be prevented by a timely tender of the sum due.<sup>6</sup> So a threatened

moment before sale." See also *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 499; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 336; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576; 5 Am. Dec. 638; *Carson v. Arctic Min. Co.*, 5 Mich. 288; *Great Northern, etc., R. Co. v. Kennedy*, 4 Exch. 417; *Iron R. Co. v. Fink*, 41 Ohio St. 321; 22 Am. & Eng. R. Cas. 20; 52 Am. Rep. 84.

1. The court says in *Carson v. Arctic Min. Co.*, 5 Mich. 295, per Martin, J.: "If it is true that the stock was forfeited to the use of the company upon the failure to pay the assessment, there would be perhaps no difficulty in holding that the remedy by action was taken away thereby; and such is the weight of authorities (see among other cases, *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330; *Allen v. Montgomery R. Co.*, 11 Ala. 437; and when forfeiture is made an alternative and not a current remedy, such is most certainly the result. See *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674; *Edinburgh, etc., R. Co. v. Hibblewhite*, 6 M. & W. 715; *Giles v. Hutt*, 3 Exch. 18; *Great Northern, etc., R. Co. v. Kennedy*, 4 Exch. 417. But by forfeiture in the sense employed in all these cases, and all others of the same class, is meant the reclamation by the corporation of the entire stock to its own use; and this result is held to follow upon the principle that such forfeiture necessarily involves a total loss of interest in the thing forfeited, by the party in default, and a resumption by the company of the entire consideration of the debtor's promise. The stock forfeited vests absolutely and beneficially in the company, and the debtor can have no benefit from it or its proceeds. We shall see, as we progress, that no such consequences attend the sale of the stock under the charter of

the present defendant in error, and that consequently there is in this case no forfeiture which satisfies the call and extinguishes the company's claim therefor."

2. *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Mann v. Cooke*, 20 Conn. 178; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Kennebec, etc., R. Co. v. Kendall*, 31 Me. 470; *Athol, etc., R. Co. v. Prescott*, 110 Mass. 213; *Mills v. Stewart*, 41 N. Y. 384; *Stokes v. Lebanon, etc., Turnpike Co.*, 6 Humph. (Tenn.) 241; *Brockenbrough v. James River, etc., Co.*, 1 Patt. & H. (Va.) 94.

3. *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; *Hartford, etc., R. Co. v. Kennedy*, 12 Conn. 499; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Brockenbrough v. James River, etc., Co.*, 1 Patt. & H. (Va.) 94.

4. *Sturges v. Stetson*, 1 Biss. (U. S.) 251.

5. *Freeman v. Harwood*, 49 Me. 195; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330; *Sturges v. Stetson*, 1 Biss. (U. S.) 246; *Great Northern, etc., R. Co. v. Kennedy*, 4 Exch. 417.

Where the incorporation act required a capital stock of not less than 4,000 shares, and delinquent subscribers were made liable for the balance if shares should sell for less than assessments due with interest and costs of sale, subscribers were held liable for such balance, though 4,000 shares had not been subscribed for. *York, etc., R. Co. v. Pratt*, 40 Me. 447.

6. *Walker v. Ogden*, 1 Biss. (U. S.) 287. In *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280, where a check was tendered in payment, the court said: "There was no objection to the tender at the time it was made, either as to form or amount, and all objections which might have been taken upon either ground were therefore



forfeiture of paid up stock may be enjoined,<sup>1</sup> though, if the assessment be valid, the fact that the corporation is worthless and seeking to acquire the stock, is not a sufficient ground for injunction.<sup>2</sup> Generally, an invalid forfeiture will be annulled at the suit of a stockholder.<sup>3</sup> Thus, if the meeting was unlawfully held outside the state,<sup>4</sup> or if notice of calls was not given,<sup>5</sup> or if the stockholder was dead and no administrator had been appointed,<sup>6</sup> the forfeiture will be set aside. It has been held that mere laches will not deprive stockholders of this equitable right,<sup>7</sup> but that undue delay<sup>8</sup> or acquiescence<sup>9</sup> will estop them from claiming it. And it may be said generally that relief from forfeiture will not be granted unless the right to such relief is clearly shown.<sup>10</sup> The measure of damages for an unauthorized forfeiture is the market value of the stock at the time of the act,<sup>11</sup> but the stockholder is not entitled to a decree for a specific interest in the corporate property.<sup>12</sup> In *England*, the official liquidator, who corresponds in many respects to the American receiver, has no power to cancel a forfeiture.<sup>13</sup> The action for relief

waived, and the tender must be held to have been sufficient in amount and in proper form. The check of the party not objected to was, for all the purposes of a legal tender, the equivalent of money. (*Duffy v. O'Donovan*, 46 N. Y. 223.) A sufficient tender of the amount due for the assessment having been made before the sale, the sale was without legal authority and void."

That the tender is accompanied by a protest will not vitiate it. *Sweny v. Smith*, L. R., 7 Eq. 324.

1. *Moore v. New Jersey Lighterage Co.*, 57 N. Y. Super. Ct. 1.

2. *Burham v. San Francisco, etc., Mfg. Co.*, 76 Cal. 24.

3. *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280; *Sweny v. Smith*, L. R., 7 Eq. 324; *Stubbs v. Lister*, 1 Y. & C. C. 81; *Clarke's Case*, 42 L. J. Ch. 277; 27 L. T., N. S. 843; *Dixon's Case*, L. R., 5 Ch. 79; *Spackman v. Evans*, L. R., 3 H. L. 171.

4. *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623.

5. *Catchpole v. Ambergate R. Co.*, 1 El. & Bl. 111; 7 Railway Cas. 221.

6. *Glass v. Hope*, 16 Grant (Upper Can.) Ch. 420.

7. *Laches*.—*Garden Gully, etc., R. Co. v. McLister*, L. R., 1 App. Cas. 39; *Hunter v. Stewart*, 4 De G., F. & J. 168.

8. Failure of subscribers for more than six years after a call for shares in a cost-book mine to respond or to assert their claim to stock, estops them

from then claiming it, though the forfeiture was irregular. *Rule v. Jewell*, 18 Ch. Div. 660.

9. *Lesseps v. Architect's Co.*, 4 La. Ann. 316, where the forfeiture was *ultra vires*. See also *King's Case*, L. R., 2 Ch. 714; *Woollaston's Case*, 4 De G. & J. 437; *Webster's Case*, 32 L. J. Ch. 135; *Knight's Case*, L. R., 2 Ch. 321; *Kelk's Case*, L. R., 9 Eq. 107; *Austin's Case*, 24 L. T., N. S. 932; *Prendergast v. Turton*, 1 Y. & C. 98; *Lyster's Case*, L. R. 4 Eq. 233; *Teasdale's Case*, L. R., 9 Ch. 54; *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43.

10. *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285; *Marshall v. Golden Fleecce, Gold, etc., Min. Co.*, 16 Nev. 156; *Small v. Herkimer Mfg., etc., Co.*, 2 N. Y. 330; *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49; *Weeks v. Silver Islet, etc., Min. Co.*, 23 N. Y. Super. Ct. 1; *Germantown, etc., R. Co. v. Fittler*, 60 Pa. St. 124; 100 Am. Dec. 546; *Clark v. Barnard*, 108 U. S. 436; *Sparks v. Liverpool Waterworks Co.*, 13 Ves. 428; *Prendergast v. Turton*, 1 Y. & C. 98.

11. *Budd v. Multnomah St. R. Co.*, 15 Oregon 413; 40 Am. & Eng. R. Cas. 551; 3 Am. St. Rep. 169; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Stubbs v. Lister*, 1 Y. & C. C. 81.

12. *Smith v. Maine Boys Tunnel Co.*, 18 Cal. 111.

13. *Dawes' Case*, 37 L. J. Ch. 901.

should be brought in the state where the corporation has its domicile.<sup>1</sup>

(3) *Application of Remedies*.—A few cases illustrating the application of the rules of evidence,<sup>2</sup> pleading and practice,<sup>3</sup> in this branch of the law, will be found in the notes. Each subscription is an independent undertaking, in no wise affected by the terms of others,<sup>4</sup> and separate actions must be brought against each subscriber.<sup>5</sup> The right to enforce the contract is commen-

1. North State, etc., Min. Co. v. Field, 64 Md. 151. Compare Sudlow v. Dutch Rhenish R. Co., 21 Beav. 43.

2. Evidence.—In an action by a corporation to collect the amount of a subscription, evidence of the value of the stock in question, or of other stock, is inadmissible. South Georgia, etc., R. Co. v. Ayres, 56 Ga. 230.

Erasure of a subscription does not prevent suit upon it; explanatory evidence is admissible. Johnson v. Wabash, etc., Plank Road Co., 16 Ind. 389.

Proof of acceptance of a subscription by the corporation may be by parol, and a liability or expense incurred by the corporation on the faith of subscription is evidence thereof. Jones v. Florence, etc., University, 46 Ala. 626.

Original certificates are admissible to prove the fact of subscription. Hughes v. Antietam Mfg. Co., 34 Md. 316.

Declarations of a deceased commissioner who was authorized to receive subscriptions, are not admissible to prove the fact of subscription. Western Maryland R. Co. v. Manro, 32 Md. 280.

An acknowledgment of signatures to subscriptions after suit brought is sufficient; proof of payment for stock standing in one's name involves proof of a previous subscription; corporate books are not of themselves evidence of subscription; a subscriber on condition that others subscribe, is bound (impliedly) by any evidence that would hold the others. Philadelphia, etc., R. Co. v. Hickman, 28 Pa. St. 318. See generally EVIDENCE, vol. 7, p. 42.

3. Pleading and Practice.—In an action by an assignee of subscriptions against a subscriber, upon whom the corporation has drawn an order in favor of such assignee, a declaration which fails to set out the subscription is not good in respect thereto, though good as to the order. Stockton v. Creager, 51 Ind. 262.

Where an action does not include a

final installment, the complaint need not show delivery, tender, or issuance of the stock. Minneapolis Harvester Works v. Libby, 24 Minn. 327. See also South Georgia, etc., R. Co. v. Ayres, 56 Ga. 230.

The company is not bound to make delivery of unpaid stock; only to tender it conditionally. Hardy v. Merriweather, 14 Ind. 205, following Gorham v. Reeves, 1 Ind. 421.

As to what constitutes tender, see Mitchell v. Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406.

A letter of attorney by one in whose name a subscription had been taken, authorizing the attorney to vote as his proxy at a meeting, is evidence to go to the jury. McCully v. Pittsburgh, etc., R. Co., 32 Pa. St. 25.

Silent acquiescence by the subscriber in the payment by a third party for him of a percentage required down, is ratification. Mississippi, etc., R. Co. v. Harris, 36 Miss. 17; also subsequent voting by proxy as a stockholder. Greenville, etc., R. Co. v. Choice, 5 Rich. (S. Car.) 143.

Plaintiff must prove its corporate existence, and may introduce for that purpose a recorded certificate of incorporation. Hughes v. Antietam Mfg. Co., 34 Md. 316.

In an action on a stock subscription it must be shown that the company is entitled to have capital stock and to receive subscriptions. Minneapolis Harvester Works v. Libby, 24 Minn. 327. See generally PLEADING, vol. 18, p. 467.

4. Connecticut, etc., R. Co. v. Bailey, 24 Vt. 465; 58 Am. Dec. 181.

5. Erie, etc., R. Co. v. Patrick, 2 Abb. App. Dec. (N. Y.) 72; 2 Keys (N. Y.) 256, where two actions were required against a party who had subscribed once as trustee and once individually. See also Baines v. Babcock, 95 Cal. 581; Herron v. Vance, 17 Ind. 595; Price v. Grand Rapids, etc., R. Co., 18 Ind. 137.

surate with, and dependent upon, the right to acquire the stock.<sup>1</sup> But enforcement will not be restrained in order to give time for the displacement of directors who made the call.<sup>2</sup> Where the corporation has become insolvent,<sup>3</sup> the duty of enforcement devolves upon the official in charge. Thus, receivers,<sup>4</sup> assignees for creditors,<sup>5</sup> and trustees<sup>6</sup> appointed by a court, are proper parties to sue for unpaid subscriptions. It is the general rule that these officers have no greater powers in enforcing subscriptions than the corporation itself had.<sup>7</sup>

d. DEFENSES—(1) *Abandonment or Delay of Enterprise*.—The fact that a corporate enterprise has failed, and the corporation become insolvent, is not generally a good defense to an action to enforce a subscription.<sup>8</sup>

1. *James v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 261.

An assignee of a company, in enforcing the contract of subscription, must show that the company's obligation to deliver stock, as well as the defendant's agreement to pay for it, was transferred. *Minneapolis Harvester Works v. Libby*, 24 Minn. 327.

2. *Anglo-Universal Bank v. Borag-non*, 45 L. T. 362.

3. In an action by an insolvent corporation no defense can be maintained grounded on defects in organization, unless the same could have been successfully pleaded in answer to a creditor's bill. *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295.

A defunct corporation cannot maintain an action against one of its members who has received more than his share of the corporate property or owes it; the proper remedy is a suit for an accounting. *Krutz v. Paola Town Co.*, 20 Kan. 397.

4. *Actions by Receivers*.—*Chandler v. Brown*, 77 Ill. 333; *Stark v. Burke*, 9 La. Ann. 341; *Stewart v. Lay*, 45 Iowa 604; *Frank v. Morrison*, 58 Md. 423; *Mann v. Pentz*, 3 N. Y. 415; *Dayton v. Borst*, 31 N. Y. 435; *Cal-kins v. Atkinson*, 2 Lans. (N. Y.) 12; *Dorris v. French*, 4 Hun (N. Y.) 292; *Van Wagenen v. Clark*, 22 Hun (N. Y.) 497; *Nathan v. Whitlock*, 9 Paige (N. Y.) 152; *Clarke v. Thomas*, 34 Ohio St. 46; *Mean's Appeal*, 85 Pa. St. 75.

In *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 299, it was said: "The action, having been brought by the company before the appointment of the receiver, could be continued in the name of the original party for the benefit of the receiver. (Code, § 121.)

The right to collect the unpaid subscriptions was transferred to the receiver. (2 R. S. 463; § 36, Laws of 1852, p. 67; Laws of 1860, p. 699; 2 R. S. 469, §§ 67, 69; *Rankine v. Elliott*, 16 N. Y. 377; *Tracy v. First Nat. Bank*, 37 N. Y. 523.)"

In *New York and Maryland*, the right to sue is conferred by statute. *Dayton v. Borst*, 31 N. Y. 435; *Stillman v. Dougherty*, 44 Md. 380.

In *England*, it seems, no such power exists. *In re Birmingham, etc., R. Co.*, 18 Ch. Div. 155.

5. *Assignees*.—*Chamberlain v. Bromberg*, 83 Ala. 576; *Tobey v. Russell*, 9 R. I. 58; *Hatch v. Dana*, 101 U. S. 205.

6. *Trustees*.—*Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156; *Lewis v. Glenn*, 84 Va. 947.

7. *Republic L. Ins. Co. v. Swigert* (Ill. 1890), 32 Am. & Eng. Corp. Cas. 555; *Billings v. Robinson*, 94 N. Y. 415; *Cutting v. Damerel*, 88 N. Y. 410; *Winters v. Armstrong*, 37 Fed. Rep. 508; *Cleveland v. Burnham*, 55 Wis. 598.

Fraud in inducing a subscription cannot be set up against an action by a trustee appointed by the court to enforce liability for unpaid subscriptions. *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156.

A trustee appointed by a court may sue non-resident stockholders who have no personal notice of a suit by the creditor; and such subscribers are bound by assessments by order of such court. *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156.

8. *Failure Not a Defense*.—*Hardy v. Merriweather*, 14 Ind. 205; *Morgan County v. Thomas*, 76 Ill. 140; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 187; *Miers v. Zanesville, etc., Turnpike Co.*

So the partial<sup>1</sup> or temporary<sup>2</sup> abandonment of the undertaking will not release subscribers. But where in reliance upon the fact of abandonment otherwise confirmed, subscribers had changed their circumstances,<sup>3</sup> and where no effort towards collection had been made within the period of limitation,<sup>4</sup> and when other subscriptions had been refunded and all prosecution of the corporate design had ceased,<sup>5</sup> or where the charter had lapsed for non-compliance with its terms,<sup>6</sup> the courts have refused to enforce the contracts. Delay in the progress of the enterprise is rarely available as a defense.<sup>7</sup>

(2) *Charter Changes, etc.*—A mere change in the corporate name after subscriptions are made, will not preclude recovery.<sup>8</sup>

11 Ohio 273; 1 Redfield on Railways (2d ed.) 170.

A stockholder in a corporation formed for the purpose of developing wild oil land cannot maintain an action to recover back his subscription on the ground of the failure of the company to acquire all of the land mentioned in its prospectus; he must show fraud or misrepresentation, or such an entire failure in the business of the company as amounts to virtual dissolution. *Kelsey v. Northern Light Oil Co.*, 54 Barb. (N. Y.) 111.

Where subscribers to a railroad company gave notes for the amount of their subscriptions, payable on completion of the road, but were subsequently induced to give in place of these, new ones payable in four years, in order to enable the company to carry out its contract, upon the confident but honest expression of opinion by its officers that the road would be completed in less than four years, they were held liable upon the new notes, though the contract was afterwards abandoned and the road left uncompleted. *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St. 208. See also *Bish v. Bradford*, 17 Ind. 490; *Smith v. Gower*, 2 Duv. (Ky.) 17; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

1. *Partial Abandonment.*—*Dorman v. Jacksonville, etc.*, R. Co., 7 Fla. 265; *Buffalo, etc.*, R. Co. *v. Gifford*, 87 N. Y. 204.

Abandonment of part of a railway is no defense. *In re Jennings*, 1 Ir. Ch. 236.

2. *McMillan v. Maysville, etc.*, R. Co., 15 B. Mon. (Ky.) 218; 41 Am. Dec. 181; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112.

3. *Fountain Ferry Turnpike Co. v. Jewell*, 8 B. Mon. (Ky.) 147.

4. *Pittsburgh, etc.*, R. Co. *v. Byers*, 32 Pa. St. 22. In this case it was held that a subscriber thus discharged was not again rendered liable by giving an incomplete letter of attorney to vote on question of accepting a supplement to the charter.

5. *McCully v. Pittsburgh, etc.*, R. Co., 32 Pa. St. 25.

6. *Sodus Bay, etc.*, R. Co. *v. Lap-ham*, 43 Hun (N. Y.) 314.

In *Delaware River, etc.*, R. Co. *v. Rowland* (Pa. 1887), 30 Am. & Eng. R. Cas. 524, there being some evidence of the fact of abandonment, it was held proper to submit the question to the jury.

7. *Delay.*—*Pickering v. Templeton*, 2 Mo. App. 424; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; 35 Am. Rep. 536; *First National Bank v. Hurford*, 29 Iowa 579.

In *Miller v. Pittsburgh, etc.*, R. Co., 40 Pa. St. 237; 80 Am. Dec. 570, the work was delayed two years and a half, but the court said: "Until it can be shown how railroads can be built without money, no such defense as is here set up can prevail."

But in *Boyle's Case*, 54 L. J. Ch. 550, it was said *obiter*, that an unreasonable delay would authorize one to withdraw his subscription.

8. *Change of Name.*—*Mahan v. Wood*, 44 Cal. 462; *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156; *Bucksport, etc.*, R. Co. *v. Buck*, 68 Me. 81; *Buffalo, etc.*, R. Co. *v. Dudley*, 14 N. Y. 336; *Schenectady, etc.*, Plank R. Co. *v. Thatcher*, 11 N. Y. 102; *North Whitehall Tp. v. South Whitehall Tp.*, 3 S. & R. (Pa.) 117; *Scarborough v. Butler*, 2 Lev. 238; *Colchester v. Seaber*, 3 Burr. 1866; *Mellor v. Spateman*, 1 Saund. 344, n. 1.

In *Buffalo, etc.*, R. Co. *v. Dudley*, 14 N. Y. 354, *Selden, J.*, says: "The

The company may sue in its new name,<sup>1</sup> though it assumes the burden of proving its identity with the same organization as it was formerly named.<sup>2</sup> A material change in the corporate design as represented to the subscriber, at least places the burden upon the company of showing that the change was not fraudulent.<sup>3</sup> The materiality of a change is a question of law,<sup>4</sup> but in determining what will constitute a material change, the decisions are not entirely harmonious.<sup>5</sup> On the one hand it has been held that

point made by the defendant upon the alteration of the plaintiff's charter, changing the name of the corporation and authorizing the extension of its road from Attica to Buffalo, must, I think, be considered as sufficiently answered by the decision of this court in the case of *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102. The power reserved to the legislature in the original act of incorporation to alter or repeal the act is as broad in this case as in that. It is, indeed, entirely unlimited. Under the rule established in that case, no mere addition to or alteration of the charter, however great, would operate to discharge a stockholder from his obligation to the corporation. To work such a discharge the charter must be repealed, or the legislation must be such as virtually to subvert the corporation itself, or, at least, to destroy its identity. A mere change of name has repeatedly been held not to have that effect. (*Scarborough v. Butler*, 3 Lev. 238; *Colchester v. Seeber*, 3 Burr. 1806; *Mellor v. Spateman*, 1 Saund. 344, note 1; *North Whitehall Tp. v. South Whitehall Tp.*, 3 S. & R. (Pa.) 117.) In other respects the change in this case is not materially greater than in that of *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102. It does not become necessary, therefore, to take into consideration the soundness of the principles advanced in the case of *Hartford, etc., R. Co. v. Croswell*, 5 Hill (N. Y.) 383; 4 Am. Dec. 354. That case is in direct conflict with several English cases, as well as with some decided in this country; and a portion of its reasoning would, I think, require to be examined with some care before it is finally adopted. *Midland R. Co. v. Gordon*, 16 M. & W. 803; *Stevens v. South Devon R. Co.*, 13 Beav. 48; *Ffooks v. London, etc., R. Co.*, 19 E. L. & Eq. 7; *Irvine v. Turnpike Co.*, 2 P. & W. (Pa.) 466; *Gray v. Monon-*

*gahela Nav. Co.*, 2 W. & S. (Pa.) 156; 37 Am. Dec. 500."

A misnomer of the corporation in a notice to pay installments is not fatal. *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156; 37 Am. Dec. 500.

Where a corporation is organized under a general law, and reorganized under a special charter, subscribers to the former are also subscribers to the latter, if they ratify the change; a receipt of dividends from the new corporation would be evidence of an unequivocal character of their holding the stock in such corporation. *Hammond v. Straus*, 53 Md. 1.

1. *Greenville, etc., R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332; *Bucksport, etc., R. Co. v. Buck*, 68 Me. 81. And see cases cited in last note.

2. *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894, holding that the minutes of the stockholders' meeting are admissible to prove such identity.

3. *Bery v. Marietta, etc., R. Co.*, 26 Ohio St. 673; *Burrows v. Smith*, 10 N. Y. 550. Compare *Norwich Lock Mfg. Co. v. Hockaday* (Va. 1893), 16 S. E. Rep. 877; *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182.

4. *Memphis, etc., R. Co. v. Sullivan*, 57 Ga. 240, holding also that if its evident purpose is to legalize previous illegal proceedings, a finding that a change is material will not be disturbed.

5. *Treat, C. J.*, in *Banet v. Alton, etc., R. Co.*, 13 Ill. 504, thus discusses the subject of the text and reviews the authorities then current: "The rule in relation to contracts of this character must be general in its operation. What will discharge one stockholder from the payment of his subscription must be held to have the same effect as to others. If the defendant is to be relieved from the performance of his obligations because of the change in the route of the road, so must any other subscriber, although it should clearly

subscribers were released by an unauthorized alteration in the route of a turnpike,<sup>1</sup> by the location of a manufacturing plant in a different borough than that named,<sup>2</sup> a change in the terminus of a railroad,<sup>3</sup> division of a proposed continuous railway line, mak-

appear that his interests would be promoted by the alteration. The matter of injury to one, or of benefit to the other, cannot affect their respective liabilities. The true question, then, is not whether the defendant was deprived of any incidental benefit by the change in the location of the road, but whether the amendment of the charter worked such a change in the company as releases subscribers from their engagements, at least such of them as have not assented to the alteration. A reference to the authorities bearing on this subject will not be inappropriate. In *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268; 10 Mass. 384, it was decided that a subscription to build a turnpike in a specified direction could not be recovered to construct a road in a different direction, although the change was authorized by the legislature and assented to by the directors of the corporation. In *Union Locks & Canals v. Towne*, 1 N. H. 44; 8 Am. Dec. 32, a subscriber was held to be excused from the payment of his subscription on the ground that the corporation had obtained an amendment of the charter that materially changed the objects and character of the company. *Hartford, etc., R. Co. v. Croswell*, 5 Hill (N. Y.) 383; 40 Am. Dec. 354, is a leading case on this subject. In that case, in 1833, the legislature of *Connecticut* incorporated a company to construct a railroad from Hartford to New Haven, and Croswell subscribed for ten shares of the capital stock. In 1839, the legislature authorized the company to procure and run a line of steamboats in connection with their road, and, for that purpose, to increase their capital stock to an amount not exceeding two hundred thousand dollars. The amendment was accepted by the board of directors, and ratified by a majority of the stockholders. The corporation then brought an action against Croswell to recover the amount of his subscription. The court held that the subscription could not be recovered, on the ground that the amendment to the charter effected an essential change in the company, the addition of a new and

different enterprise. In *Clark v. Monongahela Nav. Co.*, 10 Watts (Pa.) 364, and *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156; 37 Am. Dec. 500, it was held that an alteration in the charter of an incorporation, by which additional privileges were granted to the company, was not such an invasion of the contracts of subscription as would relieve the subscribers from their liability to pay; although the additional privileges might extend the liabilities of the company, and thereby affect the stockholders. In *Pennsylvania, etc., Canal Co. v. Webb*, 9 Ohio 136, the court say: "It is not every minute change which will absolve a subscriber from his engagements. In work of this kind, some power of regulation is retained by the legislature; some discretion is confided to the agents who execute the details. Where a subscription is general, uncumbered with conditions, perhaps the stockholder has no reason to complain of any line of transit which starts from the same point of business, accommodates the same travel and transportation, and substantially subserves the same general interests." The cases of *Wain v. Turnpike Co.*, before cited, *London, etc., R. v. Wilson*, 6 Bing. N. Cas. 135, and *Midland R. Co. v. Gordon*, 16 M. & W. 804, recognize the same principles."

1. **Material Changes.** — *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268. Even where the subscriber has held corporate offices, and, as a director, has petitioned the legislature for such alteration. *Middlesex Turnpike Corp. v. Swan*, 10 Mass. 384; 6 Am. Dec. 139.

2. *Auburn Bolt, etc., Works v. Schultz* (Pa. 1891), 22 Atl. Rep. 904; *Norwich Lock Mfg. Co. v. Hockaday* (Va. 1893), 16 S. E. Rep. 877.

3. *Thompson v. Guion*, 5 Jones Eq. (N. Car.) 113, giving as a reason that the subscriber had no power to go into a court of equity to enforce the original charter against the authority of the legislature. See also *Marietta, etc., R. Co. v. Elliott*, 10 Ohio St. 57, where by legislative enactment there was a change of terminus, and an extension of the corporate powers

**The Contract of Subscription. STOCKHOLDERS. Enforcement of the Contract.**

ing it three separate enterprises,<sup>1</sup> sale of the road,<sup>2</sup> or extension of limits upon holding property and collecting tolls by it.<sup>3</sup>

On the other hand, it is said that immaterial changes such as the law would imply,<sup>4</sup> will not constitute a good defense, and that the subscription must be presumed to have been executed

authorizing the company to run a line of steamers beyond the terminus.

If the company procure an act of the assembly altering termini, subscribers are no longer bound. *Manheim, etc., Plank R. Co. v. Arndt*, 31 Pa. St. 317. See also *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392; 1 Am. & Eng. R. Cas. 366.

1. *Fulton County v. Mississippi, etc., R. Co.*, 21 Ill. 338.

2. *South Georgia, etc., R. Co. v. Ayers*, 56 Ga. 230.

3. *In Union Locks & Canals v. Towne*, 1 N. H. 44; 8 Am. Dec. 32, the court, by Woodbury, J., said: "But the money for which this action is brought was assessed for some other objects and under some other circumstances; for purchasing one hundred instead of six acres of land, and under a right to be repaid by an indefinite toll for an indefinite time instead of one limited in its amount and continuance. It is impossible to state the case without perceiving a variation from the contract originally made, and a variation, too, which reaches the gravamen or essence of the contract. Many a cautious man would be willing to hazard the assessments which might be made on a share under the restrictions of the first act, who would never risk those which his more wealthy or more adventurous associates might make under the indulgences of the second one."

4. *Union Agricultural, etc., Assoc. v. Neill*, 31 Iowa 95. The case is thus stated by the court: "After the defendant had subscribed, the articles were copied, and on the 28th day of October the copied articles were signed and acknowledged. Before the acknowledgment, the following changes were made, to wit: In article ten it was provided that the company should continue for the term of twenty years from this date (the date of the acknowledgment, subject to renewal by vote of three-fourths of the stockholders. It is claimed that, in consequence of this change, the organization to which defendant subscribed is not the one which is attempting to enforce the

subscription, and that the defendant, consequently, is not liable to the plaintiff. It may be admitted that a material and radical change in the objects of the association would release the defendant from his liability upon his subscription. *Hartford, etc., R. Co. v. Crosswell*, 5 Hill (N. Y.) 388; 40 Am. Dec. 354. But the changes here made are not of such character. The first simply provides, that the organization shall continue twenty years from the 28th day of October, 1867, instead of twenty years from the 1st day of January, 1868. This amendment simply incorporates into the articles of association a condition, which, if not inserted, the law would imply. By section 1158 of the Revision, the duration of this corporation cannot exceed twenty years. After the lapse of that time after its organization, it must expire by limitation of law, although the articles of incorporation provide for a longer duration; and the same is true of the change providing for renewal upon the vote of three-fourths instead of two-thirds of the stockholders. Under said section such renewal can be had only upon such three-fourths' vote. If the change had not been made, the provision requiring a two-thirds' vote would have been simply inoperative. If the articles had remained as originally drawn, or if they had been entirely silent with regard to duration and mode of renewal of the corporation, the law would have attached to them the same consequences as now. In either case the corporation would endure twenty years from the date of its organization, with a right of renewal by a vote of three-fourths of the stockholders. It follows that the changes are entirely immaterial. The defendant could not possibly be prejudicially affected by them. They do not precipitate a call for installments on his subscription. The original articles provide that the company should commence business when the subscription reached \$10,000. The amended articles contain the same provision. Under both, the same contingency renders defendant liable to a

under contemplation of possible charter changes.<sup>1</sup> Accordingly, as illustrating its position, this group of courts has held that a departure from a proposed route,<sup>2</sup> especially if the subscriber has failed to express his preference,<sup>3</sup> or if the change is consistent with the original design,<sup>4</sup> or an improvement thereon,<sup>5</sup> an extension of the line of road,<sup>6</sup> or an amendment authorizing the construction of branch lines,<sup>7</sup> will not discharge those who have subscribed to the stock of railway enterprises. So, in general, this class of authorities holds that charter amendments merely enlarging original powers,<sup>8</sup> granting additional priv-

call for payment. In fact \$10,000 had been pledged before the defendant subscribed, so that his liability to a demand for payment was created at the time of his subscription. The change being immaterial, does not exonerate defendant from his obligations. *Hartford, etc., R. Co. v. Croswell*, 5 Hill (N. Y.) 388; 40 Am. Dec. 354."

1. *Mowry v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78.

A material alteration in the charter without the consent of a subscriber, and made after his stock was forfeited, will not release him from payment of a note given for the subscription. *Mitchell v. Rome R. Co.*, 17 Ga. 574.

2. **Change of Route.**—*Central Plank Road Co. v. Clemens*, 16 Mo. 359; *Fry v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336.

One who is active in effecting a change of route cannot afterward repudiate the subscription on the ground of indefiniteness of object as expressed in the articles of incorporation. *Owen-ton, etc., Turnpike Co. v. Smith* (Ky. 1890), 31 Am. & Eng. Corp. Cas. 312 n.

The failure to fix the limit of the first section of a road in relocation does not discharge one who had subscribed for stock in the first section before such relocation. *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79.

3. *Greenville, etc., R. Co. v. Coleman*, 5 Rich. (S. Car.) 118.

4. *Wilson v. Wills Valley R. Co.*, 33 Ga. 466. In *Banet v. Alton, etc., R. Co.*, 13 Ill. 513, it was said: "The alteration in the present case is not of such a radical character as to exonerate the stockholders from the payment of their subscriptions. The general features and objects of the corporation continue unchanged. The termini of the road remain the same; the only change consisting in a deviation from an intermediate point. The work

is still designed to accommodate the same line of travel and transportation, and promote the same general interests. The length of the road is reduced, and the cost of construction is diminished. The change will be useful to the public, as the legislature has determined, and beneficial to the company, as the board of directors has decided; and the facts of the case clearly sustain both of these conclusions. The only injury that can accrue to any of the subscribers will be the loss of some incidental benefit to their company; and that, as we have already seen, cannot be taken into consideration. If the charter had been so amended as to authorize the construction of a road from Alton to Vandalia or Shelbyville, or from Springfield to Beardstown or Peoria, instead of the one originally designated, the company would be committed to a new and difficult enterprise; and the stockholders might with much force and justice say, this is not the undertaking in which we are engaged, and not the stock in which we agreed to invest our funds."

5. *Gibbons v. Grinsel*, 79 Wis. 365.

6. **Extension of Road.**—*Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536; *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392; 1 Am. & Eng. R. Cas. 366; *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156; 37 Am. Dec. 500; *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336.

7. *Greenville, etc., R. Co. v. Coleman*, 5 Rich. (S. Car.) 118; *Peoria, etc., R. Co. v. Preston*, 35 Iowa 125; See also *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Illinois R. Co. v. Zimmer*, 20 Ill. 654.

8. **Auxiliary Amendments.**—*Peoria, etc., R. Co. v. Elting*, 17 Ill. 429; *Peoria, etc., R. Co. v. Preston*, 35 Iowa 115; *Pacific R. Co. v. Hughes*,



ileges,<sup>1</sup> effecting changes in matters collateral to the contract of subscription<sup>2</sup> auxiliary to corporate objects, though fundamental,<sup>3</sup> are not available to the subscriber as defenses.

(3) *Conditions Not Performed*—(a) *Conditional Subscriptions in General.*—A conditional subscription has been defined as “a continuing offer which is final and absolute when accepted.”<sup>4</sup> When the conditions are valid, the fact of their non-performance is a complete defense to an action on the subscription.<sup>5</sup> But, in general, a substantial performance only is required,<sup>6</sup> and when the question of performance is left to the directors, their decision as to the fact of performance cannot be attacked except on the ground of

22 Mo. 303; *Pacific R. Co. v. Renshaw*, 18 Mo. 210.

A discharge is not effected by a change made in pursuance of the charter, where the defendant has become a stockholder. *Burlington, etc., R. Co. v. White*, 5 Iowa 409. So where the charter may be altered or repealed by the legislature, a subscriber is not discharged by such amendment. *Union Hotel Co. v. Hersee*, 79 N. Y. 454; 35 Am. Rep. 536.

The issue of more shares than was at first contemplated is not a good defense. *Gibbons v. Grinsel*, 79 Wis. 365.

1. An alteration in a charter of incorporation by which additional privileges are given to it, is not such an invasion of the contract of subscription as will relieve the subscriber to its stock from liability to pay. *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156; 37 Am. Dec. 500. See also *Cross v. Peach Bottom R. Co.*, 90 Pa. St. 392; 1 Am. & Eng. R. Cas. 366.

2. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298.

3. *Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

4. *Definition.*—*Taggart v. Western Md. R. Co.*, 24 Md. 563; 89 Am. Dec. 760. Says White, J., in *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 335: “The subscription was designed as, and was in fact, a standing or continuing proposition, upon which the plaintiff was not expected to act until the time arrived for the final location of the road. Having been delivered for this purpose and acted on by the plaintiff, after the condition had been complied with, it became an absolute subscription.” See also *Lowe v. Edgefield, etc., R. Co.*, 1 Head (Tenn.) 659.

As to the distinction generally, be-

tween conditions precedent and subsequent, see *CONDITION*, vol. 3, p. 422.

5. *Performance Essential.*—*Banet v. Alton, etc., R. Co.*, 13 Ill. 504; *Frankfort, etc., Turnpike Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427; 17 Am. Dec. 159; *Evansville, etc., R. Co. v. Shearer*, 10 Ind. 244; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142; *Porter v. Raymond*, 53 N. H. 519; *Monadnock R. Co. v. Felt*, 52 N. H. 379; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Burrows v. Smith*, 10 N. Y. 550; *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 328; *Edwards v. Grand Junction R. Co.*, 7 Sim. 337; 1 M. & C. 650; *Ex parte Mainwaring*, 2 De G., M. & G. 66; *Preston's Case*, 15 W. R. 299; *Pellat's Case*, L. R., 2 Ch. 527; *Ex parte Bartlett*, 19 L. T., N. S. 628; *Ex parte Simpson*, L. R., 4 Ch. 184; *Ex parte Harwood*, 20 L. T., N. S. 736; *Rankin v. Hop, etc., Co.*, 20 L. T., N. S. 207; *Simpson v. Heaton's Steel, etc., Co.*, 19 W. R. 614.

If the condition is afterwards discovered to be *ultra vires* the subscription is not enforceable. *Barnett's Case*, 22 W. R. 891; L. R., 18 Eq. 507. See also *Des Moines Valley R. Co. v. Graff*, 27 Iowa 99; 1 Am. Rep. 256.

6. *Substantial Performance Sufficient.*—*O'Neal v. King*, 3 Jones (N. Car.) 517; *Cornell's Appeal*, 114 Pa. St. 153. See also *People v. Holden*, 82 Ill. 93; *Paris, etc., R. Co. v. Henderson*, 89 Ill. 86; *Des Moines Valley R. Co. v. Graff*, 27 Iowa 99; 1 Am. Rep. 256; *Springfield St. R. Co. v. Sleeper*, 121 Mass. 29; *Virginia, etc., R. Co. v. Henry*, 8 Nev. 68.

There is however some authority for the rule that strict compliance is necessary. *Martin v. Pensacola, etc., R. Co.*, 8 Fla. 390; 73 Am. Dec. 713; *Brown v. Dibble*, 65 Mich. 520; *Toledo, etc., R. Co. v. Hinsdale*, 45 Ohio St. 556; 39 Am. & Eng. R. Cas. 239.

fraud.<sup>1</sup> Performance is excused if prevented by the fault of the subscriber,<sup>2</sup> but not if unforeseen difficulties, such as floods, interfere.<sup>3</sup> The fact of performance is usually a question for the jury,<sup>4</sup> and the burden of proving it is upon the corporation asserting it.<sup>5</sup>

(b) *Validity of Conditions*.—Subscriptions before incorporation must be absolute.<sup>6</sup> Parol conditions intended to vary the terms of the written contract of subscription are void, and evidence thereof is inadmissible,<sup>7</sup> except where fraud or mistake is alleged. So, all

1. *Cass v. Pittsburg, etc., R. Co.*, 80 Pa. St. 31.

2. *Upton v. Hansbrough*, 3 Biss. (U. S.) 423.

3. *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539.

4. *St. Louis, etc., R. Co. v. Eakins*, 30 Iowa 279; *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539; *Toledo, etc., R. Co. v. Johnson*, 49 Mich. 148. See also *Brand v. Lawrenceville, etc., R. Co.*, 77 Ga. 506.

5. *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *Ridgefield, etc., R. Co. v. Reynolds*, 46 Conn. 375; *Chase v. Sycamore, etc., R. Co.*, 38 Ill. 215; *People v. Holden*, 82 Ill. 93; *Bucksport, etc., R. Co. v. Buck*, 65 Me. 536; *Union Hotel Co. v. Hersee*, 15 Hun (N. Y.) 371; *Monadnock R. Co. v. Felt*, 52 N. H. 379; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318.

6. *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225; *Bedford R. Co. v. Bowser*, 48 Pa. St. 34; *Caley v. Philadelphia, etc., R. Co.*, 80 Pa. St. 363; *Boyd v. Peach Bottom R. Co.*, 90 Pa. St. 169; 1 Am. & Eng. R. Cas. 631.

A subscription, before organization to a railroad company, under the *Pennsylvania* act of 1849, conditioned on the location of road over a certain route, is deemed an absolute subscription without reference to the condition; it is not the subscription, but the condition, that is illegal. *Pittsburgh, etc., R. Co. v. Biggar*, 34 Pa. St. 455.

A subscription to a university in contemplation of, but prior to its incorporation, has been held valid. *Johnston v. Ewing Female University*, 35 Ill. 518.

An agreement designed to give the company credit before the public to "redeem" a subscriber's stock at par and give him ten per cent. interest, cannot be enforced after insolvency as

against *bona fide* shareholders and creditors. *Eisenlord v. Oriental Ins. Co.*, 29 N. J. Eq. 437.

A nominal holder who allows his name to be used by the company under a written guaranty that it will protect him against loss, is properly included on the list of contributories. *Davidson's Case*, 3 De G. & S. 21; 18 L. J., N. S. Ch. 254. See also *Chapman's Case*, L. R., 3 Eq. 361. And so is one who subscribes in order to make the requisite amount of stock. *Ex parte Cox*, 4 De G., J. & S. 53; 33 L. J. Ch. 145.

In *Canada*, one who merely signs a subscription list but receives no allotment of shares, cannot be held as a contributory. *In re Zoological, etc., Soc.*, 16 Ont. App. 543, where the court says: "Nothing was done by which the company could have been forced to receive the subscriber. It is therefore impossible to treat him as a shareholder, and the appeal must be allowed. I refer to the recent cases in this court of *In re Speight Mfg. Co.*, 16 Ont. App. 519; *In re London P. Co.*, 16 Ont. App. 508; *Ang. & Ames on Corporations* (11th ed.), §§ 526, 527; *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344, which appears to be a very well considered case. Such cases as *Union F. Ins. Co. v. Lyman*, 46 Up. Can. 453; *Union F. Ins. Co. v. O'Gara*, 4 Ont. R. 359, have no application, turning as they do upon the terms of the special act of incorporation, by which the shares subscribed for at the instance of the company are declared to be vested in the subscriber. See also *In re Standard F. Ins. Co.*, 12 Ont. App. 486."

7. *Parol Conditions Void*.—*Mississippi, etc., R. Co. v. Cross*, 20 Ark. 443; *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86; *Johnson v. Pensacola, etc., R. Co.*, 9 Fla. 299; *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Corwith v. Culver*, 69 Ill. 502; *Thornburgh v. Newcastle, etc., R. Co.*, 14 Ind. 499;

collusive agreements between the corporation and a subscriber to the effect that the latter shall not be bound, or shall be allowed any undue advantage over his fellows, are invalid.<sup>1</sup> Conditions inserted into the contract must, of course, conform to the charter,<sup>2</sup> and must not be contrary to public policy.<sup>3</sup> Abstracts of

Brownlee v. Ohio, etc., R. Co., 18 Ind. 68; Cincinnati, etc., R. Co. v. Pearce, 28 Ind. 502; Gelpcke v. Blake, 15 Iowa 387; 83 Am. Dec. 418; Jack v. Naber, 15 Iowa 450; Kennebec, etc., R. Co. v. Waters, 34 Me. 369; Scarlett v. Academy of Music, 46 Md. 132; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110; 26 Am. & Eng. Corp. Cas. 61; Phoenix Warehousing Co. v. Badger, 6 Hun (N. Y.) 293, *affirmed* 67 N. Y. 294; Whitehall, etc., R. Co. v. Myers, 16 Abb. Pr. N. S. (N. Y.) 34; Nippenose Mfg. Co. v. Stadon, 68 Pa. St. 256; East Tennessee, etc., R. Co. v. Gammon, 5 Sneed (Tenn.) 567; Cunningham v. Edgefield, etc., R. Co., 2 Head (Tenn.) 23; Connecticut, etc., R. Co. v. Bailey, 24 Vt. 465; 58 Am. Dec. 181. See also Jack v. Naber, 15 Iowa 450; Ridgefield, etc., R. Co. v. Brush, 43 Conn. 86.

Parol evidence to show the letting of a grading contract, and the location of a certain town in compliance with conditions, is not excluded by the rule requiring the best evidence. St. Louis, etc., R. Co. v. Eakins, 30 Iowa 279.

1. **Collusive Agreements Void.**—White Mountains R. Co. v. Eastman, 34 N. H. 124.

Andrews, J., in Meyer v. Blair, 109 N. Y. 605; 4 Am. St. Rep. 500, observed: "The doctrine that an agreement between one subscriber to the stock of a corporation and the company, made concurrently with the making of the subscription, which purports to annul its obligation, or materially limit or change the liability of the subscriber, to the detriment of the company, is invalid and void, is founded upon the construction that a subscription to the stock of a corporation, whose stock is open for general subscription, is not only an undertaking between each subscriber and the company, but between him and all other subscribers to the common enterprise; and that each subscriber has the right to suppose that the subscription of every other subscriber is a *bona fide* undertaking according to its terms." Citing White Mountains R. Co. v.

Eastman, 34 N. H. 124; White v. Kuntz, 107 N. Y. 518; 1 Am. St. Rep. 886; Graff v. Pittsburgh, etc., R. Co., 31 Pa. St. 489; Miller v. Hanover, etc., R. Co., 87 Pa. St. 95; 30 Am. Rep. 349; Melvin v. Lamar Ins. Co., 80 Ill. 446.

In Melvin v. Lamar Ins. Co., 80 Ill. 456; 22 Am. Rep. 199, it is said: "All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits and subject to the same burdens. In the subscription of each person every other subscriber has a direct interest. There purported here to have been a large amount of stock taken, whereas, in fact, there was really no stock taken, the issue of the shares to Cushman and Hardin being coupled with the right on their part to surrender them and take back their money. Such a private arrangement with an individual subscriber, although it may not be intended, is, in law, a fraud upon the other subscribers; and such agreement will be disregarded, and the party be held bound to all the responsibilities of a *bona fide* subscriber. This is the doctrine, as we regard, abundantly established by judicial decisions," the court cited, Blodgett v. Morrill, 20 Vt. 509; White Mountains R. Co. v. Eastman, 34 N. H. 124; Robinson v. Pittsburgh, etc., R. Co., 32 Pa. St. 334; 72 Am. Dec. 792; Graff v. Pittsburgh, etc., R. Co., 31 Pa. St. 489; Stanhope's Case, L. R., 1 Ch. 161; Mangles v. Grand Collier Dock Co., 10 Sim. 519; Preston v. Grand Collier Dock Co., 11 Sim. 327. See also Phoenix Warehousing Co. v. Badger, 6 Hun (N. Y.) 293; *affirmed* 67 N. Y. 294; Downie v. White, 12 Wis. 176; 78 Am. Dec. 731; Crawford County v. Pittsburgh, etc., R. Co., 32 Pa. St. 141. Also Memphis, etc., R. Co. v. Sullivan, 57 Ga. 240; *Ex parte* Davidson, 4 K. & J. 688.

2. **Thigpen v. Mississippi Cent. R. Co., 32 Miss. 347.**

3. **Public Policy.**—Morrow v. Nashville Iron, etc., Co., 87 Tenn. 262; 10 Am. St. Rep. 667; Paducah, etc., R. Co. v. Parks, 2 Pick. (Tenn.) 560; Lake Ontario Shore R. Co. v. Curtiss,

particular cases will also be found in the notes where conditions were held unavailing.<sup>1</sup> But aside from the important exceptions above noted, conditions will generally be upheld by

80 N. Y. 219; *Ft. Edward, etc., Plank R. Co. v. Payne*, 15 N. Y. 583; *Macedon, etc., Plank R. Co. v. Snediker*, 18 Barb. (N. Y.) 317; *Butternuts, etc., Turnpike Co. v. North*, 1 Hill (N. Y.) 518; *Dix v. Shaver*, 14 Hun (N. Y.) 392.

**1. Invalid Conditions—Instances.**—Subscriptions to the capital stock of a plank road company, where the act of incorporation authorizes absolute subscriptions only, conditioned on a particular extension or location of a road, are void. *Fort Edward, etc., Plank R. Co. v. Payne*, 15 N. Y. 583; *Butternuts, etc., Turnpike Co. v. North*, 1 Hill (N. Y.) 518. So, if made preparatory to the procurement of the charter. *Bedford R. Co. v. Bowser*, 48 Pa. St. 34.

Matters collateral to the contract, such as failure to effect a proposed agreement with another corporation in the manner expected, will not exonerate a subscriber. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298.

Where a subscription to a railroad company was conditioned on the commencement of work at a certain point, which was falsely represented to have been commenced, the note given was held void. *Taylor v. Fletcher*, 15 Ind. 80. So where the location was made a condition. *Parker v. Thomas*, 19 Ind. 213; 81 Am. Dec. 385.

A subscription to a telegraph line, with a condition annexed naming a committee to see that stipulations were complied with before subscriptions were payable, was held not a condition precedent to recovery of the subscription. *Shaffner v. Jeffries*, 18 Mo. 512.

Conditions annexed to subscriptions providing for a dividend by way of interest on completion of the road, or one imposing unauthorized limitations on the power to call in stock, are void as against public policy. *Troy, etc., R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297.

The word "non-assessable" upon a certificate does not relieve from the obligation to pay the amount due upon the shares represented thereby; at most, it is only a stipulation against liability after the entire subscription has been paid. *Upton v. Tribilcock*, 91 U. S. 45.

Subscribers authorized by charter to

have the privilege of taking grading contracts, etc., cannot claim such rights after lettings have been publicly advertised to take place and the subscribers have not bid. *Johnson v. Crawfordsville, etc., R. Co.*, 11 Ind. 280.

A subscription conditioned upon being paid by conveying a specific tract of land, is a mere proposition; to be binding, it must be accepted by the directors, or, perhaps, an authorized agent; but not by members of a board of directors acting separately, and not shown to constitute a quorum. *Junction R. Co. v. Reeve*, 15 Ind. 236.

The incident of partial payment provided by a charter contemplating that the subscription should be absolute is lost when the subscription becomes conditional, and such payment is not necessary to enable the company to recover. *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36.

Where a subscription to a university building is conditioned upon its erection within a given time, it need not be completed within that time; if walls, etc., are up, roof and floors need not be in. *Johnston v. Ewing Female University*, 35 Ill. 518.

A subscription conditioned on a road "passing through" a given locality does not require its construction, but only its permanent location. *Ash-tabula, etc., R. Co. v. Smith*, 15 Ohio St. 328. And a further provision that a freight house shall be built is not a condition precedent to recovery. *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225.

Where a subscription was conditioned upon the particular location of a railroad, and notes were given in payment, it was held that performance of the condition was not intended to precede payment; that the subscriber having failed to pay the notes, could not set up a failure of performance; and that a mere intention to defraud could not be pleaded in bar of the action. *Keller v. Johnson*, 11 Ind. 337; 71 Am. Dec. 355.

A conditional subscriber may, with the assent of the company, change the terms of his agreement; and a note payable absolutely in lieu of such conditional obligation is presumed to be based on a sufficient consideration.

the courts, and failure in performance will prevent the enforcement of the contract.<sup>1</sup>

(c) **Common and Important Conditions**—(1) **CAPITAL STOCK TO BE FIXED.**—By one class of authorities there is held to be an implied condition, irrespective of charter provisions, that the exact amount of capital stock shall be fixed before subscriptions can be collected.<sup>2</sup> But there appears to be an almost equal number of cases to the

Henderson, etc., *R. Co. v. Moss*, 2 Duv. (Ky.) 242.

1. **Conditions Generally Enforceable.**—See *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337; *Burrows v. Smith*, 10 N. Y. 550; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; 35 Am. Rep. 536; *Morris Canal, etc., Co. v. Nathan*, 2 Hall (N. Y.) 239; *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225; *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 328; *McMillan v. Maysville, etc., R. Co.*, 15 B. Mon. (Ky.) 218; 41 Am. Dec. 181; *Dayton, etc., R. Co. v. Hatch*, 1 Disney (Ohio) 84; *Pittsburgh, etc., R. Co. v. Stewart*, 41 Pa. St. 54; *Caley v. Philadelphia, etc., R. Co.*, 80 Pa. St. 363; *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318; *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36; *Pellatt's Case*, L. R., 2 Ch. 527.

Conditional subscriptions are valid if not against public policy; an impossible condition will be deemed never to have really existed. *Racine County Bank v. Ayers*, 12 Wis. 512.

Conditional subscriptions cannot be withdrawn unless unreasonable delay occurs in performing the condition. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298.

Where the location of the railroad was made a condition precedent, and also the order of the board of directors accepting the subscription on such terms, the actual construction of the road is the best evidence of such order having been made. *Moore v. New Albany, etc., R. Co.*, 15 Ind. 78.

A condition requiring the expenditure of the amount of the subscription on a particular part of the enterprise is valid. *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 26.

In *Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318, subscriptions conditioned on a certain amount of stock being taken were held valid.

Subscriptions are valid if made after the act of incorporation is passed, though before letters patent are issued, if the company afterwards fulfill the

conditions necessary to their issuance. *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36.

The incorporation of a company with a larger capital stock than that stated in the prospectus releases the subscriber from being held as a contributory. *Stevens v. London Steel Works*, 15 Ont. (Can.) 75; 19 Am. & Eng. Corp. Cas. 255.

A promise by commissioners of subscription to advance money to subscribers to pay off prior incumbrances on land upon which bonds and mortgages have been given for subscriptions, must be carried out before subscriptions can be enforced. *Burrows v. Smith*, 10 N. Y. 550.

Acceptance by the company of five per cent. on subscriptions made on other conditions than those named in the articles of association, shows concurrence in those new conditions and creates mutuality. *Nichols v. Burlington Plank Road Co.*, 4 Greene, Iowa 42.

A subscriber to the stock of a company formed for the purpose of erecting a hotel is released if the building is inferior to the proposed plan. *Planks Tavern Co. v. Burkhard*, 87 Mich. 182.

2. **Implied Conditions of Fixed Capital Stock.**—See also *supra*, this title. In *Worcester, etc., R. Co. v. Hinds*, 8 Cush. (Mass.) 111, the court, by Fletcher, J., said: "Subscribers for shares only undertook to pay their proportion of a capital stock fixed by the directors; it being, of course, assumed, that the directors in the discharge of their duty would fix such an amount as would carry into effect the objects and purposes of the enterprise. But if a subscriber was compelled to pay his subscription before any capital stock was fixed, he might be compelled to pay before any sum was subscribed sufficient to carry on the work, and without any assurance that any such sum would ever be subscribed. By the terms of the subscription paper it is agreed, that such assessments shall be

contrary,<sup>1</sup> and, at most, the rule requires no formal action by the company. A resolution to issue a definite amount of stock,<sup>2</sup> in addition to that subscribed, to fix a date when no more subscriptions will be received,<sup>3</sup> or to close the corporate books on a day certain,<sup>4</sup> will be sufficient to fix the capital stock.

(2) CAPITAL STOCK TO BE FULLY SUBSCRIBED—(a) *Rule Generally Imperative—Exceptions.*—That all subscriptions are made upon the implied, if not expressed, condition that the specified number of shares must first be taken, is now settled by the great preponderance of American authority.<sup>5</sup> But there are cases holding the contrary

paid by the defendant, as may be required under the provisions of law. The provisions of law require that the directors shall determine the number of shares of which the capital stock shall consist. The directors in the present case not having determined the number of shares so as thus to form a capital stock, there was, according to the principles of law, no capital stock, the defendant's shares or proportions of which were legally liable to assessment, nor can the defendant be legally held to pay any such assessments. *Portland, etc., R. Co. v. Graham*, 11 Met. (Mass.) 1; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 143; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 312."

In *Troy, etc., R. Co. v. Newton*, 8 Gray (Mass.) 508, Dewey, J., says: "The present case does not in strictness fall within the cases where the amount of capital stock was fixed by the charter, as in *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23, and *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277; or those where the capital was fixed by the terms of the subscription books, as in *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50, and *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423. It is a case of a charter, making provisions as to the capital stock or number of shares, fixing the maximum of the capital stock to which the company may be entitled, but beyond that leaving the precise number of shares from time to time to be determined by the directors of the company. In the provisions in the charter as to the maximum of the stock, and as to the determination of the number of shares from time to time by the directors, the present case resembles the cases of *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311, and *Worcester, etc., R. Co. v. Hinds*, 8

*Cush. (Mass.) 110*. It differs from them both, as they do also from each other, in other circumstances. From these cases, however, the principle may be derived, as applicable to charters of this character, that it is the duty of the directors in such case to fix and determine the number of shares from time to time. This number may be enlarged; but for the time being there must be a fixed number. This is strictly so held in respect to assessments upon shareholders, who are such by force of ordinary subscriptions to the stock." See also *Somerset R. Co. v. Clarke*, 61 Me. 384; *Pike v. Bangor, etc., Shore Line R. Co.*, 68 Me. 445.

1. *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Kirksey v. Florida, etc., R. Co.*, 7 Fla. 23; 68 Am. Dec. 426; *White Mountains R. Co. v. Eastman*, 34 N. H. 124 (where the charter authorized calls before the full limit of the stock was fixed); *Warwick R. Co. v. Cady*, 11 R. I. 131.

Even in *Massachusetts*, the rule is modified so as to allow a "requisition" upon those who have made a contract for payment of certain amounts when the corporation should require them before fixing the capital stock. *Proprietors City Hotel v. Dickinson*, 6 Gray (Mass.) 586. The ground of distinction, however, between this and other *Massachusetts* cases cited above is not clear. See also *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587; *Penobscot R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Penobscot, etc., R. Co. v. Bartlett*, 12 Gray (Mass.) 244; 71 Am. Dec. 753.

2. *Penobscot, etc., R. Co. v. Bartlett*, 12 Gray (Mass.) 244; 71 Am. Dec. 753.

3. *Bucksport, etc., R. Co. v. Buck*, 65 Me. 536.

4. *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311.

5. *Full Capital Stock Must Be Subscribed.*—*Salem Mill Dam Corp. v.*

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Ropes, 6 Pick. (Mass.) 23; 9 Pick. (Mass.) 195; 19 Am. Dec. 363, is the fountain head of authority upon this principle of American corporation law. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, is another case in support of this doctrine. The articles of incorporation fixed the amount of the capital stock at two hundred thousand dollars, while the subscription paper stated the cost of the enterprise at not less than one hundred and fifty thousand dollars. The petition in an action to enforce subscriptions alleged that the total amount of subscription was one hundred and twenty-five thousand dollars, and the court held that a cause of action was not stated; citing *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; 9 Pick. (Mass.) 195; 19 Am. Dec. 363; *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 53; *Shurtz v. Schoolcraft, etc.*, R. Co., 9 Mich. 269; *Topeka Bridge Co. v. Cummings*, 3 Kan. 76; *Somerset R. Co. v. Clarke*, 61 Me. 384; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 404; 64 Am. Dec. 300; *Peoria, etc., R. Co. v. Preston*, 35 Iowa 118; *Fox v. Clifton*, 6 Bing. 776; *Pitchford v. Davies*, 5 M. & W. 2; 4 M. & M. 151.

In *Peoria, etc., R. Co. v. Preston*, 35 Iowa 119, Day, J., observes: "This whole question underwent an exhaustive discussion in *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23, decided in 1827. We despair of being able to add anything to the reasons there assigned. See also *Salem Mill Dam Corp. v. Ropes*, 9 Pick. (Mass.) 187; 19 Am. Dec. 363. This case was followed in *Massachusetts*, by *Central Turnpike Co. v. Valentine*, 10 Pick. (Mass.) 142; by *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50; by *Worcester, etc., R. Co. v. Hinds*, 8 Cush. (Mass.) 110; by *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 277; in *New Hampshire*, in *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300, decided in 1855; in *Maine*, in *Penobscot R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654, and in *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571, both decided in 1855. See also *Littleton Mfg. Co. v. Parker*, 14 N. H. 543, and *Contoocook Valley R. Co. v. Barker*, 32 N. H. 363." And in *Stoneham Branch R. Co. v. Gould*, 2 Gray (Mass.) 278, Shaw, C. J., says: "It is a rule of law too well settled to be now questioned, that when the capi-

tal stock and number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; 9 Pick. (Mass.) 187; 19 Am. Dec. 363; *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Worcester, etc., R. Co. v. Hinds*, 8 Cush. (Mass.) 110. This is no arbitrary rule; it is founded on a plain dictate of justice and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five hundredth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced towards it."

In *Anvil Min. Co. v. Sherman*, 74 Wis. 226, Orton, J., says: "It would appear unjust as well as a violation of the contract of subscription to assess the stock of one subscriber for the expenses of the general business of the corporation before it is authorized to do such business, and capable of making a fair and equal assessment upon all of its capital stock, and neither condition is complied with until all of its capital stock has been subscribed. It is to be observed that the contracts of subscription in all of the cases are materially alike. The cases which have followed the above ruling are too numerous to be cited here. Among them are *Newburyport Bridge v. Story*, 6 Pick. (Mass.) 45; *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Eaton v. Pacific Nat. Bank*, 144 Mass. 260; 19 Am. & Eng. Corp. Cas. 293; *Warwick R. Co. v. Cady*, 11 R. I. 131; *Haskell v. Worthington*, 94 Mo. 560; *Banty v. Buckles*, 68 Ind. 49; *Allman v. Havana, etc., R. Co.*, 88 Ill. 521; *Peoria, etc., R. Co. v. Preston*, 35 Iowa 115; *Rockland, etc., Steamboat Co. v. Sewall*, 78 Me. 167; 12 Am. & Eng. Corp. Cas. 85. This doctrine is laid down in the text-books as being sustained by an almost unbroken line

doctrine.<sup>1</sup> So where the statute or charter fixes a lower limit than the full capital stock, subscriptions to that limit are essential.<sup>2</sup>

of authorities. *Cook, Stocks*, §§ 104, 176; *Thomp. Liab., Stockh.*, § 120; *Green's Brice's, Ultra Vires* 153."

The following authorities from other states support this doctrine: *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86; *South Georgia, etc., R. Co. v. Ayers*, 56 Ga. 230; *Memphis, etc., R. Co. v. Sullivan*, 57 Ga. 240; *Temple v. Lemoa*, 112 Ill. 51; *Hoagland v. Cincinnati, etc., R. Co.*, 18 Ind. 452; *Peoria, etc., R. Co. v. Preston*, 35 Iowa 115; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 14; 63 Am. Dec. 522; *Lail v. Mt. Sterling, etc., Coalroad Co.*, 13 Bush (Ky.) 32; *Exposition R. Co. v. Canal St. R. Co.*, 42 La. Ann. 370; *Topeka Bridge Co. v. Cummings*, 3 Kan. 55; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; 9 Pick. (Mass.) 187; 19 Am. Dec. 363; *Penobscot, etc., R. Co. v. Bartlett*, 18 Gray (Mass.) 244; 71 Am. Dec. 753; *Boston R. Co. v. Wellington*, 113 Mass. 79; *Oldtown R. Co. v. Veazie*, 39 Me. 571; *Penobscot R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Belfast, etc., R. Co. v. Cottrell*, 66 Me. 185; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 236; *Hughes v. Antietam Mfg. Co.*, 34 Md. 318; *Shurtz v. Schoolcraft, etc., R. Co.*, 9 Mich. 269; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 390; *Monroe v. Ft. Wayne, etc., R. Co.*, 28 Mich. 272; *International Fair Assoc. v. Walker* (Mich. 1891), 36 Am. & Eng. R. Corp. Cas. 233; *Curry Hotel Co. v. Mullins* (Mich. 1892), 53 N. W. Rep. 360; *Selma, etc., R. Co. v. Anderson*, 51 Miss. 829; *Somerset R. Co. v. Clarke*, 61 Me. 379; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Anderson v. Middle, etc., R. Co.* (Tenn. 1891), 17 S. W. Rep. 803; *Hale v. Sanborn*, 16 Neb. 1; *Contoocook Valley R. Co. v. Barker*, 32 N. H. 363; *Hards v. Platte Valley Imp. Co.* (Neb. 1892), 53 N. W. Rep. 73; *Littleton Mfg. Co. v. Parker*, 14 N. H. 543; *Bray v. Farwell*, 81 N. Y. 600; *Erie, etc., R. Co. v. Owen*, 32 Barb. (N. Y.) 616; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Garrett v. Dillsburg, etc., R. Co.*, 78 Pa. St. 465; *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536; *Orynski v. Loustaunan* (Tex. 1890), 15 S. W. Rep. 674; *Winters v. Armstrong*, 37 Fed. Rep. 508.

But the securing of the required amount is an effectual acceptance of all conditional subscriptions. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298.

And a subscriber waives the prerequisite of full capital stock by acting as an officer and taking part in corporate meetings. *Masonic Temple Assoc. v. Channell*, 43 Minn. 353.

A premature contract, before the required capital stock has been paid in, for the construction of necessary works, will not release a subscriber. *Naugatuck Water Co. v. Nichols*, 58 Conn. 403; 31 Am. & Eng. Corp. Cas. 306.

1. **Exceptions to Rule.**—See *New Castle, etc., R. Co. v. Bell*, 8 Blackf. (Ind.) 584; *York, etc., R. Co. v. Pratt*, 40 Me. 447; *Skowegan, etc., R. Co. v. Kinsman*, 77 Me. 370; 22 Am. & Eng. R. Cas. 13; *Cheraw, etc., R. Co. v. White*, 14 S. Car. 51; *Chubb v. Upton*, 95 U. S. 665. Also *Belton Compress Co. v. Saunders*, 70 Tex. 699.

Where the act of incorporation fixes the minimum capital, provides for an increase, and clothes the company with the full powers of a corporation on a ten per cent. subscription, and payment of one dollar per share, the full minimum capital need not be subscribed before a recovery can be had upon a subscription. *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36.

Especially in *Oregon* the general rule is abrogated by statute and judicial construction. *Oregon Cent. R. Co. v. Scoggin*, 3 Oregon 161; *Willamette, etc., Freighting Co. v. Stannus*, 4 Oregon 261; *Astoria, etc., R. Co. v. Hill*, 20 Oregon 177.

2. *New Haven, etc., R. Co. v. Chapman*, 38 Conn. 65; *Hoagland v. Cincinnati, etc., R. Co.*, 18 Ind. 452; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Hunt v. Kansas, etc., R. Co.*, 11 Kan. 412; *Boston, etc., R. Co. v. Wellington*, 113 Mass. 79; *Lexington, etc., R. Co. v. Chandler*, 13 Met. (Mass.) 311; *Penobscot, etc., R. Co. v. Bartlett*, 12 Gray (Mass.) 244; 71 Am. Dec. 753; *Sedalia, etc., R. Co. v. Abell*, 17 Mo. App. 645; *Schenectady, etc., Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Rensselaer, etc., Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56; *Hamil-*



But it seems that the rule is not available against the claims of corporate creditors,<sup>1</sup> or if an intention to commence business beforehand is shown.<sup>2</sup> If the corporation is organized with a definite capital stock, the subscribers are liable for preliminary expenses.<sup>3</sup> In *England*, the principle above stated is generally acknowledged to be the common-law rule,<sup>4</sup> but it has been greatly modified by judicial departure and by statute.<sup>5</sup>

(b) *How Performance Is Determined*.—In determining whether the full amount of stock has been subscribed, it is generally permissible

ton, etc., *Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 166; *Perkins v. Saunders*, 56 Miss. 733; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36; *Norwich Lock Mfg. Co. v. Hockaday* (Va. 1893), 16 S. E. Rep. 877. But see *Galveston Hotel Co. v. Bolton*, 46 Tex. 633.

1. *Stewart v. Minnesota, etc., R. Co.*, 36 Minn. 369.

2. *Arkadelphia Cotton Mills v. Trimble* (Ark. 1891), 36 Am. & Eng. Corp. Cas. 253.

3. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 142.

4. *English Doctrine*.—*Galvanized Iron Co. v. Westoby*, 8 Exch. 17; *Fox v. Clifton*, 6 Bing. 776; 19 E. C. L. 233; *Wontner v. Sharp*, 4 C. B. 404; *Pitchford v. Davies*, 5 M. & W. 2; *Norwich, etc., Co. v. Theobald*, 1 M. & M. 151. But see *Lyon's Case*, 35 Beav. 646.

5. "The English courts seem to have no clearly defined rule in this matter, but allow each case to turn largely on its own facts; releasing the subscriber if the discrepancy in the subscriptions is very large, and holding him liable if it is small, or if he has in any way aided the company in beginning business." *Cook, Stock & Stockholders*, § 179.

Under 19 & 20 Vict., ch. 97, that the capital stock is deficient is not a good defense. *Ornamental, etc., Co. v. Brown*, 2 H. & C. 63.

But where the act of incorporation requires full subscription before any of its provisions "shall be put in force," an action on a call is not maintainable until all subscriptions are complete. *Norwich, etc., Nav. Co. v. Theobald*, 1 M. & M. 151. And *semble*, if but a small fraction of the proposed shares are taken, a few subscribers cannot insist on carrying on

the enterprise and making calls. *Houbeach Coal Co. v. Teague*, 5 H. & N. 151.

In the absence of fraud it is not necessary that the entire stock be subscribed before the corporate powers are exercisable. *Macdougall v. Jersey, etc., Hotel Co.*, 34 L. J. Ch. 28. In which case two-thirds of the stock was subscribed. See also *In re English, etc., Rolling Stock Co.*, 12 Jur. N. S. 738. But the fact that less than 1,000 out of 25,000 shares have been subscribed is a good defense. *Elder v. London Land Imp. Co.*, 30 L. T., N. S. 285. But see *Lyon's Case*, 35 Beav. 646.

And where the amount of stock is fixed, the directors have no right to employ assistants until such sum is subscribed. *Peirce v. Jersey Waterworks Co.*, L. R., 5 Ex. 209.

A provision that "so soon as 1,500,000l. shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act," does not make a full subscription a condition precedent to the exercise of the power to make calls, but only to the exercise of extraordinary powers, eminent domain, etc., as provided by the act. *Waterford R. Co. v. Dalbiac*, 6 Railway Cas. 753.

But where a clause empowers directors to continue, by formal resolution, the organization of registered members, even though the full stock is not subscribed, such resolution or the full subscription is a condition precedent to the power to make calls. *North Stafford Steel, etc., Co. v. Ward*, L. R., 3 Exch. 172. See also *Watts v. Salter*, 10 C. B. 477; 70 E. C. L. 477; *Lyon's Case*, 35 Beav. 646; *Johnson v. Goslett*, 3 C. B., N. S. 569; 91 E. C. L. 569; *London, etc., Assur. Co. v. Redgrave*, 4 C. B., N. S. 524; 93 E. C. L. 524; *Macdougall v. Jersey, etc., Hotel Co.*, 10 Jur., N. S. 1043; *Elder v. New Zealand Land Imp. Co.*, 30 L. T., N. S. 285; *Houbeach Coal Co. v. Teague*, 5 H. & N. 151.

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to count all subscriptions made in good faith,<sup>1</sup> though they are taken merely to complete the amount required for incorporation,<sup>2</sup> and though some of them prove to be worthless.<sup>3</sup> But conditional<sup>4</sup> or invalid<sup>5</sup> subscriptions, those given by insolvents,<sup>6</sup> by parties *non compos mentis*,<sup>7</sup> or by other corporations *ultra vires*,<sup>8</sup> may not be counted; nor may a subscription payable in other stock at par, but whose actual value is depreciated.<sup>9</sup> As to whether subscriptions payable in material or labor should be included the authorities are not harmonious.<sup>10</sup>

1. *Penobscot R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Penobscot R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 259.

2. *Mangles v. Grand Collier Dock Co.*, 2 R. Cas. (Eng.) 359.

3. *Penobscot R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Salem Mill Dam Corp. v. Ropes*, 9 Pick. (Mass.) 187; 19 Am. Dec. 363.

4. *California Southern Hotel Co. v. Russell*, 88 Cal. 277; *New York, etc., R. Co. v. Hunt*, 39 Conn. 75; *Brand v. Lawrenceville, etc., R. Co.*, 77 Ga. 506; *Oskaloosa Agr. Works v. Parkhurst*, 54 Iowa 357; *Troy, etc., R. Co. v. Newton*, 8 Gray (Mass.) 596. But a subscription conditioned upon the payment of interest has been included. *Rutland, etc., R. Co. v. Thrall*, 35 Vt. 536.

5. *Belfast, etc., R. Co. v. Cottrell*, 66 Me. 185; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

6. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; 77 Am. Dec. 237; *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568.

7. *Phillips v. Covington, etc., Bridge Co.*, 2 Metc. (Ky.) 219; *Hahn's Appeal* (Pa. 1886), 7 Atl. Rep. 482.

8. *Berry v. Yates*, 24 Barb. (N. Y.) 199.

9. *Ticonic Water Power, etc., Co. v. Lang*, 63 Me. 480.

The charter of a railroad company provided that no installments of subscriptions to its capital stock, after the first, should be called for until at least \$500,000 of the capital stock should be subscribed. After such subscriptions to the amount of \$200,000 had been made, a contractor agreed with the company to construct its road, and to accept in part payment, on the completion of the road, \$300,000 in its capital stock. The contractor afterward became insolvent, and failed to fulfill his contract. It was held that such agreement was not a subscription to stock within the meaning of the proviso in

the charter. *New York, etc., R. Co. v. Hunt*, 39 Conn. 75.

10. **Subscriptions not Payable in Cash.**—In *Troy, etc., R. Co. v. Newton*, 8 Gray (Mass.) 596, a subscription, by a firm of contractors, for building a railroad, of a certain number of shares, "being a portion of the twenty-five per cent. named in our contract for graduation," was held not to be equivalent to a cash subscription. The court said: "The receipt of the stock by them depended entirely upon a contingency, as the contractors might fail to do the work, and so no stock be earned."

On the other hand, in *Phillips v. Covington, etc., R. Co.*, 2 Metc. (Ky.) 219, the court said: "Stock had been subscribed by the contractors, which some of them were to pay in services, and others in materials to be used in the construction of the bridge. This stock was objected to on the ground that its payment depended upon the continuation of the work, and was, therefore, conditional in its nature, and also on the ground that it was not payable in money. It appeared in proof that the materials were to be furnished in payment of this stock, at as cheap a rate as they could have been purchased with money; and that the compensation agreed to be allowed for the services, part of which was to be paid in stock, did not exceed that which was reasonable, and which the company would have had to pay therefor, if the payment had been made altogether in money. Under these circumstances, we do not perceive any good reason why such stock should not be regarded as valid. It suited the purposes of the company as well as stock that was payable in money. It operated to save for the company money to the amount thereof, which it would have been compelled to expend had the stock not been taken.

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(3) **PERCENTAGE REQUIRED DOWN.**—A common provision in statutes and charters and sometimes in by-laws, is one requiring the payment of a stated portion of the amount at the time of subscription. Whether in such case a failure to make payment may be pleaded as a defense by the subscriber himself is a question which has been the source of litigation and want of judicial harmony. On the principle that one may not profit by his own wrong, the weight of authority supports the rule that a subscriber cannot thus escape his obligations.<sup>1</sup> By cases of this class also,

The result was precisely the same that it would have been if the stock had been payable in money, and the money, when paid, had been expended for the payment of these services and materials. The arrangement is not prejudicial to the other stockholders, nor does it give any advantage to the stockholders who have the privilege to pay their stock in this manner, inasmuch as they only receive the cash value of their services and materials, and as these services and materials are all indispensably necessary to enable the company to construct the bridge, the construction of which is the sole object of its incorporation."

In *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 99, A subscribed in the usual form, but under a private agreement with the directors to build the road and pay for the stock, half in cash and half in work and materials. A was not able to pay in cash and failed to build the road. It was held that another subscriber could not defeat an action on his subscription by setting up the invalidity of A's subscription. From this conclusion, however, two judges dissented. See also *Cabot, etc., Bridge v. Chapin*, 6 Cush. (Mass.) 50; *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571.

**1. Failure to Pay — Cases Holding that Subscriber cannot Plead it.**—*Minnesota, etc., R. Co. v. Bassett* 20 Minn. 535; *Haywood, etc., Plank Road Co. v. Bryan*, 6 Jones (N. Car.) 82; *McRea v. Russell*, 12 Ired. (N. Car.) 224.

Caton, C. J., says, in *Illinois River R. Co. v. Zimmer*, 20 Ill. 657: "If the commissioners, at the time the subscriptions were made, saw fit to give time upon the part which should have been paid down, they could not, for that reason, be permitted to refuse to the defendants the stock, when they should pay it in obedience to the call of the company for it. If the company violated its strict duty in giving

them time on the first payment, they could not be allowed to take advantage of that wrong and refuse the subscribers the benefit of the stock, when they should offer to pay for it. So, on the other hand, the defendants cannot be allowed to take advantage of the indulgence extended to them when they made their subscriptions for the purpose of repudiating them. This indulgence is a most ungracious defense, which should not be allowed, unless it is strictly required by some inflexible rule of law. Good faith to other subscribers, who may have been induced to take stock on the strength of these very subscriptions, requires that the defendants shall go on with them in the execution of the enterprise. Good faith to the creditors of the company, who had a right to look to the list of subscribers to determine whether the company was worthy of credit, imperiously demands that those, who by their subscriptions induced the credit, shall be compelled to contribute to the fund from which they are to receive their pay. *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 5; 63 Am. Dec. 522; *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30." See also *Smith v. Tallahassee Plank Road Co.*, 30 Ala. 650; *Selma, etc., R. Co. v. Rountree*, 7 Ala. 670; *Litchfield Bank v. Church*, 29 Conn. 137 (where payment was made by an agent); *Southern L. Ins., etc., Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448; *Napier v. Poe*, 12 Ga. 170; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Ryder v. Alton, etc., R. Co.*, 13 Ill. 516; *Klein v. Alton, etc., R. Co.*, 13 Ill. 514; *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655; *Barrington v. Mississippi, etc., R. Co.*, 32 Miss. 372; *Fiser v. Mississippi, etc., R. Co.*, 32 Miss. 359; *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583; *Henry v. Vermillion, etc., R. Co.*, 17 Ohio 191; *Ashtabula, etc., R. Co. v. Smith*, 15 Ohio St. 328; *Penobscot R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257;

even where payment was required to be in cash down, the acceptance of checks,<sup>1</sup> or promissory notes<sup>2</sup> has been approved. There is, on the other hand, a very respectable list of decisions, which hold that such conditions as to payment are imperative, and that their non-performance relieves the subscriber from liability.<sup>3</sup>

(4) *Consolidation*.—See CORPORATIONS, vol. 4, p. 272 i; RAILROADS, vol. 19, p. 775.

(5) *Fraudulent Representations*.—See CORPORATIONS, vol. 4, pp. 255, 259; FALSE PRETENSES, vol. 7, p. 699; FRAUD, vol. 8, p. 635; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 115.

(6) *Increase of Capital Stock*.—See STOCK, vol. 23, p. 582.

(7) *Irregular Organization*.—See CORPORATIONS, vol. 4, p. 197.

(8) *Mismanagement*.—(See also ULTRA VIRES).—The fact that the corporation is mismanaged is not available to a subscriber as

Hayne v. Buchanan, 32 Miss. 159; Vicksburg, etc., R. Co. v. McKean, 12 La. Ann. 638; Chamberlain v. Painesville, etc., R. Co., 15 Ohio St. 225; Spartanburg, etc., R. Co. v. Ezell, 14 S. Car. 281; 6 Am. & Eng. R. Cas. 605; Stuart v. Valley R. Co., 32 Gratt. (Va.) 146; Pittsburg, etc., R. Co. v. Applegate, 21 W. Va. 172; Greenville, etc., R. Co. v. Woodsides, 5 Rich. (S. Car.) 145.

This rule has been held even where a by-law provision makes a subscription void for non-payment. Piscataqua Ferry Co. v. Jones, 39 N. H. 491.

After a subscriber has paid a judgment for one call, he is estopped to set up non-performance of the conditions as to other installments. Hall v. Selma, etc., R. Co., 6 Ala. 741.

Where the charter required payment of \$5 down upon each share, but allowed the corporation to commence the construction of its works as soon as \$3,000 should be subscribed, it was held that the \$5 per share was not a condition precedent to organization or to commencing construction. Mitchell v. Rome R. Co., 17 Ga. 574.

1. People v. Stockton, etc., R. Co., 45 Cal. 306.

2. Hayne v. Beauchamp, 13 Miss. 515; Home Stock Ins. Co. v. Sherwood, 72 Mo. 461; Pine River Bank v. Hadsdon, 46 N. H. 114; McRea v. Russell, 12 Ired. (N. Car.) 224; Vermont Cent. R. Co. v. Claves, 21 Vt. 30.

3. Cases Holding that Such Defense is Available.—Jenkins v. Union Turnpike Co., 1 Cal. Cas. (N. Y.) 86; Excelsior Grain, etc., Co. v. Stayner, 25

Hun (N. Y.) 91; Syracuse, etc., R. Co. v. Gere, 4 Hun (N. Y.) 392; New York, etc., R. Co. v. Van Horn, 57 N. Y. 473.

Under the New York act of 1850, ten per cent. need not be paid on each subscription at incorporation; it is sufficient if all cash payments amount to ten per cent. Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451; People v. Chambers, 42 Cal. 201; Wood v. Coosa, etc., R. Co., 32 Ga. 273; Farmers, etc., Bank v. Nelson, 12 Md. 35; Taggart v. Western Md. R. Co., 24 Md. 588; 89 Am. Dec. 760; Charlotte, etc., R. Co. v. Blakely, 3 Strobb. (S. Car.) 245; State Ins. Co. v. Redmond, 1 McCrary (U. S.) 308; Hibernia Turnpike Co. v. Henderson, 8 S. & R. (Pa.) 219; 11 Am. Dec. 593; Leighty Susquehanna, etc., Turnpike Co., 14 S. & R. (Pa.) 434; Bucher v. Dillsburg, etc., R. Co., 76 Pa. St. 306 (under statute of 1868); Boyd v. Peach Bottom R. Co., 90 Pa. St. 169; 1 Am. & Eng. R. Cas. 631.

This rule has been somewhat modified in Pennsylvania, by other decisions. See Clark v. Monongahela Nav. Co., 10 Watts (Pa.) 364; Everhart v. West Chester, etc., R. Co., 28 Pa. St. 339; Philadelphia, etc., R. Co. v. Hickman, 28 Pa. St. 318, where the provision was held inoperative after organization.

Failure of a subscriber to pay the ten per cent. required down is no defense, where he permits his name to remain on the articles until after organization. Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465.

A statute passed during pendency of

a defense to the enforcement of his contract.<sup>1</sup> That evil must be corrected by other means.<sup>2</sup> Thus, the purchase of property at an exorbitant figure,<sup>3</sup> a fraudulent contract with another company,<sup>4</sup> expending funds in building a dam, when the corporation was created to maintain a flouring mill,<sup>5</sup> or acts resulting in the depreciation of the stock,<sup>6</sup> will not release a subscriber.

(9) *Mistake or Ignorance*.—See MISTAKE, vol. 15, p. 625.

(10) *Reduction of Capital Stock*.—See STOCK, vol. 23, p. 582.

(11) *Release*.—Where the corporate enterprise has been abandoned, a release by the directors on that account is a good defense,<sup>7</sup> but a plea of release without the averment of a consideration, and that the corporation is free from debt, is bad.<sup>8</sup> A release of a portion only of the subscribers is a good defense to an action against others not consenting thereto,<sup>9</sup> unless their liability

a suit for a subscription without such required payment, declaring that the corporation should have the same remedies as if former statutes had not required such payment, was held not to affect the existing action. *Ogle v. Somerset, etc., Turnpike R. Co.*, 13 S. & R. (Pa.) 256.

1. *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *People v. Barnett*, 91 Ill. 422.

In *Merrill v. Reaver*, 50 Iowa 404, Beck, C. J., for the court, said: "The defendant asked the court to direct the jury that the issue of bonds by the railroad company, in excess of the amount authorized by the articles of incorporation, which impaired the value of the stock by casting a cloud over the corporate property, would be a good defense against this action. The instruction was properly refused. The bonds, if illegally issued in excess of the amount authorized, are, therefore, void, and the stock of defendant could not be affected thereby. If they are legal, defendant cannot complain. By becoming a debtor to the corporation he is not clothed with the power to control its acts. A corporation may be legally yet so unwisely managed as to impair the value of its stock. Surely this would not relieve the stockholder of liability to pay his subscription to the corporation made for his stock. Men that become stockholders must assume a certain degree of risk that the affairs of the corporation will not always be wisely or even lawfully managed. When contracts are made by the officers of the corporation, which are void, the stockholder's remedy is to be pursued by resistance to the enforcement of such contracts. He cannot

withdraw from the corporation. Defendant's rights are the same."

2. See *infra*, this title, *Rights, Powers and Prerogatives*.

3. *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *Hornaday v. Indiana, etc., R. Co.*, 9 Ind. 263; *Dorris v. French*, 4 Hun (N. Y.) 202.

4. *People v. Logan County*, 63 Ill. 387.

5. *Ginrich v. Patron's Mill Co.*, 21 Kan. 59.

6. *People v. Barnett*, 91 Ill. 422.

7. *Nettles v. Marco*, 33 S. Car. 47.

8. *Zirkel v. Joliet Opera House*, 79 Ill. 334.

9. *Release of Other Subscribers*.—*Memphis R. Co. v. Sullivan*, 57 Ga. 240; *Rutz v. Esler, etc., Mfg. Co.*, 3 Ill. App. 83; *Crawford County v. Pittsburgh, etc., R. Co.*, 32 Pa. St. 141; *New York Exch. Co. v. DeWolf*, 31 N. Y. 273; 2 Den. (N. Y.) 403.

A municipal subscription to the stock of a company which previously released its private subscribers, is invalid. *Crawford County v. Pittsburgh, etc., R. Co.*, 32 Pa. St. 141.

An arrangement between officers and certain subscribers, that if the town in which the latter reside voted a certain amount of municipal aid, they should be released from the operation of their subscriptions, is void. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

But the fact that a trustee of an insolvent corporation appointed by the court to collect unpaid subscriptions has compromised with other delinquent stockholders, who made payments within a given time, is not a defense. *Hambleton v. Glenn* (Md. 1890), 31 Am. & Eng. Corp. Cas. 505.

is several.<sup>1</sup> Stockholders may claim the benefits of a release of the corporation.<sup>2</sup>

(12) *Set-Off and Counterclaim*.<sup>3</sup>—Where the corporation is a "going concern" and seeks to collect unpaid subscriptions for its own benefit exclusively, the subscriber may set off debts due from it to him,<sup>4</sup> and such a set-off allowed by the company cannot be afterwards questioned except for fraud.<sup>5</sup> Even as against the claims of corporate creditors, where the liability which they seek to enforce is one in addition to that for unpaid subscriptions, is immediate and several, and actionable by any creditor against any stockholder, set-off is generally available.<sup>6</sup> But where, in case of such additional liability, the statute providing for it creates a joint fund for the payment of creditors, and the corporation is insolvent, the stockholder must pay his proportion thereof and look to the corporate assets for the satisfaction of his claim.<sup>7</sup> So, as against the enforcement by creditors of the stockholder's ordinary liability for unpaid subscriptions, a set-off cannot be pleaded.<sup>8</sup> A stockholder cannot, by purchasing claims

1. *Stilphen v. Ware*, 45 Cal. 110; *Brown v. Eastern Slate Co.*, 134 Mass. 590; 3 Am. & Eng. Corp. Cas. 120; *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; *Hanson v. Donkersley*, 37 Mich. 184; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *Parrott v. Colby*, 6 Hun (N. Y.) 55; *affirmed*, 71 N. Y. 597; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Sutherland v. Olcott*, 95 N. Y. 93; *Jones v. Barlow*, 62 N. Y. 202; *Aultman's Appeal*, 98 Pa. St. 505; *Bank of Fort Madison v. Alden*, 129 U. S. 372.

2. *Bank of Poughkeepsie v. Ibbotson*, 5 Hill (N. Y.) 461; *Herries v. Platt*, 21 Hun (N. Y.) 132; *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

3. See generally SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 22, p. 209.

4. *Barnett's Case*, L. R., 19 Eq. 449. An agreement between the corporation and a subscriber, who held its note, that assessments on his shares should be regarded as payments on the note, is valid, and the note will be held to have been paid by sufficient assessments as against both the payee, and an indorsee after maturity. *Paine v. Central Vt. R. Co.*, 118 U. S. 152; 25 Am. & Eng. R. Cas. 37.

5. *Goodwin v. McGehee*, 15 Ala. 232; *Thompson v. Meisser*, 108 Ill. 359.

6. *Belcher v. Wilcox*, 40 Ga. 391; *Boyd v. Hall*, 56 Ga. 563; *Thompson v. Meisser*, 108 Ill. 359; *Buchanan v. Meisser*, 105 Ill. 638; *Garrison v.*

*Howe*, 17 N. Y. 458; *Jerman v. Benton*, 79 Mo. 148; *Mathez v. Neidig*, 72 N. Y. 100; *Agate v. Sands*, 73 N. Y. 620; *Wheeler v. Millar*, 90 N. Y. 353; *Richards v. Crocker*, 19 Abb. N. Cas. (N. Y.) 73; *Remington v. King*, 11 Abb. Pr. (N. Y.) 278; *Christensen v. Colby*, 43 Hun (N. Y.) 362; *Tallmadge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 352; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; 18 Am. Dec. 454; *Welles v. Stout*, 38 Fed. Rep. 807.

7. *Thebus v. Smiley*, 110 Ill. 316; *Buchanan v. Meisser*, 105 Ill. 638; *Weber v. Fickey*, 47 Md. 196; *Emmert v. Smith*, 40 Md. 123; *Matthews v. Albert*, 24 Md. 527; *In re Empire City Bank*, 18 N. Y. 199; *Lawrence v. Nelson*, 21 N. Y. 158; *Clapp v. Wright*, 21 Hun (N. Y.) 240; *Briggs v. Cornwell*, 9 Daly (N. Y.) 436; *Hillier v. Alleghany Mut. Ins. Co.*, 3 Pa. St. 470; 45 Am. Dec. 656; *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777; *Witters v. Sowles*, 32 Fed. Rep. 130; *Hobart v. Gould*, 8 Fed. Rep. 57.

A contributory of an insolvent company, who is also a creditor, cannot set off the debt due to him by the company against calls made in the course of winding up proceedings in respect of a double liability imposed by statute. *Maritime Bank v. Troop*, 16 Can. Sup. Ct. 456; 31 Am. & Eng. Corp. Cas. 410.

8. In *Scovill v. Thayer*, 105 U. S. 152, *Woods, J.*, said: "It is a general rule that a holder of claims against

against the corporation, extinguish his liability to an amount greater than that actually paid by him.<sup>1</sup>

(13) *Statute of Limitations*.—See *supra*, this title, *Calls and Assessments—Limitations*; also LIMITATION OF ACTIONS, vol. 13, p. 721.

(14) *Ultra Vires Acts*.—See ULTRA VIRES.

(15) *Miscellaneous Defenses*.—In the notes will be found instances of defenses which have been raised and passed on by the courts, but which hardly fall under any one of the preceding heads.<sup>2</sup>

an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation in a suit by an assignee in bankruptcy. *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Sanger v. Upton*, 91 U. S. 56; *Scammon v. Kimball*, 92 U. S. 362; *Morgan County v. Allen*, 103 U. S. 498."

"The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." *Sawyer v. Hoag*, 17 Wall. (U. S.) 622.

In support of the text, see *Quick v. Lemon*, 105 Ill. 578; 1 Am. & Eng. Corp. Cas. 620; *Singer v. Given*, 61 Iowa 93; 1 Am. & Eng. Corp. Cas. 87; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 10 Am. & Eng. Corp. Cas. 203; 3 Am. St. Rep. 797; *In re Empire City Bank*, 18 N. Y. 199; *Shickle v. Watts*, 94 Mo. 410; 21 Am. & Eng. Corp. Cas. 561; *Mathis v. Pridham* (Tex. App. 1892), 20 S. W. Rep. 1015; *Mudford's Case*, 14 Ch. Div. 634; *Black's Case*, L. R., 8 Ch. 254; *Griswell's Case*, L. R., 1 Ch. 528; *Bissitt v. Kentucky, etc., Nav. Co.*, 15 Fed. Rep. 363. See also *Boulton Carbon Co. v. Mills*, 78 Iowa 460; *Tama Water Power Co. v. Hopkins*, 79 Iowa 653; *Lawrence v. Nelson*, 21 N. Y. 158; *Scammon v. Kimball*, 5 Biss. (U. S.) 431; *Matthews v. Albert*, 24 Md. 527; *Hillier v. Allegheny Mut. Ins. Co.*, 3 Pa. St. 470; 45 Am. Dec. 656; *Long v. Penn Ins. Co.*, 6 Pa. St. 421; *Osgood v. Ogden*, 4 Keyes (N. Y.) 70; *Gill's Case*, 12 Ch. Div. 755; *Calisher's Case*, L. R., 5 Eq. 214; *Barnett's Case*,

L. R., 19 Eq. 449; *In re Whitehouse & Co.*, L. R., 9 Ch. Div. 595; *Garnett, etc., Min. Co. v. Sutton*, 3 B. & S. 321; 113 E. C. L. 320.

1. *Setting Off Purchased Claims*.—*Thompson v. Meisser*, 108 Ill. 359; 3 Am. St. Rep. 797; *Gauch v. Harrison*, 12 Ill. App. 457; *Bulkley v. Whitcomb*, 49 Hun (N. Y.) 290; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Goodwin v. McGehee*, 15 Ala. 232; *Peters v. Fort Madison Const. Co.*, 72 Iowa 405; *Briggs v. Cornwell*, 9 Daly (N. Y.) 436; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Manville v. Karst*, 16 Fed. Rep. 173.

2. Where there is no fraud, a failure of consideration will not invalidate certificates issued and delivered. *Protection L. Ins. Co. v. Osgood*, 93 Ill. 69.

Refusal to issue to a subscriber scrip for his shares is not a failure of consideration, where it appears that officers would thus render themselves liable for the amount to the company's creditors. *Battershall v. Davis*, 31 Barb. (N. Y.) 323.

Failure to incorporate, held not sufficient to relieve a subscriber; the equitable right in the capital of the proposed company being sufficient. *Smith v. Gillen*, 52 Ark. 442.

One who has received what he subscribed for, cannot complain of an issue of stock to those who could not have compelled it, whose names were not on the books, or who had not actually paid in the amount required down. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Subscription to an excess of the unauthorized stock cannot be enforced, but is not a defense to other subscriptions if the corporation is prepared to issue a sufficient amount of authorized stock. *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583; *Litchfield Bank v. Church*, 29 Conn. 137; *Smith v. North American Min. Co.*, 1 Nev. 430.

(16) *Waiver of Defenses*—(See also ESTOPPEL, vol. 7, p. 1; WAIVER).—Certain acts and declarations of subscribers have been treated by the courts as an implied waiver<sup>1</sup> of defenses otherwise valid. Thus, serving the corporation in some official capacity,<sup>2</sup> such as president,<sup>3</sup> director,<sup>4</sup> or judge of a corporate

It is a good defense to an action on a subscription that the subscriber had the option of paying \$500 or giving the right of way, and that he had chosen the latter. Such a defense is also good on the ground that it is a power not coupled with an interest and could be revoked before execution by the corporation. *Evansville, etc., R. Co. v. Wright*, 38 Ind. 64.

*Ultra vires* acts of the directors in allowing certain stockholders to pay up their subscriptions in depreciated confederate currency are no defense to an action against other stockholders for amounts due on proper calls. *Macon, etc., R. Co. v. Vason*, 57 Ga. 314.

Where both subscriber and corporation agree that another shall take the shares, and the transfer is effected with that understanding, the original subscriber is discharged. *In re Towns Drainage, etc., Co., L. R.*, 16 Eq. 104. That the certificate has not been tendered is not a defense. *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499; 71 Am. Dec. 337; *Fulgam v. Macon, etc., R. Co.*, 44 Ga. 597; *South Georgia, etc., R. Co. v. Ayers*, 56 Ga. 230; *Vawter v. Ohio, etc., R. Co.*, 14 Ind. 174; *Columbia Electric Co. v. Dixon*, 46 Minn. 463; *Astoria, etc., R. Co. v. Hill*, 20 Oregon 177; *Paducah, etc., R. Co. v. Parks*, 86 Tenn. 554; *Hawley v. Upton*, 102 U. S. 314.

In *England*, undue delay in registration will relieve the transferrer. *Ex parte Nation*, L. R., 3 Eq. 77; *Ex parte Read*, 36 L. J. Ch. 472; *Lowe's Case*, L. R., 9 Eq. 589. But not if the transferrer himself has been negligent. *Walker's Case*, L. R., 6 Eq. 30. And the transferee must be a responsible person. *Shipman's Case*, L. R., 5 Eq. 219.

The making of a premature contract by the company before the full capital stock is paid in will not release a subscriber. *Naugatuck Water Co. v. Nichols*, 58 Conn. 403; 31 Am. & Eng. Corp. Cas. 306.

The fact that a subscriber offered, during the solvency of the corporation, to pay for his stock, and the issue of it to him was refused, or the fact that an

attempt was made to prefer a director in making an assignment, will not afford a good defense to an action by the assignee of the corporation. *Potts v. Wallace*, 146 U. S. 689.

1. *Implied Waiver*.—*Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36.

A subscriber to a turnpike company who consents to a change in the route, cannot subsequently repudiate his subscription on the ground of indefiniteness in the articles as to corporate objects. *Owenton, etc., Turnpike Co. v. Smith* (Ky. 1890), 31 Am. & Eng. Corp. Cas. 312, n.

Evidence tending to show a waiver of the implied condition of full subscription should be submitted to the jury. *Hards v. Platte Valley Imp. Co.* (Neb. 1892), 53 N. W. Rep. 23.

2. Mere election without serving, is not a waiver. *Ridgefield, etc., R. Co. v. Reynolds*, 46 Conn. 375.

3. *Dayton, etc., R. Co. v. Hatch*. 1 Disney (Ohio) 84.

4. *Lane v. Brainerd*, 30 Conn. 565; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Masonic Temple Assoc. v. Channell*, 43 Minn. 353; *Ruggles v. Brock*, 6 Hun (N. Y.) 164; *West Cornwall R. Co. v. Mowatt*, L. R., 15 Q. B. 521; *Ex parte Mowatt*, 1 Drew 247; *Sharpley v. Louth, etc., R. Co.*, 2 Ch. Div. 665.

But in *Middlesex Turnpike Corp. v. Swan*, 10 Mass. 389; 6 Am. Dec. 139, where the subscriber had acted in several offices of the corporation, the court said: "The probable result of the defendant's engagement as a corporator is—and in this he may be subject in all respects to the corporate remedy provided by the statute—that all variations of the road originally built, expenses lawfully incurred connected with the original design or growing out of it, which the corporation, acting in their artificial capacity, have concurred in and authorized, are within his subscription for shares, his consent to become a proprietor, subject to the by-laws, rules, votes and undertakings of the corporation, so



election,<sup>1</sup> participating in the affairs of the company,<sup>2</sup> payment

far as these are within the scope of the original design, and so far as the legislature may permit; that being the ultimate authority to which each corporator submits himself. And this would be an answer to the supposed case of money paid on the original subscription. The promise, however, connected with this consent to become a corporator, is not to have the same latitude of interpretation. In that promise he is not a corporator, but an individual contracting with the corporation; and he undertakes in that extraordinary manner, referring himself to what the legislature had done, not to any probable subsequent grant. And it is not competent to one of the parties to change the terms of this collateral contract; and as there is no express, so there is no implied, consent, to be deduced from the circumstances proved in the case at bar, where the defendant may have been controlled by the will of the majority, or, if he concurred in the votes and proceedings of the corporation, it was as a corporator, not carrying with his concurrence any renewal of his supposed collateral promise."

1. *Pittsburg, etc., R. Co. v. Proudfit*, 2 Pittsb. (Pa.) 85.

2. *Participating in Corporate Affairs.*—*Cole v. Dyer*, 29 Ga. 434; *Stillman v. Dougherty*, 44 Md. 380; *Garling v. Baechtel*, 41 Md. 305; *Hager v. Cleveland*, 36 Md. 476; *Central Plank Road Co. v. Clemens*, 16 Mo. 359; *Erie, etc., Plank Road Co. v. Brown*, 25 Pa. St. 156; *Deposit, etc., Assurance Co. v. Ayscough*, 6 El. & Bl. 761.

Participation as a director in the business of the corporation before the full amount of stock is taken, is a waiver of such requirement. *Masonic Temple Assoc. v. Channell*, 43 Minn. 353.

Where a company begins business with less than the required capital, a subscriber waives that defense by writing to the directors and urging them to call a special meeting. *Tredwen v. Bourne*, 6 M. & W. 461. And by failure to refuse to take his stock under the rules where the company begins business on one-third of the capital. *Ex parte Hawkins*, 2 K. & J. 253.

But one who merely subscribes his name to the prospectus of a proposed company, and attends meetings of the subscribers, but pays no subscription,

is not chargeable for goods furnished the company when formed. *Bourne v. Freeth*, 9 B. & C. 632; 4 M. & R. 512.

One who subscribed with knowledge of a misrecital in the act of incorporation, and acts as a stockholder, is estopped to set up such misrecital as a defense. *Cromford, etc., R. Co. v. Lacey*, 3 Y. & J. 80.

Irregularities in the subscription, and a condition precedent therein, are waived by the subscriber acting as a director. *Lane v. Brainerd*, 30 Conn. 565. But see *Middlesex Turnpike Corp. v. Swan*, 10 Mass. 389; 6 Am. Dec. 139.

A clause in the subscription providing that the full amount should be expended in certain places, was held, in view of the fact that the subscriber accepted the directorship and must have intended to at once become a stockholder, to be directory merely, and not a condition precedent. *Lane v. Brainerd*, 30 Conn. 565.

Giving note for balance of subscription, and taking receipt stipulating that the amount of the note should, when paid, be applied thereon, is *prima facie* a waiver of conditions precedent. *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225.

Among other conditions was one that the academy being organized, should be leased to D; there was a waiver by him, and the subscriber was notified of such waiver, and declined to pay only on the ground that he had not the money. He was held liable for his proportion of money expended by the trustees, though other subscribers had since obtained an act of incorporation and chosen the same trustees. *Mirick v. French*, 2 Gray (Mass.) 420.

A railroad corporation voted to issue six hundred additional shares, and to allow each stockholder to take one new share for every two shares already held by him, provided he should by a certain day subscribe therefor, and pay a part of the price, and give notes for the remainder. Held, that there was no implied condition, that the whole number of six hundred new shares should be issued; and that the failure of the corporation to issue that number was no ground for maintaining an action by a stockholder, to recover back money so paid by him, nor for defeating an action on notes so

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of the subscription, in whole,<sup>1</sup> or in part,<sup>2</sup> or giving an absolute promissory note,<sup>3</sup> have been held to constitute a waiver. But mere silence will not generally have that effect.<sup>4</sup>

given by him. *Nutter v. Lexington, etc., R. Co.*, 6 Gray (Mass.) 85.

Mere payment of assessments to pave the route of a railroad surveyed has been held not sufficient to show acquiescence in deficient capital stock, or material amendment of charter. *Memphis, etc., R. Co. v. Sullivan*, 57 Ga. 240.

A subscriber is not estopped to defend where the assessment is made before the requirements of the charter are met, although he exhibited himself as a stockholder. *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571. Requirements of charter as to number of shares to be taken cannot be waived. *Memphis, etc. R. Co. v. Sullivan*, 57 Ga. 240. But see *Central Turnpike Corp. v. Valentine*, 10 Pick. (Mass.) 146.

A subscriber who votes at the organization, and for directors, is not relieved from liability on his subscription by the passage of an act reducing the amount prescribed by a former act, to be raised before corporate authority shall be granted. *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

There is no mutuality in an agreement by which parties subscribe under a general assurance from a corporation creditor that he will take the stock off their hands if they require. They cannot go on acting as stockholders until the concern proves disastrous and then force the agreement. *Slee v. Bloom*, 19 Johns. (N. Y.) 456; 20 Johns. (N. Y.) 669; 10 Am. Dec. 273.

One who represents himself as a stockholder may be estopped to claim that his subscription was irregular. *Cheltenham, etc., R. Co. v. Daniel*, L. R., 2 Q. B. 281; *Birmingham, etc., R. Co. v. Locke*, L. R., 12 Q. B. 256.

A stockholder who assists in framing a by-law, in accordance with which an assessment is levied, is estopped to question the legality thereof. *Willamette Freighting Co. v. Stannus*, 4 Oregon 261.

But one who subscribed to the capital stock of a corporation, while the charter prescribed a minimum number of shares, of which the capital stock should consist, which number was subsequently reduced by an amendment to the charter, was held not to be estopped to set up the original condition

of his subscription, though he has acted publicly as a stockholder, and held office in the corporation, and contributed towards the payment of its expenses. *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571.

1. **Payment.** — *Parks v. Evansville, etc., R. Co.*, 23 Ind. 567; *Ossipee Hosiery, etc. Mfg. Co. v. Canney*, 54 N. H. 295; *Littleton Mfg. Co. v. Parker*, 14 N. H. 543; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300; *Contoocook Valley R. Co. v. Barker*, 32 N. H. 363.

A condition precedent in a subscription to be paid for in land is waived, if the subscriber delivers an absolute deed to the company and receives his stock therefor. *Parks v. Evansville, etc., R. Co.*, 23 Ind. 567; *citing Evansville, etc., R. Co. v. Dunn*, 17 Ind. 603. *Contra*, *Garling v. Baechtel*, 41 Md. 305. And payment is not a waiver if made upon the false assurance of a corporate officer that an essential condition has been performed. *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86; *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539; *Somerset, etc., R. Co. v. Cushing*, 45 Me. 524; *Oldtown, etc., R. Co. v. Veazie*, 39 Me. 571; *Grosse Isle Hotel Co. v. L'Anson*, 43 N. J. L. 442; *Morris Canal, etc., Co. v. Nathan*, 2 Hall (N. Y.) 239; *Pittsburgh, etc., R. Co. v. Stewart*, 41 Pa. St. 54.

2. A subscriber who pays a required installment before the books are closed, though not at time of taking the stock, as required, is concluded from objecting to payment of the residue. *Klein v. Alton, etc., R. Co.*, 13 Ill. 514. See also *Hamilton v. Grangers' L. & H. Ins. Co.*, 67 Ga. 145; *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568; 6 Am. & Eng. Corp. Cas. 478; *Mississippi, etc., R. Co. v. Harris*, 36 Miss. 17.

3. *Keller v. Johnson*, 11 Ind. 337; 71 Am. Dec. 355; *O'Donald v. Evansville, etc., R. Co.*, 14 Ind. 259; *Evansville, etc., R. Co. v. Dunn*, 17 Ind. 603; *Slipher v. Earhart*, 83 Ind. 173; *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225.

4. *Burlington, etc., R. Co. v. Boestler*, 15 Iowa 555; *Bucksport, etc., R. Co. v. Brewer*, 67 Me. 295; *Hanover Junction, etc., R. Co. v. Haldeman*, 82 Pa. St. 36.

**III. RIGHTS, POWERS, AND PREROGATIVES**—(See CORPORATIONS, vol. 4, p. 184; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39) —1. **In General.**—The powers exercised by a corporation and its members, in the performance of their ordinary functions, have been classified as legislative, electoral, and administrative.<sup>1</sup> There are some ordinary rights of stockholders, however, which this classification would hardly include.<sup>2</sup> There are also certain extraordinary powers, such as those relative to consolidation,<sup>3</sup> and to the increase and reduction of stock.<sup>4</sup> Direct participation in the management of corporate affairs is not a right which stockholders as such can claim:<sup>5</sup> that right belongs to the ministerial officers of the corporation, and, during their terms, their plans will not be interfered with, even by the courts, merely to suit different views

A subscriber is not estopped to deny his obligation to pay in installments by reason of the fact that other subscribers were led to pay theirs by his acts. *Ridgefield, etc., R. Co. v. Brush*, 43 Conn. 86. But see *Gibbons v. Ellis* (Wis. 1893), 53 N. W. Rep. 701.

1. *Com. v. Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450. In this case it is said: "Corporate powers are usually distinguished into legislative, electoral and administrative; in private corporations aggregate, though sometimes all the members act immediately in the administration of its affairs, usually, for the sake of convenience, the direct management is intrusted by charter to certain officers, or a board of managers, elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions; the former, in the institution of by-laws for the general government of the company, the latter, in the superintendence and execution of its general business."

2. In *Forbes v. Memphis, etc., R. Co.*, 2 Woods (U. S.) 331. *Bradley, J.*, for the court, observed: "A commercial, or other business corporation, is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity totally distinct from that of any or all of its members considered as individuals. A corporation is a person. Its property is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein. The rights of a stockholder are, to meet at stockholders' meetings, to participate in the profits of the business,

and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know of any other rights, except incidental ones, subsidiary or auxiliary to these. Of course, a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law, or in equity, according to the nature of the case."

There are also some rights belonging to corporations without capital stock, and not properly treated here, such as the *delectus personarum*, or right to admit new members.

3. See CORPORATIONS, vol. 4, p. 272.

4. See STOCK, vol. 23, p. 582.

5. "The individual members of the corporation, whether they should all join or act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any personal or real estate, any security or chose in action; could not collect a debt or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the

of the stockholders as to corporate policy.<sup>1</sup> But the latter are entitled to have the corporate property applied solely to the promotion of charter purposes.<sup>2</sup> A stockholder may contract with the corporation and acquire the same rights thereby as any individual.<sup>3</sup>

**2. Legislative Rights.**—See BY-LAWS, vol. 2, p. 705; CORPORATIONS, vol. 4, p. 211.

**3. Electoral Rights.**—The subject of qualifications for, and exercise of the right to vote at corporate meetings, is treated, in the main, elsewhere.<sup>4</sup> In addition, it may be stated that the right to vote belongs to preferred stockholders.<sup>5</sup> The right, as between pledgor and pledgee, is treated elsewhere.<sup>6</sup> The right to vote is personal to the stockholder and cannot be taken from him by resolution or by law.<sup>7</sup> Stockholders are not disqualified to vote on a question before a corporate meeting because of a pecuniary interest in the settlement thereof.<sup>8</sup> Where one corporation is authorized to

organization of the institution gives them." *Shaw, C. J., in Smith v. Hurd*, 12 Met. (Mass.) 385; 46 Am. Dec. 690. See also *Humphreys v. McKissock*, 140 U. S. 312.

1. *State v. Bank of Louisiana*, 6 La. Ann. 746; *Salem Bank v. Gloucester Bank*, 17 Mass. 29; 9 Am. Dec. 111; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313; 64 Am. Dec. 375; *Conro v. Pt. Henry Iron Co.*, 12 Barb. (N. Y.) 27; *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Hoyt v. Thompson*, 19 N. Y. 207; *Dayton, etc., R. Co. v. Hatch*, 1 Disney (Ohio) 84; *Com. v. St. Mary's Church*, 6 S. & R. (Pa.) 508; *Dana v. Bank of United States*, 5 W. & S. (Pa.) 223.

2. *Rabe v. Dunlap* (N. J. 1893), 25 Atl. Rep. 959.

3. *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537.

A stockholder may purchase corporate property at sheriff's sale, and in the absence of fraud he is not accountable to other stockholders, though he bids it in much below its value. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118; 42 Am. Dec. 103.

4. See CUMULATIVE VOTING, vol. 4, p. 954; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 41.

5. *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136.

6. See PLEDGE AND COLLATERAL SECURITY, vol. 18, p. 703.

7. *Tomlin v. Farmers, etc., Bank* (Kansas City Ct. of App. Mch. 1893).

**8. Interest Does Not Disqualify.**—In *Gamble v. Queens County Water Co.*, 123 N. Y. 91; 31 Am. & Eng. Corp. Cas. 313, a stockholder had voted in favor of a resolution to purchase from himself certain property and to pay therefor in stock and bonds, and the court said: "In so doing, he committed no legal wrong. A shareholder has a legal right at a meeting of the shareholders to vote upon a measure, even though he has a personal interest therein, separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self-interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote upon their own stock vote upon it in the light solely of their own interest, or at least in what they conceive to be their own interest. Their action resulting from such votes must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority. In such case it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders."

In the very similar case of *Bjorn-*

hold stock in another, it may vote by virtue thereof,<sup>1</sup> and stock may be placed in the hands of a depository to be voted by him in accordance with instructions from a committee of the owners;<sup>2</sup> and general pledgees may be entitled to vote, though the charter confers the privilege only upon those pledgees who reserve it.<sup>3</sup>

**4. Right to Share in Distribution of New Stock.** — Those who are shareholders when an increase of the capital stock is effected, enjoy the right to subscribe to the new stock in proportion to their shares, and before subscriptions may be received from outsiders.<sup>4</sup> This

*aard v. Goodhue County Bank* (Minn. 1892), 52 N. W. Rep. 48, Chief Justice Gilfillan says: "While stockholders in a corporation owe the duty of good faith to each other in the management of the affairs of the corporation, they do not stand to each other in a fiduciary relation within the rule we have stated. They are not trustees nor agents for each other in the matter of voting upon any proposition that may come before a meeting of the stockholders. In voting, each must be guided by his own judgment as to what is for the best interest of the corporation. The fact that he may have a personal interest, separate from the others or from that of the corporation in the matter to be voted upon, does not affect his right to vote. It is not to be understood that the majority stockholders may use their power of voting for the purpose of defrauding the minority."

*Northwestern Transp. Co. v. Beatty*, L. R., 12 App. Cas. 589, is in point. At a meeting of the directors of the company, one Beatty, a director, secured the passage of a resolution for the purchase of a steamboat by the company from himself. At a general meeting of the shareholders the action of the directors was ratified, Beatty personally casting a majority of the votes therefor. But for the votes of B. the resolution would have failed of adoption. The defeated minority appealed to the courts, the case coming finally before the privy council, and it was adjudged that the vendor was entitled to exercise his voting power as a shareholder in the general meeting to ratify the action of the directors' meeting; that his doing so could not be deemed oppressive by reason of his individually possessing a majority of the votes acquired in the manner authorized by the constitution of the company.

1. *Davis v. U. S., etc., Co.* (Md. 1893), 25 Atl. Rep. 982.

2. *Ohio, etc., R. Co. v. Hamilton County* (Ohio 1892), 32 N. E. Rep. 933.

3. *Com. v. Dalzell* (Pa. 1893), 25 Atl. Rep. 535.

4. A leading case on this point is *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156, where the court, by Sewall, J., says: "Viewing a corporation of this kind as a copartnership, a power of increasing their stock, reserved in their original agreement, is a beneficial interest vested in each partner, to which no stranger can be made a party but by the consent of each subsisting partner; and it is a power which the subsisting partners must exercise proportionally and according to their interest in the original stock. Or, considering an incorporation for a bank, as I think it may be more correctly stated, to be a trust created with certain limitations and authorities, in which the corporation is the trustee for the management of the property, and each stockholder a *cestui que trust* according to his interest and shares, then a limitation of the capital to be employed in the trust, that it shall not be less than one sum, and not exceeding a certain greater sum, is not a power granted to the trustee to create another interest for the benefit of other persons than those concerned in the original trust, or for their benefit in any other proportions than those determined by their subsisting shares. It is clear that a power of that kind might be given, but not by the limitation supposed, which plainly relates to one and the same stock. Whether the least or the greatest, or any intermediate sum be employed in it, the trust is the same, and for the use and benefit of the same persons. A share in the stock or trust, when only the least sum has been paid in, is a share in the power of increasing it, when the trustee determines, or rather when the *cestuis que trustent* agree upon employing a greater sum,

right is generally absolute, and a bonus cannot be exacted as a condition of its exercise,<sup>1</sup> but it may be curtailed by charter provisions<sup>2</sup>, and limited as to the time within which it is to be exercised;<sup>3</sup> and it belongs only to actual stockholders,<sup>4</sup> and does not apply to reissues.<sup>5</sup> Where the new stock simply complements the authorized capital, it is held that old stockholders have no priority in its distribution over those who own no shares.<sup>6</sup> The right to share in the increase may be enforced in equity, and an

within the limits provided in the purposes of the trust." This doctrine has been affirmed in *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Atkins v. Albree*, 12 Allen (Mass.) 359; *Mason v. Davol Mills*, 132 Mass. 76; *Jones v. Morrison*, 31 Minn. 140; 1 Am. & Eng. Corp. Cas. 313; *Humboldt Driving Park Assoc. v. Stevens*, 34 Neb. 528; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312; *Jones v. Terre Haute*, etc., R. Co., 57 N. Y. 196; *Taylor v. Miami Exporting Co.*, 5 Ohio 162; 22 Am. Dec. 785; *State v. Franklin Bank*, 10 Ohio 91; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Wilson v. Bank of Montgomery County*, 29 Pa. St. 537; *Reese v. Bank of Montgomery Co.*, 31 Pa. St. 78; 72 Am. Dec. 726; *Curry v. Scott*, 54 Pa. St. 270; *Biddle's Appeal*, 99 Pa. St. 278; *Dousman v. Wisconsin*, etc., Min. Co., 40 Wis. 418. In the recent case of *Humboldt Driving Park Assoc. v. Stevens*, 34 Neb. 528, the court gave the following reason for the rule: "A number of persons relying upon the integrity of each other might be willing to become members of a corporation, while they would not become such members if the stockholders were unknown. This is particularly applicable in case of small corporations, like that of a driving park."

A vendor under an option to deliver within a year, though a *quasi* trustee for the purchaser, is not bound to advance his own money to preserve the purchaser's right to the shares issued by the corporation. And if the purchaser makes distinct demands, one for the stock with accrued dividends, and one for the new shares, he may recover on the former, though not entitled to the latter. *Currie v. White*, 45 N. Y. 822.

A grant of land by the state of *Florida* to a corporation having power to make contracts to accomplish corporate purposes, is not a grant to the original incorporators in the proportion in which they have subscribed, nor does it

authorize an allotment of the land to them. *Brown v. Florida*, etc., R. Co., 19 Fla. 472; 16 Am. & Eng. R. Cas. 463.

1. *Cunningham's Appeal*, 108 Pa. St. 546; *Dawson v. North American Ins. Co.*, 5 Rv. & Corp. Law J. 154.

2. In *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294, the charter provided that the directors "shall have power to increase the stock . . . on such terms and conditions, and in such manner as to them shall seem best." And the court held that this provision was sufficient to remove a stockholder's prior right to the increase, saying: "Now, this provision of the charter is utterly inconsistent with the proposition that the existing stockholders had the exclusive right to take the increased stock, in amounts proportionate to the quantities they then held of the original stock. How could the directors of the company, on the one hand, possess the power to increase the stock in such manner as to them seemed best, and at the same time, the stockholders, on the other hand, possess the power to compel an increase of it in but one single manner: viz., by giving it to them?"

3. *Hart v. St. Charles*, etc., R. Co., 30 La. Ann. 758; *Sewall v. Eastern R. Co.*, 9 Cush. (Mass.) 5. The right must be exercised with reasonable promptness. *Terry v. Eagle Lock Co.*, 47 Conn. 141.

4. Thus, a mere executory purchaser does not possess the right to share in the increase; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312; nor is the holder of notes convertible into shares at a certain date entitled to share in an independent increase of stock made prior to that date. *Pratt v. American Bell Telephone Co.*, 141 Mass. 225; 12 Am. & Eng. Corp. Cas. 110; 55 Am. Rep. 465.

5. *State v. Smith*, 48 Vt. 266; *Hartridge v. Rockwell*, R. M. Charlt. (Ga.) 260.

6. *Curry v. Scott*, 54 Pa. St. 270, where the court says, in distinguishing

action at law for damages will also lie.<sup>1</sup> The measure of damages is the highest market price which the stock afterwards attains, although pending the suit the corporation becomes insolvent.<sup>2</sup> But the plaintiff must prove a demand and offer to subscribe.<sup>3</sup> The liability of the corporation is several only, and each member must sue in his own right.<sup>4</sup>

5. **Right to Dividends.**—See DIVIDENDS, vol. 5, p. 725.

6. **Right to Inspect Corporate Books**—See PRODUCTION OF DOCUMENTS, vol. 19, p. 227.

7. **Right of Action.**—For actions by stockholders, see CORPORATIONS, vol. 4, p. 280; actions against officers, see OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 172; actions to compel issue of certificate, see STOCK, vol. 23, p. 582. See also ULTRA VIRES.

8. **Rights Upon Dissolution.**—See CORPORATIONS, vol. 4, p. 306.

IV. **LIABILITY**—1. **Nature and Extent**—a. **EQUITABLE OR SUBSCRIPTION LIABILITY**—(1) *The "Trust-Fund Doctrine"*—(a) **In General.**—The liability of members of a corporation is founded on statute.<sup>5</sup> But in the modern stock corporation, where membership is usually acquired by entering into the contract of subscription, each member may be said to assume the obligation to pay

the case from prior adjudications: "The cases upon which the plaintiff relies are inapplicable to the case now in hand. In *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156, it was held that when a banking company had been incorporated with a capital not less than one sum, and not greater than another, and had commenced business with the smaller capital, and afterwards voted to increase to the largest, those who held the stock in the capital first raised had a prior right to subscribe to the new stock. The case was really decided by two judges of a court consisting of five; but assuming its ruling to be sound law, it is unlike the case we have. Here is no increase of capital, but a filling up of one both authorized and required. This is a substantial difference. So the case of *Reese v. Bank of Montgomery County*, 31 Pa. St. 78; 72 Am. Dec. 726, decides nothing more than that untaken stock is held by the corporation in trust for the corporators, and must be disposed of for the benefit of all; that it cannot be disposed of unequally to the corporators, and that if so disposed of, each corporator injured may have his action against the corporation. Neither of these cases decides that a stockholder has any greater right than a stranger to subscribe to original stock untaken."

1. *Dousman v. Wisconsin*, etc., Min. Co., 40 Wis. 418; *Reading Trust Co.*

*v. Reading Iron Works*, 137 Pa. St. 282. But see *Sewall v. Eastern R.Co.*, 9 Cush. (Mass.) 5.

2. *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282.

3. *Wilson v. Bank of Montgomery County*, 29 Pa. St. 537.

4. *Dousman v. Wisconsin*, etc., Min. Co., 40 Wis. 418.

5. In *Gray v. Coffin*, 9 Cush. (Mass.) 199, Shaw, C. J., said: "To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in consideration of public policy, and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute." See also *Lindley on Partnership*, p. 13x. *Shaw v. Boylan*, 16 Ind. 384; *Andover Free Schools v. Flint*, 13 Met. (Mass.) 539; *Coffin v. Rich*, 45 Me. 511; 71 Am. Dec. 559; *French v. Teschemaker*, 24 Cal. 540; *Norton v. Hodges*, 100 Mass. 241; *Oliver v. Liverpool*, etc., Ins. Co., 100 Mass. 531; *Myers v. Irwin*, 2 S. & R. (Pa.) 371; *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Thomas v. Dakin*, 22 Wend. (N. Y.) 95; *Smith v. Hucka-*

to the company the full amount named in his contract ;<sup>1</sup> *i. e.*, he agrees to pay the corporation only, and the satisfaction of its claims, in any manner acceptable to it, discharges him from further liability.<sup>2</sup> But the American courts of equity have evolved the doctrine that by the act of subscription one becomes liable for the full amount thereof to corporate creditors as well as to the corporation ; that all who deal with the latter have a right to rely upon the total amount subscribed as a security for their claims—in a word, and in the language of the courts themselves, that unpaid subscriptions are a “trust fund” for the payment of creditors.<sup>3</sup> While in its origin this doctrine is distinctively Ameri-

bee, 53 Ala. 193; *Slee v. Bloom*, 19 Johns. (N. Y.) 456; 10 Am. Dec. 273.

1. *Smith v. Huckabee*, 53 Ala. 191; *Jones v. Jarman*, 34 Ark. 323; *French v. Teschemaker*, 24 Cal. 518; *Green v. Beckman*, 59 Cal. 545; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Shaw v. Boylan*, 16 Ind. 384; *Hampson v. Wear*, 4 Iowa 413; 66 Am. Dec. 116; *Adams v. Wiscasset Bank*, 1 Me. 361; 10 Am. Dec. 88; *Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 9; *Andover Free Schools v. Flint*, 13 Met. (Mass.) 539; *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Erickson v. Nesmith*, 4 Allen (Mass.) 433; *Essex Co. v. Lawrence Mach. Shop*, 10 Allen (Mass.) 352; *Norton v. Hodges*, 100 Mass. 241; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Freeland v. McCullough*, 1 Den. (N. Y.) 414; 43 Am. Dec. 685; *Seymour v. Sturgess*, 26 N. Y. 134; *Atwood v. Rhode Island Agr. Bank*, 1 R. I. 376; *Woods v. Wicks*, 7 Lea (Tenn.) 40; *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. (S. Car.) 227; *Bird v. Calvert*, 22 S. Car. 292; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Walker v. Lewis*, 49 Tex. 123; *Dauchy v. Brown*, 24 Vt. 197; *Terry v. Little*, 101 U. S. 216; *U. S. v. Knox*, 102 U. S. 422; *Knower v. Haines*, 31 Fed. Rep. 513. See also *Reinhold v. Ludeling*, 29 La. Ann. 552; *Schricker v. Ridings*, 65 Mo. 208; *Matthewes v. Stanford*, 17 Ga. 543.

2. *Morawetz, Corporations*, § 818; *Cooper v. Frederick*, 9 Ala. 739; *Jones v. Jarman*, 34 Ark. 323; *Spear v. Grant*, 16 Mass. 9; *Brown v. Fisk*, 23 Fed. Rep. 228; *Patterson v. Lynde*, 106 U. S. 519; 112 Ill. 204; 10 Am. & Eng. Corp. Cas. 195.

3. *Evolution of the Trust-Fund Doctrine*.—This doctrine appears to date from 1824, when it was formulated by Judge Story in *Wood v. Dummer*, 3 Mason (U. S.) 308. While he speaks

there of banking corporations, the principle announced was doubtless intended by him, and certainly has become, a general one. It is stated thus: “The capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation, it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for the payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me, this point appears so plain, upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The billholders and other creditors have the first claim upon it, and the stockholders have no rights until all the other creditors are satisfied.”

In *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, it was said: “The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as



can, and does not obtain in *England*,<sup>1</sup> yet by statute, a limited

the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." And in *Handley v. Stutz*, 139 U. S. 427, Brown, J., observed: "Ever since the case of *Sawyer v. Hoag*, 17 Wall. (U. S.) 731, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *Morgan County v. Allen*, 103 U. S. 498; *Hawkins v. Glenn*, 131 U. S. 319; 26 Am. & Eng. Corp. Cas. 318; *Graham v. La Crosse, etc.*, R. Co., 102 U. S. 148; 1 Am. & Eng. R. Cas. 416; *Richardson v. Green*, 130 U. S. 104."

The doctrine has been confirmed by a long list of American authorities. In addition to those cited above, see *Winans v. McKean R., etc.*, Co., 6 Blatchf. (U. S.) 216; *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86; *Holmes v. Sherwood*, 3 McCrary (U. S.) 405; 16 Fed. Rep. 725; *Marsh v. Burroughs*, 1 Woods (U. S.) 463; *Chicago, etc., R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Scammon v. Kimball*, 92 U. S. 362; *Hatch v. Dana*, 101 U. S. 205; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Goodwin v. McGehee*, 15 Ala. 232; *Smith v. Huckabee*, 53 Ala. 191; *Glenn v. Semple*, 80 Ala. 159; 60 Am. Rep. 92; *Jones v. Arkansas, etc., Co.*, 38 Ark. 17; *Baines v. Babcock*, 95 Cal. 981; *Crandall v. Lincoln*, 52 Conn. 73; 52 Am. Rep. 560; *Hightower v. Thornton*, 8 Ga. 486; *Clapp v. Peterson*, 104 Ill. 26; *Coffin v. Ransdell*, 110 Ind. 417; 16 Am. & Eng.

Corp. Cas. 432; *Osgood v. King*, 42 Iowa 478; *Robertson v. Conrey*, 5 La. Ann. 297; *Rider v. Morrison*, 54 Md. 429; *Appleton v. Turnbull*, 84 Me. 72; *Farnsworth v. Robbins*, 36 Minn. 369; *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Haskell v. Sells*, 14 Mo. App. 91; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Slee v. Bloom*, 19 Johns. (N. Y.) 456; 10 Am. Dec. 273; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; 18 Am. Dec. 454; *Mann v. Pentz*, 3 N. Y. 415; *Dayton v. Borst*, 31 N. Y. 435; *Bartlett v. Drew*, 57 N. Y. 587; *Nathan v. Whitlock*, 3 Edw. Ch. (N. Y.) 215; *Hastings v. Drew*, 76 N. Y. 9; *Gilmore v. Bank of Cincinnati*, 8 Ohio 62; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. (Pa.) 534; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *Ohio L. Ins., etc., Co. v. Merchants' Ins. & T. Co.*, 11 Humph. (Tenn.) 1; 53 Am. Dec. 742; *Adler v. Milwaukee Brick Mfg. Co.*, 13 Wis. 60; *Fowler v. Robinson*, 31 Me. 189; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 598. See also *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199; *Van Cott v. Van Brunt*, 2 Abb. N. Cas. (N. Y.) 283; *State Sav. Assoc. v. Kellogg*, 63 Mo. 540; *In re Bachman*, 12 Nat. Bankr. Reg. 223; *Tuckerman v. Brown*, 33 N. Y. 297; 88 Am. Dec. 386; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Osgood v. Laytin*, 3 Keyes (N. Y.) 521; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; *Walker v. Lewis*, 49 Tex. 123; *Matthews v. Albert*, 24 Md. 527; *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Md. 492; *Booth v. Campbell*, 37 Md. 522; *Emmert v. Smith*, 40 Md. 123; *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1365; *Ryan v. Leavenworth, etc.*, R. Co., 21 Kan. 365.

Where the corporation is insolvent and has been placed in the hands of a receiver, a statute authorizing a judgment creditor to have execution against the stockholders does not apply. *Showalter v. Laredo Imp. Co.*, 83 Tex. 162.

In the absence of fraud the stockholders cannot be held liable upon original shares not disposed of by the company, and to which they did not subscribe. *Sweney v. Talcott* (Iowa, 1892), 52 N. W. Rep. 106.

1. "I have not found a similar statement of doctrine in any English books

application of similar principles is there allowed.<sup>1</sup> The more recent applications of the doctrine have been subjected to considerable criticism in this country.<sup>2</sup>

(b) *Applications of the Doctrine*—(1) *STOCK ISSUED FOR AN OVERVALUED CONSIDERATION*.—It is elsewhere stated that payment for stock may be made in property or services.<sup>3</sup> But suppose that these are accepted at an overvaluation; under the trust fund doctrine, can corporate creditors compel such stockholders to make good the difference between the actual and accepted value of their payments? The decisions are not harmonious on this point, and may be divided into three groups: *First*, those which hold that in the absence of an affirmative showing of fraud *aliunde*, mere overvaluation will not render the stockholder liable for the difference; <sup>4</sup> *Second*, those holding that overvaluation itself, especially

of reports." Thompson, *Liability of Stockholders*, § 10, n. 2. See also *Beach Priv. Corp.*, § 123.

1. "Now, what are the rights of creditors? To make every present and past member of the company liable to the debts and liabilities of the company, and the expenses of winding up subject to limitations in the 35th section of the Companies Act, 1862. The rights of the creditors are only against members, or persons who have been members, within twelve months; and who are members depends on the memorandum, the articles and the general law." Cotton, L. J., in *Re Dronfield Silkstone Coal Co.*, 17 Ch. Div. 93. And in the same case James, L. J., observed: "I am of opinion that the creditor *qua* creditor has no right except according to the statute, and within the limits prescribed by the statute. He has a right to proceed against every present member, and against every past member who was a member within twelve months before the commencement of the winding up. That is the extent of his right. Creditors know, or have the means of knowing, who are the shareholders in a company, and the limit of twelve months was fixed because a creditor may be presumed to go on trusting a company on the faith of the persons who were shareholders when his debt was contracted, until he has means of knowing that a change of shareholders has taken place."

2. The case of *Handley v. Stutz*, 139 U. S. 417, affords the text for a criticism of the doctrine in an article by R. C. McMurtrie, Esq., in 25 Am. Law. Rev. 749. See also *Hospes v. North Western, etc., Mfg. Co.* (Minn. 1892). 36 Am. & Eng. Corp. Cas. 206, where the court

speaks of the phrase as "misleading, if not inaccurate."

3. See *supra*, this title, *Consideration and Payment*.

4. *Cases Holding that There Is No Liability for Mere Overvaluation*.—*Schenck v. Andrews*, 57 N. Y. 147; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 94.

*Van Cott v. Van Brunt*, 82 N. Y. 535, was an action by a receiver of a railroad company, against V, the president, and a director thereof, who had entered into a contract in behalf of the company, with one C, to build and equip a portion of the road, and to receive therefor a certain amount of stock and bonds. C immediately assigned the contract to V, who performed it at a cost to himself of less than the par value of the stock and bonds received, but more than their actual value. The court, without deciding the question whether, had the defendant realized a profit beyond the amount actually expended in construction, all benefits would inure to the company, held as follows: "In view of the facts presented, no sufficient reason appears why the stock held by V and not subscribed for by him should not be treated and regarded as full paid-up stock. It was evidently intended by the parties that it should, and such was manifestly the agreement by which the stock was transferred in payment of the building of a portion of the road. If the rule be once established that no agreement can be made to build railroads by the transfer of stocks or bonds to the contractor, without rendering him liable for the par value thereof, it would seriously interfere with the construction of enterprises of this description, and would prevent

the building of many railroads. We are unable to discover any reason why stock and bonds may not be transferred to a contractor to pay for the building of a railroad, where the contract is made in good faith and with no fraudulent intent, although such stock or bonds should prove to be worth even more than the amount allowed for the same."

In *Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343; 15 Am. & Eng. Corp. Cas. 610, the plaintiff, a judgment creditor of an insolvent corporation, filed a bill in equity against the stockholders, who had paid for their shares in mining property, accepted at their own estimates. The court, by Field, J., said: "The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription."

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the incorporators in their business, which was continued under the charter. They were immediately serviceable, and, therefore, had to the company a present value. The incorporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made."

*Phelan v. Hazard*, 5 Dill. (U. S.) 45, is a case often cited under this group, but the precise question now under discussion was not there involved. The following statement *obiter* and the cases cited in support of it, will probably account for the frequent citation of *Phelan v. Hazard*, 5 Dill. (U. S.) 45, in this connection: "The cases are numerous in which such transactions as that which was entered into in this instance between the owners of the mining property and the corporation which they formed have come before the courts, and, in the absence of fraud, have been

sustained. *Pell's Case*, L. R., 5 Ch. 11; *In re Baglan Hall Colliery Co.*, L. R., 5 Ch. 346; *Maynard's Case*, L. R., 9 Ch. 60; *Schroeder's Case*, L. R., 11 Eq. 131; *Cleland's Case*, L. R., 14 Eq. 387; *Sichell's Case*, L. R., 3 Ch. 119; *Jones' Case*, L. R., 6 Ch. 48; *Forbes & Judd's Case*, L. R., 5 Ch. 270; *Pritchard's Case*, L. R., 8 Ch. 956; *Ferrao's Case*, L. R., 9 Ch. 355; *Bush's Case*, L. R., 9 Ch. 554; *Dent's Case*, L. R., 8 Ch. 768; *Carling's Case*, 1 Ch. Div. 115; *Savage v. Ball*, 17 N. J. Eq. 142; *Smith v. North American Min. Co.*, 1 Nev. 423; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Spence v. Iowa Valley, etc., Co.*, 36 Iowa 411."

But in speaking of the practice of citing English cases on this question, Walker, J., in *Elyton Land Co. v. Birmingham, etc., Co.*, 92 Ala. 407; 35 Am. & Eng. Corp. Cas. 597, says: "The absence of the recognition of English cases of this trust feature of a subscription to stock renders them unsafe guides in American courts when dealing with questions relating to the liability of stockholders in reference to the debts of the corporation."

In *Du Pont v. Tilden*, 42 Fed. Rep. 87; 30 Am. & Eng. Corp. Cas. 129, it was held that where a corporation is authorized by its charter to purchase real estate and pay for the same in stock, the *bona fide* purchaser of stock which has been issued in payment of land to an amount greatly in excess of the value of the land, is not liable to creditors of the corporation as for unpaid stock, when there was no fraud in the issue of the stock and the corporation has taken no steps to rescind the transaction.

And in *Bickley v. Schlag*, 46 N. J. Eq. 533, *Beasley, C. J.*, said: "In view of the proof in the case it was not and could not be disputed that the stock in question, as between these stockholders and the corporation, had been paid for in full; for they had transferred to the company, in satisfaction for it, certain steamboats and other property, each share so purchased being marked with the words, 'issued for property purchased.' Consequently, so long as this contract of sale subsisted, an indisputable title to the stock existed in the stockholders, and it was also thereby conclusively established that they were in no wise indebted to the company by reason of their purchase. The inquiry, therefore, in the court below should have been whether the agreement in

if gross, constitutes, or at least raises a strong presumption of fraud;<sup>1</sup> *Third*, those which apparently ignore the element of actual and technical fraud, and hold that purchasers of stock should be credited only with the true value of that which they give in payment, and that creditors may look to them for the difference between such value and that of the stock as issued,<sup>2</sup> except where such creditors are also stockholders and have notice

question was fraudulent or not; for, if the transaction was an honest one, the difference in value between the property constituting the consideration of the sale and the stock had no legal significance. The charter of this company authorizes the corporation to exchange its capital stock for property, and, under that condition of things, a court of equity cannot set aside a transaction of that kind simply on the ground that the bargain on the side of the corporation is a disadvantageous one. In such affairs the company and the purchaser stand on the common footing of buyer and seller." See also, as further illustrating this doctrine, *Davis v. Montgomery Furnace, etc., Co.* (Ala. 1890), 8 So. Rep. 496; *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88; *Coffin v. Ransdell*, 110 Ind. 417; 16 Am. & Eng. Corp. Cas. 432; *Medler v. Albuquerque Hotel, etc., Co.* (N. Mex. 1892), 28 Pac. Rep. 551; *Whitehill v. Jacobs*, 75 Wis. 476; *Bank of Fort Madison v. Alden*, 129 U. S. 372; 26 Am. & Eng. Corp. Cas. 71; *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879. Compare *Brant v. Ehlen*, 59 Md. 1; *Carr v. LeFevre*, 27 Pa. St. 413.

1. **Overvaluation as a Badge of Fraud.**—*Douglass v. Ireland*, 73 N. Y. 104; *Boynton v. Hatch*, 47 N. Y. 232.

In *Boynton v. Andrews*, 63 N. Y. 96, it was said: "It cannot be questioned that where property, the value of which is well known and understood, or capable of being easily ascertained, is taken at a most exorbitant estimate, far beyond any intrinsic and real value, it raises a strong presumption that the valuation is not in good faith and was made for a fraudulent purpose. This presumption will be conclusive unless it is rebutted by evidence which fully explains the apparent bad faith. In the case at bar the whole amount of capital for which the stock was issued was \$100,000. It is proved by the trustee from whom it was purchased that it was worth not to exceed \$50,000, and

it is thus established beyond any controversy that it was taken for double its real value. The articles taken were not of a class where the value was not apparent or depended upon circumstances, but such as any one familiar with that species of property could readily ascertain and estimate. In fact the trustee from whom they were purchased knew all about them, as he had been the owner of the property, and the valuation he placed upon them is a conceded fact. There could be no mistake or error of judgment in fixing a value upon this particular property by its owner, and under the circumstances it is manifest that there was a plain case of gross overvaluation with full knowledge of the facts. Such a transaction was fraudulent in law, on its face." See also *Blake v. Griswold*, 103 N. Y. 429; *Northwestern Mut. L. Ins. Co. v. Cotton Exch., etc., Co.*, 46 Fed. Rep. 22.

2. **Stockholders Credited Only With Actual Value.**—*Joseph v. Davis* (Ala. 1892), 10 So. Rep. 830; *Fitzpatrick v. Dispatch Publishing Co.*, 83 Ala. 604; 19 Am. & Eng. Corp. Cas. 423; *Williams v. Evans*, 87 Ala. 725; *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187; 7 Am. & Eng. Corp. Cas. 101; *Osgood v. King*, 42 Iowa 478; *Jackson v. Traer*, 64 Iowa 469; 52 Am. Rep. 449; *Chisholm v. Forney*, 65 Iowa 333; *Halderman v. Ainslie*, 82 Ky. 395; *Libby v. Tobey*, 82 Me. 397; 31 Am. & Eng. Corp. Cas. 526; *McAvity v. Lincoln Pulp, etc., Co.*, 82 Me. 504; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Gamble v. Queens County Water Co.*, 123 N. Y. 91; 31 Am. & Eng. Corp. Cas. 313; *Clayton v. Ore Knob Copper Co.* (N. Car. 1891), 14 S. E. Rep. 36; *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302; *Bailey v. Pittsburgh, etc., Coal Co.*, 69 Pa. St. 334; *Gogebic Investment Co. v. Iron Chief Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417; *Thorold v. Neelon*, 18 Ont. App. Rep. 658; *Memphis, etc., Co. v. Dow*, 120 U. S. 287.

In *Shickle v. Watts*, 94 Mo. 410, the

of the agreement to issue the shares for less than face value.<sup>1</sup> Many decisions of the third group were rendered under statutes which prohibit the issue of stock for property, except at its par value. There is a substantial agreement in all the cases that where fraud is actually shown, the stockholders are liable.<sup>2</sup> In estimating the value of the property or services given, a fair profit should be allowed to the purchaser.<sup>3</sup>

(2) DISCOUNTING SHARES AND RELEASING SUBSCRIBERS.—Under the trust fund doctrine, creditors may enforce the payment of subscriptions at par, even though the corporation has agreed to ac-

court said: "Where an agreement is entered into between a contractor and a corporation, whereby the former is to perform work for or furnish material to, the latter, and take unpaid stock in part or in full payment, such contractor, whether for labor or material, can only charge therefor the reasonable market value for such labor or material thus given in exchange, and all agreements by the corporation to pay more than such reasonable compensation will be disregarded and held for naught by the courts, where the rights of creditors intervene; and this is the case even though no fraud be proven."

A strong authority under this group is *Elyton Land Co. v. Birmingham Warehouse, etc., Co.*, 92 Ala. 407; 35 Am. & Eng. Corp. Cas. 597. It will be found to contain almost a complete resumé of the cases *pro* and *con* on the question raised in the text, and, in summing up its conclusions, the court says: "Our examination satisfies us that the weight of American authority does not support the statement made by Mr. Cook, in section 47 of his work on Stocks and Stockholders, to the effect that the attempts which have been made in cases where stock was issued for property taken at an overvaluation, to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him, have been unsuccessful; and that, if there has been an overvaluation, which is shown to have been fraudulent, then the contract is to be treated like other fraudulent contracts, and is to be adopted *in toto* or rescinded *in toto* and set aside. We have found no authority at all asserting the exemption of the stockholder from such liability where it appeared that the stock subscription was governed by a statutory regulation at all similar to section 1805 of the Code

of 1876, or section 1662 of the Code of 1886. On the other hand, the *New York, New Jersey, Maryland, and Pennsylvania* decisions which have been cited show that the courts in those states, in giving effect to statutory requirements, certainly no more stringent than ours, as to the mode in which stock subscriptions shall be made payable, do not allow attempted payments in property worth greatly less than the amount of the stock issued therefor to foreclose the just demand of corporate creditors to require that the stock subscription be made good in money, or in money's worth, as contemplated by the statutes. Those courts recognize in such provisions safeguards intended for the protection of persons dealing with corporations as well as for the corporations themselves and the persons associated together therein."

But shares representing the difference between the face value of a certain issue and the actual consideration, are not "fictitious" within the meaning of a constitutional inhibition. *Mathis v. Pridham* (Tex. App. 1892), 20 S. W. Rep. 1015.

1. *Mathis v. Pridham* (Tex. App. 1892), 20 S. W. Rep. 1015.

2. *Crawford v. Rohrer*, 59 Md. 599; 1 Am. & Eng. Corp. Cas. 81; and see generally cases cited in foot notes immediately preceding this.

3. In *Gamble v. Queens County Water Co.*, 123 N. Y. 91; 31 Am. & Eng. Corp. Cas. 313, Peckham, J., for the court, observed: "When viewing the completed work, and endeavoring to place some value upon it, we are not to be confined to the mere cost of materials, and the value of the labor contained in and expended upon it. A fair profit to the contractor is to be included, and the inquiry should be what, under all the circumstances, is the fair value of the property to the company con-

cept a less amount,<sup>1</sup> or even where its officers have falsely repre-

sidering its proposed use by it, and the general purpose for which the company is organized. This seems to be the rule derived from the cases of *Schenck v. Andrews*, 57 N. Y. 142; *Boynton v. Andrews*, 63 N. Y. 94; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87, in which suits were brought by creditors of the corporations." *Reversing*, 52 Hun (N. Y.) 166.

1. *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466, is the leading authority on this point. In this case the directors of the New York Banking Company, on the same day upon which it suspended business, passed a resolution that no more installments beyond the fifty per cent. then paid, should be required of subscribers. But the court of chancery held that the receiver of the corporation could proceed in equity, irrespective of the resolution, to compel the payment of the balance due on shares. While the trust-fund doctrine is not referred to in words, the opinion by the assistant vice-chancellor shows a substantial recognition thereof. See also in support of the doctrine, *Northrop v. Bushnell*, 38 Conn. 498; *Hickling v. Wilson*, 104 Ill. 54; *Great Western Tel. Co. v. Gray*, 122 Ill. 630; 19 Am. & Eng. Corp. Cas. 26; *Fisher v. Seligman*, 7 Mo. App. 383; *Eyerman v. Krickhaus*, 7 Mo. App. 455; *Stranka v. Allen*, 7 Mo. App. 434; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537; 37 Am. Rep. 135; *Mann v. Cooke*, 20 Conn. 178; *Pickering v. Templeton*, 2 Mo. App. 424; *Christensen v. Eno*, 106 N. Y. 97; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 666; *Pullman v. Upton*, 96 U. S. 328; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Upton v. Burnham*, 3 Biss. (U. S.) 431; *In re Glen Iron Works*, 17 Fed. Rep. 324; *Myers v. Seeley*, 10 Nat. Bank. Reg. 411. Also *Brant v. Ehlen*, 59 Md. 1; *Crawford v. Rohrer*, 59 Md. 599; 1 Am. & Eng. Corp. Cas. 81; *Kehlor v. Lademann*, 11 Mo. App. 550; *Pittsburgh, etc., R. Co. v. Stewart*, 41 Pa. St. 54; *Scovill v. Thayer*, 105 U. S. 143; *Hatch v. Dana*, 101 U. S. 205; *Upton v. Tribilcock*, 91 U. S. 45; *Sturges v. Stetson*, 1 Biss. (U. S.) 246. See also the following periodicals: 15 Am. Law Reg. N. S. 638, note by Henry Budd, Jr.; 19 Cent. Law Jour. 465, "Liability of Holders of Nominally

Paid-up Stock," article by B. F. Rex; 2 Leg. Int. 189, "Personal Liability for Subscriptions."

In *Hawley v. Upton*, 102 U. S. 316, Waite, C. J., in delivering the opinion of the court, said: "It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation, must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished."

In *Flinn v. Bagley*, 7 Fed. Rep. 785, the defendants subscribed and agreed to pay certain sums of money towards the increased capital stock of a corporation, with the understanding that they were to receive stock therefor, at sixty-six and two-thirds cents on the dollar. This arrangement was carried out, and certificates for the stock delivered to them, and it was held that the assignee in bankruptcy of the corporation might still collect the remaining one-third of the par value of the stock for the benefit of its creditors. And the court observes: "This case is certainly a hard one upon the defendants. Finding the company embarrassed for the want of funds, they agreed to subscribe a certain sum and take in payment stock at what it was really worth. It is clear that no fraud was intended, and that they must be held liable upon an implied agreement to pay more for the benefit of the creditors than they had expressly agreed to pay for the benefit of the corporation. It is a hardship, however, from which I see no way of relieving them consistent with the views of the supreme court in *Hawley v. Upton*, and a decree must therefore be entered for the complainant."

For statutory and constitutional provisions as to issue of fictitiously paid up stock, see *Strock*, vol. 23, p. 582.

sented the shares as paid up.<sup>1</sup> Nor can the company release a subscriber from liability to creditors by accepting a surrender and effecting a cancellation of his stock.<sup>2</sup> But a creditor who has become such, long after the surrender of shares by a subscriber, cannot enforce payment against the latter,<sup>3</sup> and one who continues to deal with a corporation, knowing that it has limited the liability of its subscribers to make full payment for stock, waives the right to compel such payment.<sup>4</sup> It is said moreover, that the general rule above stated, will not be applied so as to work a hardship on creditors whom it was intended to protect,<sup>5</sup> and most

1. *Briggs v. Cornwell*, 9 Daly (N. Y.) 436.

2. **Surrender and Cancellation as Bearing on Release of Liability.**—*Farnsworth v. Robbins*, 36 Minn. 369; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Gill v. Balis*, 72 Mo. 424; *Burke v. Smith*, 16 Wall. (U. S.) 390; *New Albany v. Burke*, 11 Wall. (U. S.) 96; *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334. See also *Vick v. LaRochelle*, 57 Miss. 602; *Miller's Appeal*, 1 Penny (Pa.) 120; and, generally, cases cited in preceding notes.

3. *Erskine v. Peck*, 83 Mo. 465, *affirming* 13 Mo. App. 280. In this case the plaintiff's claim against the corporation arose about a year after the surrender in question, and his judgment was three years later than the same event. See also *Hollingshead v. Woodward*, 35 Hun (N. Y.) 410; *Johnson v. Lullman*, 15 Mo. App. 55; *Sanderson v. Aetna Ins. Co.* (Ohio, 1879). 8 Cent. L. J. 266.

4. In the opinion of Champlin, J., in *Young v. Erie Iron Co.*, 65 Mich. 127; 16 Am. & Eng. Corp. Cas. 626, this exception to the general principle is thus stated: "Although it is a well-established doctrine founded upon just principles, that the capital stock of a corporation, and especially its unpaid capital in the hands of subscribers or purchasers from the corporation, is a trust fund for the satisfaction of the debts of an insolvent corporation, yet it is equally well settled that persons dealing with corporations may consent to existing arrangements, and by contracting with them, with notice or knowledge of arrangements which limit the liability of subscribers to pay the full amount of the capital stock, may expressly or impliedly waive the right to compel the stockholders to contribute the full amount of their subscriptions in discharge of corporate obligations. *Robinson v. Bidwell*, 22 Cal. 379; *Coit*

*v. North Carolina, etc.*, *Amalgamating Co.*, 14 Fed. Rep. 12; 15 Am. & Eng. Corp. Cas. 610; *Mor. Corp.*, § 829. There is no allegation in the bill that the creditors represented by complainant did not know and fully understand that the capital stock was paid up by property transferred to the corporation, or that the stock issued or sold by it was issued as full paid stock, and not liable to further assessment. On the contrary, the complainant's assignors held shares of a stock, representing upon the face of it to be full paid, as collateral security for money loaned to the corporation. An exception to the principle that the capital of a corporation is a trust fund to which creditors can resort for payment is recognized in some states in favor of mining corporations, based upon the universal knowledge of the custom of such corporations to have a very large nominal capital, and to issue such capital to its full amount as paid up, but to dispose of it at what it will bring in the market. The capital of such corporations, from the nature of the venture, is of an extremely fluctuating and uncertain character, and is invested in property acquired for the sole purpose of being exhausted and distributed among shareholders in the form of dividends, and not kept as a permanent fund with which to carry on business. *In re South Mountain Consolidated Min. Co.*, 7 Sawy. (U. S.) 30; 5 Fed. Rep. 403; 8 Sawy. (U. S.) 366; 14 Fed. Rep. 347."

5. *Clark v. Bever*, 31 Fed. Rep. 676; 36 Am. & Eng. Corp. Cas. 165. In this case a railway corporation was insolvent and its stock worthless. The corporation was indebted to one G, and in good faith transferred to him in payment of the debt, the unissued stock at twenty cents on the dollar. A statute of the state prohibited the transfer of corporate stock with attempted ex-

of the cases hold that a creditor who accepts depreciated stock to an amount in excess of his claim is not liable to other creditors for the par value.<sup>1</sup> As between corporation and subscriber, an agreement to accept less than the par value of stock, is valid.<sup>2</sup> Where shares are issued gratuitously, decisions are not harmonious as to whether the recipients may be held liable by creditors.<sup>3</sup> At least they cannot be held by those who became creditors before the issue of such shares.<sup>4</sup>

(3) **EFFECT OF INCREASING STOCK.**—Where an authorized increase of stock is effected, subscribers thereto cannot defeat the claims of creditors by mere technical objections to the regularity of the increase.<sup>5</sup> Thus, subscribers to the increased stock have been held liable for the par value of their shares to creditors, though notice of the meeting to effect the increase did not conform to the statute,<sup>6</sup> though the full number of days did not elapse between passing and confirming a resolution for increase,<sup>7</sup> and even where the full amount of the increase was not sub-

emptions from full payment thereof. It was held that the statute was enacted for the protection of creditors, and where a strict construction thereof would work a positive injury to the creditors, a liberal construction, in accordance with its spirit, should be given. G was accordingly held not liable to the creditors for the remaining eighty cents.

1. *Clark v. Bever*, 31 Fed. Rep. 676; 139 U. S. 96; 36 Am. & Eng. Corp. Cas. 165; *Kehlor v. Lademann*, 11 Mo. App. 550. But there must be something near a fair equivalent. *Fogg v. Blair*, 139 U. S. 118. *Contra*, *Jackson v. Traer*, 64 Iowa 469; 52 Am. Rep. 449.

2. *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264; *Christensen v. Eno*, 106 N. Y. 99.

3. **Gratuitous Shares.**—In *Christensen v. Eno*, 106 N. Y. 97, it was held that one to whom unissued shares of corporate stock have been transferred gratuitously by the corporation, does not become a debtor to the corporation or make himself liable to the creditors thereof, as on a subscription. See also *Seymour v. Sturgess*, 26 N. Y. 134; *In re Western Canada Oil Co.*, L. R., 1 Ch. Div. 115; *Waterhouse v. Jamieson*, L. R., 2 H. L. Sc. 29.

But in *Hickling v. Wilson*, 104 Ill. 54, it was held that subscribers who paid nothing for their stock, and some of which had been sold, were liable to creditors. See also *Preston v. Cincinnati, etc., R. Co.*, 36 Fed. Rep. 54.

4. *Hosper v. Northwestern, etc., Mfg.*

*Co.* (Minn. 1892), 36 Am. & Eng. Corp. Cas. 206.

5. **Increase—Technical Objections Unavailable as Against Creditors.**—In *Chubb v. Upton*, 95 U. S. 668, Hunt, J., for the court, said: "It is idle to deny that this was the case of an organization which claimed to have taken, and apparently supposed that it had taken, the measures required by law to complete its increase of capital. It acted as such, and the defendant, by receiving his certificate of stock, entered into engagements with it as such. If it be conceded that its increased stock was but *de facto*, and that it could have been annulled or suppressed by the action of the attorney-general as acting under an irregular organization, the defendant derives no aid from the admission. The cases cited are clear to the point that he cannot make the objection, but must perform the engagements he has made." See also *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

6. *Veeder v. Mudgett*, 95 N. Y. 295; 6 Am. & Eng. Corp. Cas. 485; *Upton v. Jackson*, 1 Flipp. (U. S.) 413; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Sewell's Case*, L. R., 3 Ch. 131.

But a required notice cannot be entirely omitted, even by unanimous consent of the stockholders. *State v. McGrath*, 86 Mo. 239; and even irregularity in the notice has been held fatal. *In re Wheeler*, 2 Abb. Pr. N. S. (N. Y.) 361.

7. *In re Miller's Dale, etc., Co.*, 31 Ch. Div. 211. See also *Kansas City*



scribed for.<sup>1</sup> Such objections may be raised by the state alone, through its attorney-general;<sup>2</sup> a subscriber waives them by accepting the results of the increase.<sup>3</sup> So, by the trust-fund principle, subscribers who accept increased shares without paying the par value may be compelled to do so by creditors, though their certificates contain recitals that the stock is paid up,<sup>4</sup> and though the shares are issued as a bonus.<sup>5</sup> But where the increase consists of spurious or overissued stock, its holders are not liable to creditors;<sup>6</sup> nor can a creditor who was cognizant of the transac-

Hotel Co. v. Harris, 51 Mo. 464; McCarthy v. Lavasche, 89 Ill. 270; 31 Am. Rep. 83.

1. Delano v. Butler, 118 U. S. 634; Clarke v. Thomas, 34 Ohio St. 46; Nutter v. Lexington, etc., R. Co., 6 Gray (Mass.) 85; Belton Compress Co. v. Saunders, 70 Tex. 699. But see Eaton v. Pacific Nat. Bank, 144 Mass. 260; 19 Am. & Eng. Corp. Cas. 293.

2. Pullman v. Upton, 96 U. S. 329. See also Byers v. Rollins, 13 Colo. 22; *In re* Reciprocity Bank, 22 N. Y. 9; Peckham v. Smith, 9 How. Pr. (N. Y.) 436.

3. Poole v. West Point, etc., Assoc., 30 Fed. Rep. 513; Pullman v. Upton, 96 U. S. 329; Chubb v. Upton, 95 U. S. 665; Veeder v. Mudgett, 95 N. Y. 295; 6 Am. & Eng. Corp. Cas. 485; Sheldon Hat, etc., Co. v. Eickemyer Hat, etc., Co., 90 N. Y. 607; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Aspinwall v. Sacchi, 57 N. Y. 331; Buffalo, etc., R. Co. v. Cary, 26 N. Y. 75; Eaton v. Aspinwall, 19 N. Y. 119.

4. Upton v. Tribilcock, 91 U. S. 47; Sanger v. Upton, 91 U. S. 64; Webster v. Upton, 91 U. S. 67; Chubb v. Upton, 95 U. S. 666; Hawley v. Upton, 102 U. S. 316; Stutz v. Handley, 41 Fed. Rep. 544. In this case Jackson, J., delivering the opinion of the court, said: "The untrue statement in the certificate that the shares are paid up cannot discharge the shareholder, who has not paid for the same, from liability thereon. It has no greater effect than the unauthorized delivery of an untrue receipt to a person indebted to the corporation. The debtor of the company, obtaining such a receipt without actual payment, would certainly not be discharged, even as to the corporation. Neither can the original holder of unpaid shares avoid liability therefor, by reason of the false recital in the certificate issued to him that the stock was fully paid up."

The fact that the word "non-assessable" is stamped upon the certificate will not relieve a subscriber from liability

to pay therefor. Upton v. Tribilcock, 91 U. S. 47.

5. Stutz v. Handley, 41 Fed. Rep. 531; Morrow v. Nashville Iron, etc., Co., 87 Tenn. 262.

6. **Holders of Spurious Stock Are Not Liable.**—In *Scovill v. Thayer*, 105 U. S. 149, Woods, J., delivering the opinion of the court, said: "In this case the attempt to increase the stock of the company beyond the limits fixed by its charter was *ultra vires*. The increased stock itself was, therefore, void. It conferred on the holders no rights and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a contest between them, the latter would have been excluded from all participation in the management of the company or in its profits. To hold that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holder of such spurious stock has none of the rights, he can be subjected to none of the liabilities of a holder of genuine stock. His contract to pay for spurious stock is without consideration and cannot be enforced. . . . We think that he is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. Upton v. Tribilcock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant. But

tion and acquiesced in it, hold a stockholder individually liable on account of the increase.<sup>1</sup>

(4) EFFECT OF REDUCTION.—The general principles just stated as governing the increase of stock, and its effect on liability, apply also to reductions.<sup>2</sup> Those who were corporate creditors at the time may ignore the reduction and hold the subscribers liable for the value of the shares as they originally stood;<sup>3</sup> but those who subsequently give credit are confined to the value of the reduced stock for their security.<sup>4</sup>

(5) THE RULE IN ENGLAND.—In cases where the trust fund doctrine would be applied in the *United States*, a less stringent rule prevails in *England*. There, aside from statutory provisions, creditors have, in general, no greater rights against subscribers than the company itself,<sup>5</sup> and release of subscriptions is largely discretionary with the directors.<sup>6</sup>

here, the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the stockholder can neither give it validity nor bind him or the corporation." See also *Clark v. Turner*, 73 Ga. 1; *Page v. Austin*, 10 Can. Sup. Ct. 132.

1. *Coit v. North Carolina, etc., Amalgamating Co.*, 14 Fed. Rep. 12; 15 Am. & Eng. Corp. Cas. 610.

2. See generally *supra*, this title, *Effect of Increasing Stock*.

3. *Reduction Cannot Affect Existing Creditors.*—*In re State Ins. Co.*, 11 Biss. (U. S.) 301; 14 Fed. Rep. 28; *Dane v. Young*, 61 Me. 160; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

Where stockholders were liable for an amount of unpaid balance on stock, the par of which was originally \$50, and an amendatory act was passed reducing it to \$25 per share, it was held that a stockholder was not liable on his original subscription for a judgment obtained after reduction for the other \$25, though he had given his note for it. *Woodhouse v. Commonwealth Ins. Co.*, 54 Pa. St. 307.

4. *Cooper v. Frederick*, 9 Ala. 738; *Hepburn v. Exchange Banking Co.*, 4 La. Ann. 87; *Palfrey v. Paulding*, 7 La. Ann. 363.

5. *In re Dronfield, etc., Coal Co.*, 17 Ch. Div. 76; *In re Ambrose, etc., Min. Co.*, 14 Ch. Div. 390; *In re Ince Hall, etc., Co.*, 30 W. R. 945; *Waterhouse v. Jamieson, L. R.*, 2 H. L. Sc. 37.

6. *Release — English Rule.* — *Bath's Case*, 8 Ch. Div. 334; *Barrett's Case*, L. R., 13 Eq. 507; *Stanhope's Case*, L. R., 1 Ch. App. 161; *Spackman v. Evans, L. R.*, 3 H. L. 171. Surrender

and cancellation are proper, when expressly authorized. *Cockburn's Case*, 4 De G. & Sm. 177; *Snell's Case*, L. R., 5 Ch. 22; *Ex parte Fenn*, 22 L. J. Ch. 692; *In re Bodmin United Mines Co.*, 23 Beav. 370; *Ex parte Wright*, 37 L. J., Ch. 529; *Ex parte Bellhaven*, 3 De G. J. & S. 41; *Dixon v. Evans*, L. R., 5 H. L. 606; *Thomas' Case*, L. R., 13 Eq. 437; *Colville's Case*, 48 L. J. Ch. 633. And a release cannot be set aside after undue delay, even when not authorized. *Meux's Executor's Case*, 2 De G. M. & G. 522. The company may confer the power upon itself by special resolution. *Teasdale's Case*, L. R., 9 Ch. 54; *Taylor v. Pilsen Joel, etc., Light Co.*, 27 Ch. Div. 268. But where the power is not conferred, a surrender and cancellation of shares is void. *Walter's Second Case*, 3 De G. & Sm. 244; *Munt's Case*, 22 Beav. 55; *Jones' Case*, 27 L. J. Ch. 666; *Daniell's Case*, 26 L. J. Ch. 563; *Ex parte Preece*, 15 Jur. 528; *Richmond's Case*, 4 Kay & J. 305. And lapse of time will not render it binding on the remaining stockholders unless they are shown to have had actual knowledge. *Ex parte Stanhope*, L. R., 1 Ch. 161; *Ex parte Spackman*, 34 L. J. Ch. 321; *affirmed* L. R., 3 H. L. 171. But see *Evans v. Smallcombe, L. R.*, 3 H. L. 249.

*Listing Contributors.* — Cases in which owners of fully paid-up stock were not held as contributors: *Ex parte Leifchild*, 11 Jur. N. S. 941; 14 W. R. 22; 13 L. T., N. S. 267; *In re Marlborough Club Co.*, L. R., 5 Eq. 565; *Ex parte Thomas*, 42 L. J. Ch. 781; 21 W. R. 782; *Ex parte Pell*, L. R., 5 Ch. 11; *Kirby's Case*, 46 L. T. 682.

**b. ADDITIONAL OR STATUTORY LIABILITY—(1) *In General.***—Generally, in the *United States*, constitutions, statutes, or charters deal with the liability of stockholders.<sup>1</sup> The liability thus imposed is usually termed “statutory liability,” and may be grouped or classified according to degree as ordinary, proportional, double, or unlimited.

(2) *Degrees*—(a) **Ordinary.**—The lowest degree of liability imposed may be said to be that which by statute is declaratory of the equitable liability for unpaid subscriptions.<sup>2</sup>

(b) **Proportional.**—This degree of liability exists where the statute provides that the proportion of the stockholder's liability to the corporate indebtedness shall be the same as the proportion of his shares to the whole number of shares. In such case the payment by him of his part relieves him from further liability.<sup>3</sup> So up to this limit a creditor of the corporation may enforce his whole claim against a single stockholder.<sup>4</sup>

(c) **Double.**—This form of liability is sometimes imposed by ambiguous phrases which occasion controversy and require judicial interpretation.

Thus, a liability “to the amount of their stock”<sup>5</sup> or “to an

Cases in which owners of fully paid-up stock were held as contributories: *In re Anglesea Colliery Co.*, L. R., 1 Ch. 555; *In re Hollyford Min. Co.*, 1 Ir. Eq. 39; *Ex parte Migotti*, L. R., 4 Eq. 238; *Dent's Case*, L. R., 15 Eq. 407; *Fraser's Case*, 42 L. J. Ch. 358; *Crickmer's Case*, L. R., 10 Ch. 614; *Aspinall's Case*, 36 L. T., N. S. 362.

1. See the statutes of the various states.

2. See various state statutes.

3. *Adkins v. Thornton*, 19 Ga. 325; *Belcher v. Wilcox*, 40 Ga. 391; *Jones v. Wiltberger*, 42 Ga. 575; *Branch v. Baker*, 53 Ga. 502; *Crease v. Babcock*, 10 Met. (Mass.) 524; *U. S. v. Knox*, 102 U. S. 422.

4. *Larrabee v. Baldwin*, 35 Cal. 155; *Lane v. Morris*, 8 Ga. 468; *Lane v. Harris*, 16 Ga. 217; *Branch v. Baker*, 53 Ga. 502; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Hatch v. Burroughs*, 1 Woods (U. S.) 439. See also *Young v. Rosenbaum*, 39 Cal. 646; *San Jose Sav. Bank v. Pharis*, 58 Cal. 380; *Morrow v. San Francisco Superior Court*, 64 Cal. 383, where this species of liability is further construed.

5. **Double Liability.**—In *Root v. Sin-nock*, 120 Ill. 350; 19 Am. & Eng. Corp. Cas. 317; 60 Am. Rep. 559, the bank's charter contained this proviso: “Provided also that the stockholders in this corporation shall be individually liable to the amount of their stock for

all debts of the corporation, and such liability shall continue for three months after the transfer of any stock on the books of the corporation.” It was held that the stockholders were each individually liable to pay to the creditors of the bank, not merely the balance unpaid upon subscriptions for stock, but to the extent of the nominal or face value of the stock held by them for debts of the bank. And Scholfield, J., for the court, observed: “The contention of appellant is, that the liability imposed by the seventh section of the charter of the Union Bank of Quincy, upon the stockholders, is simply to pay creditors of the bank the balance unpaid upon subscriptions for stock. The language of the seventh section, affecting this question, is: ‘Provided also that the stockholders of this corporation shall be individually liable to the amount of their stock, for all debts of the corporation; and such liability shall continue for three months after the transfer of any stock on the books of the corporation.’ The plain and obvious meaning of this language is, to our minds, the stockholders are liable to creditors for their debts, to an extent measured by the amount of their stock. Omitting the clause expressing the extent of liability, and we have this: ‘The stockholders of this corporation shall be individually liable for all debts of the corporation.’ If this were all, their

amount equal to their stock,"<sup>1</sup> is generally held to render stockholders liable for a sum equal to their full subscription, after the latter has been paid, and is equivalent to the phrase "to double the amount of the stock held by them," which creates a liability for twice the amount of the subscription.<sup>2</sup> But a provision for liability "to an amount equal to the amount unpaid on the stock" imposes no obligation to pay beyond par value.<sup>3</sup>

(d) *Unlimited*.—In some instances each stockholder is made liable for all debts of the corporation.<sup>4</sup> This is in effect a partnership liability, and will be discussed later.<sup>5</sup>

(3) *Statutes Imposing*—(a) *Constitutionality*.—Under the Federal Constitution, and the authorities construing it, the liability of stockholders as fixed at incorporation, cannot be affected by subsequent statutes, unless the right so to legislate has been reserved by the state.<sup>6</sup> Thus, a statute attempting to increase the liability of stockholders for debts already incurred is void.<sup>7</sup> So a

liability would be unlimited—they would be absolutely liable for all debts of the corporation. The intention, however, is to limit that liability; but to what extent? The answer is: 'To the amount of their stock'—not to the amounts unpaid on their stock. The language makes the liability because of the fact of being stockholders, and not because of the fact of being debtors of the corporation. If the liability intended was simply to pay the creditor the amount due the corporation, what would have been more natural and easy than to have used just that language?" Under a statute making stockholders liable for debts existing against the corporation at the time of the dissolution "to the extent of their respective shares of stock," their liability extends not merely to the loss of the amount of the stock, but to a further sum equal to such amount, if necessary to pay the debts. *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; 18 Am. Dec. 454. See also *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401; *Pettibone v. McGraw*, 6 Mich. 441; *Sacketts Harbor Bank v. Blake*, 3 Rich. Eq. (S. Car.) 225. But the contrary rule is held in *Lewis v. St. Charles County*, 13 Mo. App. 48. See also *Schricker v. Ridings*, 65 Mo. 208; *Gausen v. Buck*, 68 Mo. 545.

1. *Wheeler v. Miller*, 90 N. Y. 359; *In re Empire City Bank*, 18 N. Y. 199; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1; 53 Am. Dec. 742; *Lewis v. St. Charles County*, 5 Mo. App. 225; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; 18

Am. Dec. 454; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473.

2. *Parish's Appeal* (Pa. 1890), 19 Atl. Rep. 569; *Perry v. Turner*, 55 Mo. 418; *Matthews v. Albert*, 24 Md. 527; *Norris v. Johnson*, 34 Md. 485; *Booth v. Campbell*, 37 Md. 522; *Schricker v. Ridings*, 65 Mo. 208; *Gay v. Keys*, 30 Ill. 413.

3. *Patterson v. Lynde*, 106 U. S. 519; 10 Am. & Eng. Corp. Cas. 195; *Stephens v. Fox*, 83 N. Y. 313; *Mills v. Stewart*, 41 N. Y. 384; *Brundage v. Monumental, etc., Min. Co.*, 12 Oregon 322; *Ladd v. Cartwright*, 7 Oregon 329.

4. *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Marsh v. Burroughs*, 1 Woods (U. S.) 463.

5. See *infra*, this title, *Partnership or Individual Liability*.

6. *Statutes Cannot Affect Vested Rights*.—*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Steady v. Little Rock, etc., R. Co.*, 5 Dill. (U. S.) 348; *Nichols v. Somerset, etc., R. Co.*, 43 Me. 356; *Wales v. Stetson*, 2 Mass. 146; *Nichols v. Bertram*, 3 Pick. (Mass.) 342.

7. *Com. v. Cochituate Bank*, 3 Allen (Mass.) 42; *Owen v. Purdy*, 12 Ohio St. 73; *Bailey v. Hollister*, 26 N. Y. 112; *Gardner v. Hamilton Ins. Co.*, 33 N. Y. 421; *Wheeler v. Frontier Bank*, 23 Me. 308; *Steady v. Little Rock, etc., R. Co.*, 5 Dill. (U. S.) 348; *Fry v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314; *Thompson v. Guion*, 5 Jones Eq. (N. Car.) 113; *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St.

repeal of existing provisions and a reduction of liability are invalid as against corporate creditors.<sup>1</sup> It is held in *Ohio*<sup>2</sup> that the stockholder's liability cannot be increased even for future corporate debts, but the contrary appears to be the prevailing doctrine.<sup>3</sup> Where the right to modify charters is reserved by the state, the liability may be increased.<sup>4</sup> A statute which affects merely the creditors' remedy is not unconstitutional;<sup>5</sup> hence a provision authorizing a proceeding by creditors against a single stockholder for his unpaid subscription is valid.<sup>6</sup>

(b) *Construction*.—Three distinct theories are in vogue relative to the construction of statutes imposing a merely contractual liability. According to one theory, such provisions, being in derogation of the common law, should be strictly construed;<sup>7</sup> the second holds that such legislation, being remedial, should be liberally

42; 72 Am. Dec. 685; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.) 543.

1. *Hathorne v. Calef*, 2 Wall. (U. S.) 23; *In re State Ins. Co.*, 14 Fed. Rep. 28; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Norris v. Wrenschall*, 34 Md. 492; *Provident Sav. Inst. v. Jackson Place Skating, etc.*, Rink Co., 52 Mo. 552; *St. Louis Ry. Supplies Mfg. Co. v. Harbine*, 2 Mo. App. 134; *Central Agr. Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; 3 Am. & Eng. Corp. Cas. 78; *Woodruff v. Trapnall*, 10 How. (U. S.) 190. But compare *Ochiltree v. Iowa R. R. Contracting Co.*, 21 Wall. (U. S.) 249.

2. In *Ireland v. Palestine, etc.*, *Turnpike Co.*, 19 Ohio St. 369, it was held that the *Ohio* Act of May 3d, 1852, in relation to plankroad and turnpike companies, in so far as it undertakes to impose upon stockholders without their assent individual liabilities not imposed by their charters, or by the laws under which they had been organized, is a law impairing the validity of the stockholder's contract with the company, and therefore unconstitutional.

3. *Gray v. Coffin*, 9 Cush. (Mass.) 192. See also *Stanley v. Stanley*, 26 Me. 191; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559; *Shufeldt v. Carver*, 8 Ill. App. 545; *Fogg v. Sidwell*, 8 Ill. App. 551; *Child v. Coffin*, 17 Mass. 64; *Hathorn v. Calef*, 53 Me. 471; *Weidenger v. Spruance*, 101 Ill. 278.

4. *Weidenger v. Spruance*, 101 Ill. 278; *In re Empire City Bank*, 18 N. Y. 119; *Bailey v. Hollister*, 26 N. Y. 112. See also *In re Lee's Bank*, 21 N. Y. 9; *Sleeper v. Goodwin*, 67 Wis. 577; *Sherman v. Smith*, 1 Black (U. S.) 587; *South Bay Meadow Dam Co. v. Gray*,

30 Me. 547; *Gardner v. Hope Ins. Co.*, 9 R. I. 194; 11 Am. Rep. 238; *Gulliver v. Roelle*, 100 Ill. 141; *Black v. Womer*, 100 Ill. 328; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Oldtown, etc.*, R. Co. v. *Veazie*, 39 Me. 571; *In re Elevated R. Co.*, 70 N. Y. 327.

5. *Statutes Affecting The Remedy*.—*Merchants' Ins. Co. v. Hill*, 86 Mo. 466, affirming 12 Mo. App. 148; *Cummings v. Maxwell*, 45 Me. 190; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559; *Story v. Furman*, 25 N. Y. 214; *Penniman, Petitioner*, 11 R. I. 333. Compare *Walker v. Crain*, 17 Barb. (N. Y.) 119.

6. *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515.

7. *Statutes Strictly Construed*.—*Chase v. Lord*, 77 N. Y. 1; *Grose v. Hilt*, 36 Me. 22; *Coffin v. Rich*, 45 Me. 511; 71 Am. Dec. 559; *Potter v. Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428; *Chamberlain v. Huguenot Mfg. Co.*, 118 Mass. 532; *Gray v. Coffin*, 9 Cush. (Mass.) 192; *Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488; *Lowry v. Inman*, 46 N. Y. 119; *Diven v. Lee*, 36 N. Y. 302; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293; *Youghiogheny Shaft Co. v. Evans*, 72 Pa. St. 331; *O'Reilly v. Bard*, 105 Pa. St. 569; *Mean's Appeal*, 85 Pa. St. 75; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Windham Prov. Sav. Inst. v. Sprague*, 43 Vt. 502; *Dauchy v. Brown*, 24 Vt. 197. Also *Libby v. Tobey*, 82 Me. 397; 31 Am. & Eng. Corp. Cas. 526.

One must be plainly a stockholder within the purview of the law to be subjected to liability. The meaning of the act cannot be extended so as to include cases not expressly within its provisions. *Steel v. Dunne*, 65 Ill. 298.

construed;<sup>1</sup> by the third, such enactments are to be interpreted as the court deems them to have been intended,<sup>2</sup> and it is held that they are in the nature of contracts,<sup>3</sup> and are to receive a natural and reasonable construction. Where the liability imposed is penal, the statute will be strictly construed.<sup>4</sup>

(c) **Constitutional Provisions.**—Provisions of constitutions which simply provide for an additional liability without defining its extent,<sup>5</sup> or which leave the remedy to be fixed by statute,<sup>6</sup> are not self-enforcing, and must, in order to be operative, be supplemented by further legislation. But a constitutional clause which imposes liability "to the amount of stock held" is self-executing.<sup>7</sup>

(4) **Kinds**—(a) **Contractual**—(1) **NATURE**—The usual liability imposed by statute, viz., an absolute obligation to pay, and not a contingent one, such as accrues from the non-performance of certain prescribed duties, is generally held to be contractual.<sup>8</sup> There is a

One who seeks to hold members to a joint and several liability under a particular statute must comply strictly therewith. *Harrod v. Hamer*, 32 Wis. 162.

1. **Liberal Construction.**—*Freeland v. McCullough*, 1 Den. (N. Y.) 413; 43 Am. Dec. 685; *Marion Tp., etc., Co. v. Norris*, 37 Ind. 424; *Gauch v. Harrison*, 12 Ill. App. 457; *Carver v. Brainerd Mfg. Co.*, 2 Story (U. S.) 433.

In the recent case of *Rider v. Fritchey* (Ohio, 1892), 30 N. E. Rep. 692, the following constitutional provision was before the court: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon to a further sum, at least equal in amount to such stock." It was decided that the term "dues" included a claim for unliquidated damages arising from tort.

2. **Rational Construction.**—*Bohn v. Brown*, 33 Mich. 261; *Hicks v. Burns*, 38 N. H. 141; *Davidson v. Rankin*, 34 Cal. 503; *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; 73 Am. Dec. 658; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Knowlton v. Ackley*, 8 Cush. (Mass.) 93; *Bassett v. St. Alban's Hotel Co.*, 47 Vt. 313. See also *Lane v. Morris*, 8 Ga. 475; *Ingalls v. Cole*, 47 Me. 540; *Weigley v. Coal Oil Co.*, 5 Phila. (Pa.) 67; *Dewey v. St. Alban's Trust Co.*, 57 Vt. 332; 10 Am. & Eng. Corp. Cas. 212; 48 Am. Dec. 803.

"In construing a statutory provision

imposing individual liability upon the members of a corporation, it is the duty of the courts to ascertain and carry out the intention of the legislature. To lay down any arbitrary rule for the construction of a particular class of statutes is manifestly contrary to reason, and can only lead to error and perversion of justice." *Morawetz, Private Corporations*, § 880.

3. *Hicks v. Burns*, 38 N. H. 141.

4. *Cable v. McCune*, 26 Mo. 371; 72 Am. Dec. 214; *Cady v. Smith*, 12 Neb. 628; *Garrison v. Howe*, 17 N. Y. 458; *Esmond v. Bullard*, 16 Hun (N. Y.) 65.

5. *French v. Teschemaker*, 24 Cal. 518.

6. *Diversey v. Smith*, 103 Ill. 378; 42 Am. Rep. 14; *Weidenger v. Spruance*, 101 Ill. 278; *Shufeldt v. Carver*, 8 Ill. App. 545; *Hampson v. Weare*, 4 Iowa 13; 66 Am. Dec. 116; *Larrabee v. Baldwin*, 35 Cal. 155; *French v. Teschemaker*, 24 Cal. 518; *Milroy v. Spur Mountain, etc., Min. Co.*, 43 Mich. 231; *Peck v. Miller*, 39 Mich. 594.

Statutes designed to carry into effect the double liability clause of a constitution may limit the time for enforcing such liability. *Perry v. Turner*, 55 Mo. 418.

7. *Willis v. St. Paul Sanitation Co.* (Minn. 1892), 36 Am. & Eng. Corp. Cas. 222.

8. **Usual Liability Is Contractual.**—*Lowry v. Inman*, 46 N. Y. 126; *Paine v. Stewart*, 33 Conn. 516; *Bond v. Appleton*, 8 Mass. 472; 5 Am. Dec. 111; *Hutchins v. New England Coal Min. Co.*, 4 Allen (Mass.) 580; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 537; *Hodgson v. Cheever*, 8 Mo. App. 321; *Manville v. Edgar*, 8 Mo. App.

line of cases, however, by which this usual liability is treated as statutory merely and not contractual.<sup>1</sup> But by the weight of authority this species of liability is entitled to be credited with the incidents of a contract; and accordingly falls within the provisions of a statute fixing the limitation for actions on contracts,<sup>2</sup> is enforceable only in a court of law,<sup>3</sup> and generally survives against the personal representatives of a decedent.<sup>4</sup> Where the liability is construed as contractual, statutes imposing it cannot be repealed to the detriment of existing creditors.<sup>5</sup>

(2) WHAT INCLUDED—(a) *Whether Damages Arising from Torts.*—There is a conflict in the authorities as to whether the usual liability for

324; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Freeland v. McCullough*, 1 Den. (N. Y.) 414; 43 Am. Dec. 685; *McDonough v. Phelps*, 15 How. Pr. (N. Y.) 372; *Aultman's Appeal*, 98 Pa. St. 505; *Sacketts Harbor Bank v. Blake*, 3 Rich. Eq. (S. Car.) 225; *Woods v. Wicks*, 7 Lea (Tenn.) 40. See also *Provident Sav. Inst. v. Jackson Place Skating, etc.*, Rink, 52 Mo. 552; *St. Louis Ry. Supplies Mfg. Co. v. Harbine*, 2 Mo. App. 134; *Blakeman v. Benton*, 9 Mo. App. 107; *Bagley v. Tyler*, 43 Mo. App. 195; *Hathorn v. Calef*, 2 Wall. (U. S.) 10; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Flash v. Conn*, 16 Fla. 428; 26 Am. Rep. 721; *Keyser v. Hitz*, 133 U. S. 138.

"The nature and extent of the special individual liability of the shareholders of a corporation necessarily depend upon the particular provisions of the charter or general law under which the parties have created it. It has been pointed out, that this liability is, in reality, the result of an agreement or contractual relation formed between the shareholders and the creditors of the corporation. Whether this agreement be called a contract or not, is merely a matter of definition. It may not be a contract according to the technical rules of the common law; but it contains every essential element of a contract, and it is legally binding by virtue of statutory enactment." *Morawetz, Private Corp.*, § 872.

1. *Erickson v. Nesmith*, 4 Allen (Mass.) 326; *Halsey v. McLean*, 12 Allen (Mass.) 438; 90 Am. Dec. 157; *New Haven Nail Co. v. Linden Spring Co.*, 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 71; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114.

2. *Limitation the Same as in Actions on Contracts.*—*Howell v. Roberts*, 29 Neb. 483; *Coy v. Jones*, 30 Neb. 789;

*Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287. Also *Gridley v. Barnes*, 103 Ill. 211; *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507; *Lawler v. Burt*, 7 Ohio St. 340; *Atwood v. Rhode Island Agr. Bank*, 1 R. I. 376; *Terry v. Calnan*, 13 S. Car. 220; *Bullard v. Bell*, 1 Mason (U. S.) 243; *Carrol v. Green*, 92 U. S. 509.

3. *Queenan v. Palmer*, 117 Ill. 619.  
4. *Richmond v. Irons*, 121 U. S. 27; 17 Am. & Eng. Corp. Cas. 71; *Irons v. Manufacturers' Nat. Bank*, 21 Fed. Rep. 197; *Chase v. Lord*, 77 N. Y. 1; *Manville v. Edgar*, 8 Mo. App. 324. But see *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488; *Cummings v. Wright*, 11 Mo. App. 348; *Donnelly v. Hodgson*, 13 Mo. App. 15.

5. *Contractual Statutes Not Repealable.*—*Hawthorne v. Calef*, 2 Wall. 10; *Central, etc., Mechanical Association v. Alabama, etc., Insurance Co.*, 70 Ala. 120; *Norris v. Wenschall*, 34 Md. 492; *Providence Savings Institution v. Jackson Place, etc., Co.*, 52 Mo. 552; *St. Louis R. R., etc., Co. v. Harbine*, 2 Mo. App. 134; *Conant v. Van Schaick*, 24 Barb. 87; *Woodruff v. Trapnall*, 10 How. 190. Compare *Sinking Fund Cases*, 99 U. S. 700; *Re State Insurance Co.*, 14 Fed. Rep. 28; 11 Biss. 301; *Cooper v. Fredrick*, 9 Ala. 472; *Palfre v. Paulding*, 7 La. Ann. 363; *Coffin v. Rich*, 45 Me. 507; *Jerman's Admr. v. Benton*, 79 Mo. 148; *Story v. Furman*, 25 N. Y. 214; *Rochester v. Barnes*, 26 Barb. 657; *Woodhouse v. Commonwealth Ins. Co.*, 54 Pa. St. 307. And see further as tending generally to illustrate the text propositions, the following English cases: *Re Telegraph Construction Co.*, L. R., 10 Eq. 384; *In re Credit Foncier of England*, L. R., 11 Eq. 356.

"debts" of the corporation includes a claim against it for damages sounding in tort,<sup>1</sup> or costs in an action for the same.<sup>2</sup> But it has been held that "debts" will include a judgment for waste,<sup>3</sup> and that "dues" will cover a demand for unliquidated damages arising from a tort.<sup>4</sup>

(b) *Debts Due Laborers, etc.*—A common form of statutory liability is that for debts due to servants, laborers, apprentices, and employés. Statutes imposing such liability are designed primarily to protect wage earners only,<sup>5</sup> and the courts generally have not extended their provisions to those not within that class. Accordingly it has been held that the benefits of such a provision cannot be claimed by general managers,<sup>6</sup> superintendents,<sup>7</sup> overseers,<sup>8</sup> or foremen,<sup>9</sup> even though they perform incidental labor, nor by secretaries though they do the work of book-keepers,<sup>10</sup> nor by foreign agents,<sup>11</sup> traveling salesmen,<sup>12</sup> civil engineers,<sup>13</sup> consulting

**1. Damages from Torts.**—The affirmative of this is asserted in the following cases: *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 432; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Gray v. Bennett*, 3 Met. (Mass.) 522; *Wyman v. American Powder Co.*, 8 Cush. (Mass.) 182; *Dryden v. Kellogg*, 2 Mo. App. 87; *Smith v. Omans*, 17 Wis. 395; *White v. Hunt*, 6 N. J. L. 418; *Chase v. Curtis*, 113 U. S. 452; *Bohn v. Brown*, 33 Mich. 257; *Cable v. McCune*, 26 Mo. 371; 72 Am. Dec. 214; *Doolittle v. Marsh*, 11 Neb. 243; *Heacock v. Sherman*, 14 Wend. (N. Y.) 59; *Archer v. Rose*, 3 Brewst. (Pa.) 264; *Child v. Boston, etc., Iron Works*, 137 Mass. 516; 10 Am. & Eng. Corp. Cas. 316; *Nason v. Jacob*, 93 Mo. 331; 3 Am. St. Rep. 531; *Evans v. Lewis*, 30 Ohio St. 14; *Crouch v. Gridley*, 6 Hill (N. Y.) 250; *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73; *Zimmer v. Schleeauf*, 115 Mass. 52; *In re Boston, etc., Iron Works*, 23 Fed. Rep. 880; *Losee v. Bullard*, 79 N. Y. 404, *affirming* 16 Hun (N. Y.) 65.

**2. Costs.**—That they may be recovered: *Lane v. Baker*, 2 Grant's Cas. (Pa.) 424. *Compare Veeder v. Mudgett*, 27 Hun (N. Y.) 519; *contra*, *Schouton v. Kilmer*, 8 How. Pr. (N. Y.) 527; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396.

**3. Powell v. Oregonian R. Co.**, 36 Fed. Rep. 756.

**4. Rider v. Fritchey** (Ohio, 1892), 30 N. E. Rep. 692.

**5. Statutes Generally Construed with Strictness.**—*Dean v. DeWolf*, 16 Hun (N. Y.) 186; *affirmed* 82 N. Y. 626; *Adams v. Goodrich*, 55 Ga. 233; *Williamson v. Wadsworth*, 49 Barb. (N. Y.)

294; *Heebner v. Chave*, 5 Pa. St. 115; *Harrod v. Hamer*, 32 Wis. 162; *Wakefield v. Fargo*, 90 N. Y. 217. In this last case Danforth, J., for the court, said: "It is plain, we think, that the services referred to are mental or manual services; that he who performs them is of a class whose members usually look to the reward of a day's labor or services for immediate or present support from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work or a stated job under the direction of a superior." See also *Gordon v. Jennings*, 9 Q. B. Div. 45.

**6. Wakefield v. Fargo**, 90 N. Y. 217.

**7. Kincaid v. Dwinelle**, 59 N. Y. 548; *Gordon v. Great Western R. Co.*, 8 Q. B. Div. 45; *Gurney v. Atlantic, etc., R. Co.*, 58 N. Y. 358.

**8. Hughes v. Whitaker**, 84 N. Car. 340; but see *contra* *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.

**9. Ericsson v. Brown**, 38 Barb. (N. Y.) 390; *Krauser v. Ruckel*, 17 Hun (N. Y.) 463. But see *contra* *Sleeper v. Goodwin*, 67 Wis. 577; *Short v. Medberry*, 29 Hun (N. Y.) 39.

**10. Coffin v. Reynolds**, 37 N. Y. 640; *overruling* *Richardson v. Abendroth*, 43 Barb. (N. Y.) 163.

**11. Hill v. Spencer**, 61 N. Y. 274; *Dean v. DeWolf*, 16 Hun (N. Y.) 186; *Krauser v. Ruckel*, 17 Hun (N. Y.) 463.

**12. Jones v. Avery**, 50 Mich. 326; but see *Williamson v. Wadsworth*, 49 Barb. (N. Y.) 294.

**13. Pennsylvania, etc., R. Co. v. Lueffer**, 84 Pa. St. 168. But see *contra* *Coyne v. Van Schaick*, 24 Barb. (N. Y.) 87.



engineers,<sup>1</sup> assistant chief engineers,<sup>2</sup> contractors,<sup>3</sup> or a corporation aggregate.<sup>4</sup> On the other hand, there are cases by which the provisions of such a statute have been extended to an engineer and fireman sometimes acting as a superintendent,<sup>5</sup> to a book-keeper,<sup>6</sup> and to a newspaper reporter.<sup>7</sup> The obligation imposed by these statutes is cumulative to the subscription liability,<sup>8</sup> attaches not only to individuals, but to municipal corporations which hold stock,<sup>9</sup> and is enforceable without proving a judgment against the corporation,<sup>10</sup> and the right of action is assignable.<sup>11</sup> But a mere subscriber is not subject to the provisions of a statute imposing such liability upon stockholders.<sup>12</sup>

(b) *Penal*.—See also MANUFACTURING CORPORATIONS, vol. 14, p. 284; OFFICERS (PRIVATE CORPORATIONS) vol. 17, p. 109).—The liability imposed by statute for the failure of the corporation or its officers to perform specific statutory duties is generally construed as penal, unenforceable beyond the state, and governed by Statutes of Limitations applying to penalties. Thus, statutes prescribing liability for neglect to make reports of assessments voted,<sup>13</sup> or of corporate indebtedness,<sup>14</sup> have been held to

1. *Ericsson v. Brown*, 38 Barb. (N. Y.) 390.
2. *Brockaway v. Innes*, 39 Mich. 47; 33 Am. Rep. 348. Compare *Peck v. Miller*, 39 Mich. 594.
3. *Aikin v. Wasson*, 24 N. Y. 482; *Balch v. New York, etc., R. Co.*, 46 N. Y. 521; *Atcherson v. Troy, etc., R. Co.*, 6 Abb. Pr. N. S. (N. Y.) 329; *Boutwell v. Townsend*, 37 Barb. (N. Y.) 205; *Kent v. New York Cent. R. Co.*, 12 N. Y. 628; *McCluskey v. Cromwell*, 11 N. Y. 593; *Taylor v. Manwaring*, 48 Mich. 171.
4. *Dukes v. Love*, 97 Ind. 341.
5. *Vincent v. Bamford*, 33 N. Y. Super. Ct. 506; 12 Abb. Pr. N. S. (N. Y.) 252.
6. *Chapman v. Chumar*, 54 Hun (N. Y.) 636; *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.
7. *Harris v. Norvell*, 1 Abb. N. Cas. (N. Y.) 127.
8. *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *Milroy v. Spur Mountain, etc., Min. Co.*, 43 Mich. 231.
9. *Shipley v. Terre Haute*, 74 Ind. 297.
10. *Sleeper v. Goodwin*, 67 Wis. 579.
11. *Krauser v. Ruckel*, 17 Hun (N. Y.) 463.
12. *Wheeler v. Thayer*, 121 Ind. 64.
13. *Penal Liability*.—*Sayles v. Brown*, 40 Fed. Rep. 8.
14. *Chase v. Curtis*, 113 U. S. 452; *Stokes v. Stickney*, 96 N. Y. 323; *Pier v. Hanmore*, 86 N. Y. 95; *Pier v. George*, 86 N. Y. 613; *Veeder v. Baker*, 83 N. Y. 156; *Knox v. Baldwin*, 80 N. Y. 610; *Easterly v. Barber*, 65 N. Y. 252; *Wiles v. Suydam*, 64 N. Y. 173; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Western Transp., etc., Co. v. Kilderhouse*, 87 N. Y. 430; *Lemon v. People*, 20 N. Y. 562; *Boughton v. Otis*, 21 N. Y. 261; *Losee v. Bullard*, 79 N. Y. 404.

In *Derrickson v. Smith*, 27 N. J. L. 166, Green, C. J., construing section 12 of the *New York Manufacturing Companies Act*, which requires such a report, says: "It is not claimed that the defendant, by the act of incorporation, is individually liable as a corporator, for the debts of the body corporate, or that his liability attached as a necessary result of the contract made by the company. His liability results from the failure of the trustees to comply with the requirements of the statute. It is, in fact, a penalty inflicted upon the trustees for a failure to perform the duty enjoined by the statute. It is immaterial whether that penalty be a specified sum or the payment of the debts of the corporation. In either case it is a penalty imposed by the statute; nor is it perceived how the liability of the individual trustee to pay the debts of the corporation can be said in any proper way to be founded on contract. It certainly did not result from the contract made by the corporation, nor from the defendant becoming a stockholder, nor from his

be penal. But it has been held that a statute imposing a liability for a failure to publish notice of indebtedness is "quasi-penal" only, and governed by that section of the Statute of Limitations which pertains to contractual actions.<sup>1</sup> There is a conflict of authority as to whether a liability imposed for contracting indebtedness in excess of the capital is penal,<sup>2</sup> and it has been held that an action to enforce liability for doing business before capital is paid in, is a contractual one.<sup>3</sup>

The liability arises at the moment when the contract of indebtedness with the corporation is complete,<sup>4</sup> but attaches only for debts contracted during the default.<sup>5</sup> Where the statute imposing liability is held to be penal and subject to a strict construction, it is said that the burden of proving non-compliance therewith is upon the party seeking to charge the stockholders;<sup>6</sup> but since it is a negative averment, the subject-matter of which lies peculiarly within the knowledge of the stockholders, and is a special and imposed statutory duty, the above rule would, upon

accepting the office of trustee, but solely from the omission to comply with the statute. Now the acceptance of the charter, or the defendant becoming a stockholder, is doubtless an assent to the terms of the charter, but it is in no appropriate sense an engagement to pay the debts of the company imposed as a penalty for violations of the charter. Such liability is clearly the creature of the statute."

Where the statute requires the filing of the certificate of indebtedness, the stockholders are liable if the certificate is false. *Congdon v. Winsor*, 17 R. I. 236; 36 Am. & Eng. Corp. Cas. 199.

And a statute requiring verification of the certificate of indebtedness is not complied with by mere acknowledgment. *Hardman v. Sage*, 124 N. Y. 25.

1. *Howell v. Roberts*, 29 Neb. 483; *Coy v. Jones*, 30 Neb. 798.

2. Holding that it is: *First Nat. Bank v. Price*, 33 Md. 487; 3 Am. Rep. 204; *Halsey v. McLean*, 12 Allen (Mass.) 438; 90 Am. Dec. 157; *Bird v. Hayden*, 1 Robt. (N. Y.) 383; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327. *Contra*, *Windham Prov. Sav. Inst. v. Sprague*, 43 Vt. 502; *Field v. Haines*, 28 Fed. Rep. 919. In the latter case, *Wheeler, J.*, says: "The liability is not imposed because of anything done or omitted, apart from the making of the contract constituting the debt, but on account of the part taken by the directors in making that contract. By assenting to the act which makes the debt, they make themselves liable for

the part of the debt that exceeds the capital. This part of the debt is prohibited, but not so, nor claimed to be so, but that it is binding upon the corporation. The contract creating the debt is not so illegal as to be void, and the assent of the directors is not. Their liability appears to be founded on their assent, which is in its nature a contract."

In *Iowa* stockholders are not liable for a failure to comply with the code in keeping books, or because indebtedness exceeding two-thirds of the capital stock was incurred, in violation of the code. *Langan v. Iowa, etc., Constr. Co.*, 49 Iowa 317.

3. *Cochran v. Wiechers*, 53 Hun (N. Y.) 636.

4. *Conklin v. Firman*, 57 Barb. (N. Y.) 484.

5. *Porter v. Sherman County Banking Co.* (Neb. 1893), 54 N. W. Rep. 424; *Smith v. Steele*, 8 Neb. 115; *citing Boughton v. Otis*, 29 Barb. (N. Y.) 196; *Garrison v. Howe*, 17 N. Y. 458.

6. In *Chase v. Lord*, 77 N. Y. 6, it is said: "In the first place, it is clear that there was no common-law liability on the part of the testator; and the legal presumption is that all statutory conditions have been complied with. This presumption continues until the contrary is shown. No duty rested upon the stockholder to do this; and it is incumbent upon the plaintiff to establish a non-compliance with the provisions of the statute, before he can charge the defendant." See also *Bruce v. Driggs*, 25 How. Pr. (N. Y.) 71.

general principles, hardly seem to apply in those jurisdictions where the statute is not strictly construed.<sup>1</sup>

c. **PARTNERSHIP OR INDIVIDUAL LIABILITY.**—Aside from their obligation to pay the par value of their subscriptions, and from the additional liability imposed by the legislature, stockholders may, in certain instances, be held liable as though they were merely members of a trading copartnership.

(1) *Ante-Corporate Debts*—(See also **OFFICERS (PRIVATE CORPORATIONS)**, vol. 17, p. 171).—Preliminary expenses attending corporate organization are chargeable individually upon those engaged in promoting the enterprise,<sup>2</sup> even where the capital stock has not been fully subscribed, and though this is ordinarily a condition precedent to the enforcement of the subscriber's liability.<sup>3</sup> So also those who contract debts in behalf of a proposed corporation are personally liable,<sup>4</sup> even where the company is organized but collapses,<sup>5</sup> or where the charter makes the company alone liable,<sup>6</sup> unless the creditor has agreed to look only to the company.<sup>7</sup>

(2) *Abortive Corporations*—(a) *Defective Incorporation*.—Immunity from personal and unlimited liability on the part of those engaged in associated business enterprises, is viewed by the courts generally as an exceptional privilege.<sup>8</sup> Accordingly by a sort of legal *atavism*, there is a constant tendency on the part of attempted corporations to lapse into *de jure* partnerships. There is a strong array of decisions to the effect that members of a concern which has not been legally or properly incorporated, are liable as partners.<sup>9</sup> Thus, where incorporation is provided for under a general law, and there has been a failure to comply with certain of the prescribed formalities, such as filing the certificate or articles

1. See 1 Greenl. Ev., § 79; 1 Whart. Ev., § 367; Blann v. Beal, 5 Ala. 357; Toole v. State, 88 Ala. 158; Van Etten v. Eaton, 19 Mich. 186; Huggins v. Ward, 21 W. R. 914.

2. Braithwaite v. Skofield, 9 B. & C. 401; 17 E. C. L. 404; Nockells v. Crosby, 3 B. & C. 823; Walstab v. Spottiswoode, 15 M. & W. 501.

One who permits himself to be announced as an officer of a company which was never formed is liable individually for preliminary expenses. Luke v. Duke of Argyll, L. R., 6 Q. B. 477; Collingwood v. Berkeley, 15 C. B., N. S. 145; 109 E. C. L. 145; Maddick v. Marshall, 17 C. B., N. S. 829; 112 E. C. L. 828. And see Wood v. Duke of Argyll, 6 M. & G. 928; 46 E. C. L. 928.

3. Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23.

4. Hurt v. Salisbury, 55 Mo. 310; Landman v. Entwistle, 7 Exch. 632;

Rennie v. Clarke, 5 Exch. 292; Higgins v. Hopkins, 3 Exch. 163; Hopcroft v. Parker, 16 L. T. N. S. 561. See also Scott v. Ebury, 36 L. J., C. P. 161.

5. Kelner v. Baxter, L. R., 2 C. P. 174.

6. Witmer v. Schlatter, 2 Rawle (Pa.) 359.

7. Whitwell v. Warner, 20 Vt. 425; Landman v. Entwistle, 7 Exch. 632; Rennie v. Clarke, 5 Exch. 292.

8. See an article in 23 Sol. Journal & Rep. "Unlimited Company a Legal Anomaly."

9. *Partnership Liability in Case of Defective Incorporation*.—Kaiser v. Lawrence Sav. Bank, 56 Iowa 104; 41 Am. Rep. 85, containing a review of the cases. See also Mokelumne Hill Canal, etc., Min. Co. v. Woodbury, 14 Cal. 424; 73 Am. Dec. 658; Hurt v. Salisbury, 55 Mo. 310; Bigelow v. Gregory, 73 Ill. 197; Abbott v. Omaha Smelting Co., 4 Neb. 416; Harris v.

of incorporation,<sup>1</sup> properly publishing and signing the same,<sup>2</sup> definitely describing the principal place of business,<sup>3</sup> or fixing the maximum of indebtedness,<sup>4</sup> the would-be incorporators have been held individually liable. According to this group of authorities also, the rule that regularity of incorporation may be questioned only in a direct proceeding by the state's legal adviser, does not apply.<sup>5</sup> Nevertheless there are cases almost equal in number, which take the position that one who has contracted with a *de facto* corporation, organized under color of law, and exercising corporate functions, cannot afterwards be allowed to charge its stockholders individually.<sup>6</sup> Moreover, certain minor

McGregor, 29 Cal. 125; Coleman v. Coleman, 78 Ind. 344; and see next note.

1. The receiver of a defectively organized incorporated apartment association cannot hold liable as partners members of a building company which subscribed for stock in the association, though one of the company's members realized a large sum by foreclosing mortgages against the association. Fox v. McComb, 63 Hun (N. Y.) 630. Bigelow v. Gregory, 73 Ill. 197; Garnett v. Richardson, 35 Ark. 144; Coleman v. Coleman, 78 Ind. 344; Eisfield v. Kenworth, 50 Iowa 389; Marshal v. Harris, 55 Iowa 182; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104; 41 Am. Rep. 85; Field v. Cooks, 16 La. Ann. 153; Ferris v. Thaw, 72 Mo. 446; Martin v. Fewell, 79 Mo. 401; Smith v. Warden, 86 Mo. 382; Abbott v. Omaha Smelting Co., 4 Neb. 416; Cross v. Jackson, 5 Hill (N. Y.) 478; Wells v. Gates, 18 Barb. (N. Y.) 554; Ridenour v. Mayo, 40 Ohio St. 9; 1 Am. & Eng. Corp. Cas. 247. Compare Indianapolis, etc., Min. Co. v. Herkimer, 46 Ind. 142; Heinig v. Adams, etc., Mfg. Co., 81 Ky. 300; Hurt v. Salisbury, 55 Mo. 310; Childs v. Hurd, 32 W. Va. 66; Western Union Tel. Co. v. Union Pac. R. Co., 3 Fed. Rep. 721.

And the certificate when filed must show, as required on its face, that a majority of the stockholders were present at the meeting to organize. People v. Selfridge, 52 Cal. 331.

2. Kaiser v. Lawrence Sav. Bank, 56 Iowa 104; 41 Am. Rep. 85; Clegg v. Hamilton, etc., Grange Co., 61 Iowa 121; Unity Ins. Co. v. Cram, 43 N. H. 636. *Contra*, Holmes v. Gilliland, 41 Barb. (N. Y.) 568.

3. Harris v. McGregor, 29 Cal. 124. But naming a city as "the place of business" will suffice. *In re* Spring Valley Water Works, 17 Cal. 132.

4. Heuer v. Carmichael, 82 Iowa 288.

5. Glen v. Breard, 35 La. Ann. 875; Vredenburg v. Behan, 33 La. Ann. 627; Medill v. Collier, 16 Ohio St. 599; First Nat. Bank v. Davies, 43 Iowa 424; Langan v. Iowa, etc., Constr. Co., 49 Iowa 317.

6. **Estoppel to Claim Partnership Liability.**—Snider's Sons Co. v. Troy, 91 Ala. 224; 24 Am. St. Rep. 887, is a recent and valuable authority under this head. It was there sought to charge as a partner a member of a concern, which, according to the plea and as admitted by the demurrer, had complied substantially with the incorporating act "except the residences of the persons," had organized and was doing business as a corporation. The court, by Clopton, J., took the view that: "The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity, cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning, consistent with well-settled principles, and in harmony with the policy of the state." The opinion contains the following valuable review of the authorities *pro* and *con*: "Whether the shareholders in a corporation *de facto* are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In Cook, Stock, etc., § 233, the doctrine asserted is: 'A corporate creditor, seeking to enforce the payment of his debt, may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question.' The leading cases supporting this doc-

omissions, such as failure to give notice of the preliminary meeting,<sup>1</sup> slight defects in a certificate or acknowledgment,<sup>2</sup> delay in commencing business,<sup>3</sup> misstatement as to the principal place of business,<sup>4</sup> even commencing business without a paid-up capital, and failing to procure a certificate from the state auditor as required,<sup>5</sup> have been held insufficient to impose a partnership liability. So where a creditor sues a concern as a corporation, he is estopped to set up the subsequent claim that its members are merely partners.<sup>6</sup> Even where defective incorporation is fatal to limited liability, it may be cured by a statute recognizing the concern as a corporation.<sup>7</sup> At most, those only may be held liable for a particular debt who were members when it was contracted,<sup>8</sup> and it is even held that membership acquired

trine are: *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Garnett v. Richardson*, 35 Ark. 144; *Ferris v. Thaw*, 72 Mo. 446; *Ridenour v. Mayo*, 40 Ohio St. 9; 1 Am. & Eng. Corp. Cas. 247; *Coleman v. Coleman*, 78 Ind. 344. We have omitted reference to a few cases, sometimes cited, for the reason that either the question of liability as partners was not before the court, as in *Blanchard v. Kaull*, 44 Cal. 440; or the debt was contracted before any steps were taken, other than the mere filing of a certificate, toward organization, as in *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq. 238; or it was contracted after the expiration of the charter by its own limitation without reorganization, as in *National Union Bank v. Landon*, 45 N. Y. 410. In the case last cited, the shareholders entered into a special agreement, which by its terms created a partnership as to third persons. In 2 Mor. Priv. Corp., § 748, the doctrine is stated as follows: 'If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members cannot be charged as partners to the contract, either severally or jointly, or as partners.' The following cases maintain the doctrine that the members of a corporation *de facto* cannot be held liable as partners for the corporate debts: *Fay v. Noble*, 7 Cush. (Mass.) 188; *First Nat. Bank v. Almy*, 117 Mass. 476; *Stout v. Zulick*, 48 N. J. L. 599; *Planters', etc., Bank v. Padgett*, 69 Ga. 164; *Merchants', etc., Bank v. Stone*, 38 Mich. 779; *Humphreys v. Mooney*, 5 Colo. 282; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Gartside Coal Co. v.*

*Maxwell*, 22 Fed. Rep. 197; 6 Am. & Eng. Corp. Cas. 359; *Whitney v. Wyman*, 101 U. S. 392." See also *Cory v. Lee*, 93 Ala. 468; *Eaton v. Walker*, 76 Mich. 579.

A partnership or a joint-stock company is not necessarily the result of an abortive attempt to organize a corporation. *Blanchard v. Kaull*, 44 Cal. 451. See also *Larnett v. Beal*, 65 N. H. 184; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295; *Saunders v. Farmer*, 62 N. H. 572; *Jewell v. Gilbert*, 64 N. H. 13; 10 Am. St. Rep. 357; *Case v. Kelley*, 133 U. S. 21; *Mor. Priv. Corp.*, §§ 744-755."

1. *McClinch v. Sturgis*, 72 Me. 288.

2. *Stout v. Zulick*, 48 N. J. L. 599.

3. *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83;

4. *Booth v. Wonderly*, 36 N. J. L. 250.

5. *Stokes v. Findlay*, 4 McCrary (U. S.) 205. But compare *Heuer v. Carmichael*, 82 Iowa 288.

6. *Pocheln v. Kemper*, 14 La. Ann. 308; 74 Am. Dec. 433; *Cresswell v. Oberly*, 17 Ill. App. 281.

7. *Curative Acts*.—Central Agr. Assoc. v. Alabama Gold L. Ins. Co., 70 Ala. 120; 3 Am. & Eng. Corp. Cas. 78; *State v. Steel*, 37 Minn. 428; *Richmond St. R. Co. v. Reed*, 83 Ind. 9; *In re Reformed Episcopal Church*, 12 Phila. (Pa.) 516; *In re West Park Ave., etc., Church*, 12 Phila. (Pa.) 518; *Independent Order of Mut. Aid v. Paine*, 122 Ill. 625; 22 Am. & Eng. Corp. Cas. 682; *McCord, etc., Mercantile Co. v. Glenn*, 6 Utah 139.

8. *Fuller v. Rowe*, 57 N. Y. 23; *DeWitt v. Hastings*, 69 N. Y. 518.

In *Fuller v. Rowe*, 57 N. Y. 23, a party holding himself out as president of a corporation duly organized, which,

after an abortive attempt at incorporation, by those who take no part in company affairs, will not render them liable as partners,<sup>1</sup> especially where they become stockholders in the belief that the company was legally organized.<sup>2</sup> So where but one of several would-be incorporators conducts business in the proposed corporate name, he alone is liable for the debts contracted therein.<sup>3</sup>

(b) **Unauthorized Incorporation.**—Where incorporation is attempted for the transaction of business not specified in the incorporation act, the provisions of which are sought to be availed of,<sup>4</sup> or where the act itself is unconstitutional,<sup>5</sup> those engaged in the enterprise may subject themselves to a partnership liability.

(3) **Corporate Migration.**—(See also FOREIGN CORPORATIONS, vol. 8, p. 329).—The transaction of business by a foreign corporation as such is not a right,<sup>6</sup> though it is usually authorized upon the principle of interstate comity.<sup>7</sup> Stockholders in a migratory corporation may therefore be subjected to a partnership liability by foreign states. Thus, in *New Jersey*, a foreign corporation must reorganize under the laws of that state in order to secure immunity to its members.<sup>8</sup> And it seems to be the general rule that a concern expressly authorized to do business anywhere but in the state of its domicile, will not be recognized and protected as a corporation by other states.<sup>9</sup> So, one who forms a sham or-

in fact had not been, employed the plaintiff to act as its superintendent. Defendant, supposing the company to have been incorporated, took stock therein, was elected president, and notified plaintiff to report to him, which was done, plaintiff drawing drafts on defendant as president, which were accepted and paid by the acting treasurer. The business proved a failure, and was abandoned, and in an action to recover plaintiff's salary, it was held that the defendant was not liable.

1. *Stafford Bank v. Palmer*, 47 Conn. 443. Compare *Richardson v. Pitts*, 71 Mo. 128.

2. *American Salt Co. v. Heidenheimer*, 80 Tex. 344.

3. *Rutherford v. Hill*, 22 Oregon 218; 36 Am. & Eng. Corp. Cas. 687.

4. **Unauthorized Incorporation.**—*Vredenburg v. Behan*, 33 La. Ann. 627; *Glen v. Breard*, 35 La. Ann. 875; *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; *Press Printing Co. v. Board of Assessors*, 51 N. J. L. 75; *Bank of California v. Collins*, 7 Hun (N. Y.) 336; *People v. Nelson*, 46 N. Y. 477; *People v. Gunn*, 96 N. Y. 317; *McGrew v. City Produce Exch.*, 85 Tenn. 572.

5. *Eaton v. Walker*, 76 Mich. 579; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; 38 Am. Rep. 407; *Williams v.*

*Bank of Michigan*, 7 Wend. (N. Y.) 540; *State v. How*, 1 Mich. 512.

6. **Rights of Foreign Corporations.—Interstate Comity.**—*Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Paul v. Virginia*, 8 Wall. (U. S.) 168.

7. *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Runyan v. Coster*, 14 Pet. (U. S.) 129; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129; *Williams v. Creswell*, 51 Miss. 817; *Miller v. Ewer*, 27 Me. 509; 46 Am. Dec. 619; *Merrick v. Van Santvoord*, 34 N. Y. 221; *Wright v. Bundy*, 11 Ind. 404; *Hanna v. International Petroleum Co.*, 23 Ohio St. 622; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Wood Hydraulic Hose M. Co. v. King*, 45 Ga. 35; *Second Nat. Bank v. Hall*, 35 Ohio St. 158; *Bagley v. Tyler*, 43 Mo. App. 195; *Empire Mills v. Alston Grocery Co.* (Tex. App. 1891), 33 Am. & Eng. Corp. Cas. 15.

8. *Hill v. Beach*, 12 N. J. Eq. 31.

9. *Land Grant R. & T. Co. v. Coffey County*, 6 Kan. 245. In this case it was said that no rule of comity will allow one state to spawn corporations and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not allow them to do business within its own boundaries. See also *Kruse v.*

ganization to enable him to carry on his private affairs, but doing and intending to do no business in the state where it is incorporated, is liable individually.<sup>1</sup> But it is also held in *Massachusetts* that a corporation of that state may in fact do all of its business outside,<sup>2</sup> and in *Ohio* that corporations may do business there, though organized under the more liberal laws of *Kentucky*, and thereby escape liability.<sup>3</sup> The laws of *Texas* do not authorize corporations for mercantile business, and stockholders in a company transacting such business in *Texas*, but organized in *Iowa*, are liable as partners even to one who dealt with them as a corporation.<sup>4</sup>

(4) *Fraud*—(See also OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 115).—Stockholders may sometimes incur partnership liability by fraudulent acts and representations.<sup>5</sup> Thus, using the corporation as a cloak for the prosecution of illegal business,<sup>6</sup> fraudulent representations as to the solvency of the concern,<sup>7</sup> and in some jurisdictions, holding or allowing the members to be held out as partners,<sup>8</sup> will render them liable as such. So, a false advertisement as to the amount of capital stock will sometimes,<sup>9</sup> though not always,<sup>10</sup> have that effect; but in *Georgia* it is held that creditors must have been induced to become such by acts or statements of the stockholders, in order to charge the latter.<sup>11</sup>

Dusenbury, 19 N. Y. Wkly. Dig. 201, where a corporation was organized under the law of *New Jersey*, but had no place of business in that state, and transacted all its business in *New York*. The court said: "It was not an existing corporation within the meaning of the statute of *New Jersey*, under which it purports to have been incorporated. . . . It was a fraud upon the laws of *New Jersey*, and cannot screen defendants and its organizers from personal responsibility as partners for contracts made in *New York* under the assumed name." See also to the same effect the opinion of Attorney-General of Texas, 2 Ry. & Corp. Law J. 433, as to a corporation organized in Scotland to purchase lands anywhere but in that country.

1. *Montgomery v. Forbes*, 148 Mass. 249.

2. *Saltmarsh v. Spaulding*, 147 Mass. 224; 20 Am. & Eng. Corp. Cas. 514.

3. *Second Nat. Bank v. Hall*, 35 Ohio St. 158; *Second Nat. Bank v. Lovell*, 2 Cin. (Ohio) 397.

4. *Empire Mills v. Alston Grocery Co.* (Tex. App. 1891), 33 Am. & Eng. Corp. Cas. 15.

5. *Chandler v. Bacon*, 30 Fed. Rep. 538; *Emery v. Parrott*, 107 Mass. 95.

6. *McGrew v. City Produce Exchange*, 85 Tenn. 572.

7. *Searight v. Payne*, 2 Tenn. Ch. 175. But not statements made in good faith. *Jackson v. Turquand*, L. R., 4 H. L. 305.

8. *Collingwood v. Berkeley*, 15 C. B., N. S. 145; 109 E. C. L. 145; *Mad-dick v. Marshall*, 17 C. B., N. S. 829; 11 E. C. L. 828; *Wood v. Argyll*, 6 M. & G. 928; *Lake v. Argyll*, 6 Q. B. 477; 51 E. C. L. 477.

The fact that stockholders might have represented that they were individually liable when the charter did not make them so, will not bind them as stockholders. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98.

9. In *Illinois*, by statute. See also *Haslett v. Wotherspoon*, 1 Strobb. Eq. (S. Car.) 229.

Stockholders commit a legal fraud by doing business on less than the minimum capital, and must make good the capital, with interest; and cannot retain amounts drawn from the corporate assets as pretended salaries; no profits appearing from which to pay salaries. *Burns v. Beck*, etc., *Hardware Co.*, 83 Ga. 471.

10. *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Dec. 551; *First Nat. Bank v. Almy*, 117 Mass. 476; *Evans v. Coventry*, 25 L. J. Ch. 489; *Crease v. Babcock*, 10 Met. (Mass.) 525.

11. *Sisson v. Matthews*, 20 Ga. 848.

(5) *Miscellaneous Instances.*—The status of stockholders is not affected by corporate dissolution,<sup>1</sup> nor is partnership liability incurred by them for acts of corporate agents,<sup>2</sup> unless continuance of the business is authorized by the stockholders.<sup>3</sup> Parties may become individually liable, however, by continuing the business of a corporation whose property and franchises they have purchased,<sup>4</sup> as such a transfer does not *per se* invest them with corporate powers.<sup>5</sup>

2. *Effect of Transfer*—*a.* UPON SUBSCRIPTION LIABILITY.—It is the general common-law rule that a transfer, if regular and *bona fide*, relieves the transferrer from liability for unpaid subscriptions.<sup>6</sup>

1. *Dissolution.*—Rowland *v.* Meader Furniture Co., 38 Ohio St. 269; Portland, etc., Ins. Co. *v.* Portland, 12 B. Mon. (Ky.) 77; Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53.

2. Central City Sav. Bank *v.* Walker, 66 N. Y. 424.

3. National Union Bank *v.* Landon, 45 N. Y. 410.

4. Chaffe *v.* Ludeling, 27 La. Ann. 607.

5. New Orleans, etc., R. Co. *v.* Delaware, 114 U. S. 501; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609; Fietsam *v.* Hay, 122 Ill. 293; 22 Am. & Eng. Corp. Cas. 559; 3 Am. St. Rep. 492; Archer *v.* Terre Haute, etc., R. Co., 102 Ill. 492; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455; Chaffe *v.* Ludeling, 27 La. Ann. 607.

6. *Transfer Relieves from Subscription Liability.*—Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36; Gilmore *v.* Bank of Cincinnati, 8 Ohio 62; Cole *v.* Ryan, 52 Barb. (N. Y.) 168; Billings *v.* Robinson, 94 N. Y. 415; Wakefield *v.* Fargo, 90 N. Y. 213; Cowles *v.* Cromwell, 25 Barb. (N. Y.) 413; Isham *v.* Buckingham, 49 N. Y. 216; Stewart *v.* Walla Walla Print., etc., Co., 1 Wash. 521; Chouteau Spring Co. *v.* Harris, 20 Mo. 382; Miller *v.* Great Republic Ins. Co., 50 Mo. 55; Allen *v.* Montgomery R. Co., 11 Ala. 437; Hayne *v.* Palmer, 13 La. Ann. 240; Weston's Case, L. R., 4 Ch. 20; McKenzie *v.* Kittridge, 24 U. C., C. P. 1; Provincial Ins. Co. *v.* Shaw, 19 U. C., Q. B. 533; *In re* European Bank, 41 L. J. Ch. 501; Burke *v.* Smith, 16 Wall. (U. S.) 390; Brigham *v.* Mead, 10 Allen (Mass.) 245; First Nat. Bank *v.* Gifford, 47 Iowa 575. But see *contra*, Messersmith *v.* Sharon Sav. Bank, 96 Pa. St. 440; Ladd *v.* Cartwright, 7 Oregon 329; Watson *v.* Eales, 23 Beav. 294; McCready *v.* Rumsey, 6 Duer (N. Y.) 574; *In re* Bachman, 12 Nat. Bank Reg. 223.

In *England*, while the cases do not seem entirely harmonious, in principle, it is held that a transfer, if real and substantial, and without reservation, will be upheld though made with the intention to escape liability. DePass's Case, 4 De G. & J. 544; *Ex parte* Costello, 2 De G. F. & J. 302; *Ex parte* Jessop, 27 L. J. Ch. 757; Harrison's Case, L. R., 6 Ch. 286; Colquhoun *v.* Courtenay, 43 L. J. Ch. 338; 29 L. T., N. S. 877; Chynoweth's Case, 15 Ch. Div. 13; Weston's Case, L. R., 4 Ch. 20. See also Master's Case, L. R., 7 Ch. 292; Hakim's Case, L. R., 7 Ch. 296, n.; Bishop's Case, L. R., 7 Ch. 296, n.; Williams' Case, 1 Ch. Div. 576; King's Case, L. R., 6 Ch. 196; *In re* Taurine Co., 25 Ch. Div. 118; Moore *v.* McLaren, 11 U. C., C. P. 534; Battie's Case, 39 L. J. Ch. 301; Bunn's Case, 2 De G. F. & J. 275. Even though it is a gift. Master's Case, L. R., 7 Ch. 292; 41 L. J. Ch. 501, *reversing* 25 L. T., N. S. 582. And a transfer in trust, where there are no circumstances of fraud, has been held to relieve the beneficial owner from liability, though articles of association provided that the company should not notice trusts. *Ex parte* Bugg, 2 Dr. & Sm. 452.

A fictitious transfer was sustained, though the circumstances were suspicious, where the parties deposed that no trust was reserved. Battie's Case, 39 L. J. Ch. 301; 18 W. R. 620. See also Slater's Case, 35 Beav. 391; 35 L. J. Ch. 304. Where the secretary of a company purchased shares and had them transferred to a "dummy," a person of small means, in order to conceal the fact that he (the secretary) was trafficking in shares, the transaction was *bona fide*. King's Case, L. R., 6 Ch. 196.

Knowledge that the company is on the eve of dissolution will not always prevent the release of the transferrer. *In re* Taurine Co., 25 Ch. Div. 118.



This species of liability is said to "follow the stock,"<sup>1</sup> and to pass from the transferor to the transferee.<sup>2</sup> But a *bona fide* transferee without notice cannot generally be held liable by corporate creditors for the par value of shares originally issued for an overvalued consideration,<sup>3</sup> nor is one to whom shares are issued without his knowledge liable, unless he performs some act of ratification.<sup>4</sup> By

A transfer to escape liability is not always upheld. See *Payne's Case*, L. R., 9 Eq. 223.

A transfer otherwise *bona fide* cannot be set aside because the purchaser was paid money to take the stock, or because the certificate contains false representations as to consideration. And the seller cannot refuse to sign the deed because it states a fictitious consideration. *Case v. McClellan*, 25 L. T., N. S. 753; *In re Hafod Lead Mining Co.*, 35 L. J. Ch. 304. The transferor may be released if the transferee is accepted by the corporation, though the transfer was irregular. *Murray v. Bush*, L. R., 6 H. L. 37. But not if it has entered a memorial of transfer. *Aylesbury R. Co. v. Mount*, 4 M. & G. 651; 5 Scott, N. R. 127.

An action lies against a transferor after call, but before it is payable. *North Am., etc., Assoc. v. Bentley*, 19 L. J., Q. B. 427.

1. *Nebraska Constitution*, Art. 13, § 4.  
2. *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 328; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Libby v. Tobey*, 82 Me. 397; 31 Am. & Eng. Corp. Cas. 526; *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484; *Bend v. Susquehanna Bridge, etc., Co.*, 6 Harr. & J. (Md.) 128; 14 Am. Dec. 261; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; *Brigham v. Mead*, 10 Allen (Mass.) 245; *Hartford, etc., R. Co. v. Boorman*, 12 Conn. 530; *Moore v. Jones*, 3 Woods (U. S.) 53; *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *Mann v. Currie*, 2 Barb. (N. Y.) 294; *Brown v. Hitchcock*, 36 Ohio St. 667; *Ladd v. Cartwright*, 7 Oregon 329. See also *DePass' Case*, 4 De G. & J. 544; *Cape's Case*, 2 De G. M. & G. 562; *Briggs v. Waldron*, 83 N. Y. 582; *Chesley v. Pierce*, 32 N. H. 388; *Thebus v. Smiley*, 110 Ill. 316.

In *England*, liability passes and attaches to the transferee, though the transferor had not, at the time of transfer, any stock in his name. *Weikersheim's Case*, L. R., 8 Ch. 831.

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A proposed transferee who has acted as the owner of stock will, in equity, be liable, though he has neither executed nor registered the transfer. *Shepherd v. Gillespie*, 17 L. T., N. S. 280.

The trustee, and not the beneficiary of stock transferred in trust, is liable after transfer. *Williams' Case*, 1 Ch. Div. 576. But if there is no *bona fide* trusteeship the beneficiary does not escape liability. *Ex parte Cox*, 4 De G. J. & S. 53; 33 L. J. Ch. 145. Nor are the trustees liable if transfer was made under the express provision that they should not, except by their own direction, be registered. *Gray's Case*, 1 Ch. Div. 664. The trustee may compel his beneficiary to indemnify him against calls. *Hemming v. Maddick*, L. R., 7 Ch. 395.

In *Pennsylvania*, it has been held that a transferee of stock, subject to future calls, is not personally liable for such unpaid installments if act of incorporation does not require it. *Palmmer v. Ridge Min. Co.*, 34 Pa. St. 288.

3. *Young v. Erie Iron Co.*, 65 Mich. 111; 16 Am. & Eng. Corp. Cas. 626; *Erskine v. Loewenstein*, 82 Mo. 301; *West Nashville, etc., Co. v. Nashville Sav. Bank*, 86 Tenn. 252; *Steacy v. Little Rock, etc., R. Co.*, 5 Dill. (U. S.) 348; *Brant v. Ehlen*, 59 Md. 1; *Wintringham v. Rosenthal*, 25 Hun (N. Y.) 580; *Waterhouse v. Jamieson*, L. R., 2 H. L. Sc. 29; *Burkinshaw v. Nicholls*, L. R., 3 App. Cas. 1004; *Douglass v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93; *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 57 N. Y. 134; *Phelan v. Hazard*, 5 Dill. (U. S.) 45; *Smith v. North American Min. Co.*, 1 Nev. 423; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Spense v. Iowa Valley, etc., Co.*, 36 Iowa 407. *Contra*, *Cover v. Manaway*, 115 Pa. St. 348; 2 Am. St. Rep. 552.

4. *Keyser v. Hitz*, 133 U. S. 138, holding also that an indorsement by the payee of a check purporting to be drawn in payment of a dividend due the payee as a stockholder, estops him from denying knowledge and ownership.

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many authorities it is held that pledgees or holders of stock as collateral are liable to creditors;<sup>1</sup> but in *Maryland*,<sup>2</sup> *Missouri*,<sup>3</sup> and *New York*,<sup>4</sup> such holders are exempt, and by other cases they are held liable only when their certificates fail to establish their character as pledgees.<sup>5</sup> The liability of parties to a transfer is frequently regulated by statute.<sup>6</sup> But while a transfer in good faith may thus relieve a stockholder, an irregular transfer, or one made for the express purpose of escaping liability, will not always have that effect.<sup>7</sup> Accordingly, transfers without the required registra-

1. *Germania Nat. Bank v. Case*, 99 U. S. 628; *Pullman v. Upton*, 96 U. S. 328; *Sleeper v. Goodwin*, 67 Wis. 579; *Moore v. Jones*, 3 Woods (U. S.) 53; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Crease v. Babcock*, 10 Met. (Mass.) 525; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199; *Rosevelt v. Brown*, 11 N. Y. 148; *In re Empire City Bank*, 18 N. Y. 199; *Grew v. Breed*, 10 Met. (Mass.) 569; *Aultman's Appeal*, 98 Pa. St. 505; *Hayne v. Palmer*, 13 La. Ann. 240; *Magruder v. Colston*, 44 Md. 349; 3 Am. Rep. 177; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa 344; 7 Am. Rep. 137; *Barre First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Dickinson v. Central Nat. Bank*, 129 Mass. 279; 37 Am. Rep. 351; *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162; *Koons v. First Nat. Bank*, 89 Ind. 178; 3 Am. & Eng. Corp. Cas. 176; *Price & Brown's Case*, L. R., 5 Ch. 294; *Royal Bank of India's Case*, L. R., 7 Eq. 91; L. R., 4 Ch. 252; *Weikersehm's Case*, L. R., 8 Ch. 831.

But a transfer by the pledgee terminates his liability, though made for that very purpose. *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

2. *Matthews v. Albert*, 24 Md. 527.

3. *Union Sav. Assoc. v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776; *Burgess v. Seligman*, 107 U. S. 20.

4. *McMahon v. Macy*, 51 N. Y. 155; *Stover v. Flack*, 30 N. Y. 64; 41 Barb. (N. Y.) 162; *In re Reciprocity Bank*, 22 N. Y. 17; *Guest v. Worcester, etc., R. Co.*, L. R., 4 C. P. 9.

5. *Davis v. Essex Baptist Soc.*, 44 Conn. 582; *Barre First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

6. See the statutory provisions of the various states.

7. In *England* it is held, though seemingly in conflict with the English

cases cited above, that a transfer will not be supported where facts indicate that it was colorable and made with reservation and to escape liability. *Ex parte Lund*, 27 Beav. 465; 28 L. J. Ch. 628; *Hyam's Case*, 1 De G. F. & J. 75; 29 L. J. Ch. 243; *Ex parte Costello*, 2 De G. F. & J. 302; 30 L. J. Ch. 113; *Ex parte Alexander*, 9 W. R. 410; 3 L. T., N. S. 883. And transfer to one without means has been held not in good faith. *Ex parte Hatton*, 31 L. J. Ch. 340; 10 W. R. 313; *Ex parte Budd*, 3 De G. F. & J. 297; 30 Beav. 143.

A registered transfer to a trustee to escape liability is void, though the deed of settlement makes the registered owner the beneficial one. *Chinnock's Case*, 1 Johns. 714; 8 W. R. 255.

Where the deed of transfer was never sent to the transferee, though lodged with the company four days before suspension, and it was the practice of the company to require execution by the transferee, the transferrer was held as a contributory. *Marino's Case*, L. R., 2 Ch. 596; *Ex parte Musgrave*, L. R., 5 Eq. 193. So failure to register a transfer, leaves the transferrer still liable. *Head's Case*, L. R., 3 Eq. 84; *Evans v. Woods*, L. R., 5 Eq. 9. But not if due to default of company. *Ex parte Fyfe*, L. R., 4 Ch. 768; *In re Manchester & Oldham Bank*, 54 L. J. Ch. 926.

A transfer, when calls are unpaid, if subsequently canceled, is invalid, though passed by the board of directors. *Anderson's Case*, L. R., 8 Eq. 509. And the transferrer will be liable if the transfer was made after the day when the call should properly have been issued, though it was postponed by the directors. *Gilbert's Case*, L. R., 5 Ch. 559.

Where a mortgagee of stock directs a transfer to his servant to escape liability, but is at the time subject to none, the servant holds the stock in trust. *Colquhoun v. Courtenay*, 43 L. J. Ch. 338. Neglect of formalities is held to vitiate

tion,<sup>1</sup> or to irresponsible parties, and those incompetent to hold stock, have been held to leave the transferrer *in statu quo*.<sup>2</sup> The rule regarding registration, however, is sometimes relaxed,<sup>3</sup> as in case of omission through the failure of the company,<sup>4</sup> where the transferee has done all in his power to complete the transfer,<sup>5</sup> or where registration is not required.<sup>6</sup> In *England*, a transfer to the company will not relieve the stockholder,<sup>7</sup> and in the *United*

ate transfer. *Cape's Case*, 3 De G. M. & G. 272; *Ex parte Walker*, L. R., 2 Eq. 554; *Heritage's Case*, L. R., 9 Eq. 5.

1. **Unregistered Transfer Will Not Release.**—*Shellington v. Howland*, 53 N. Y. 376; *Worrall v. Judson*, 5 Barb. (N. Y.) 210; *Louisiana Ins. Co. v. Gordon*, 8 La. 174; *Dane v. Young*, 61 Me. 160; *Fowler v. Ludwig*, 34 Me. 455; *Davis v. Essex Baptist Soc.*, 44 Conn. 582; *Kellogg v. Stockwell*, 75 Ill. 68; *Brown's N. B. Cas.* 147; *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674; *McEwen v. West London Wharves, etc., Co.*, L. R., 6 Ch. 655; *Midland, etc., Co. v. Gordon*, 16 M. & W. 804; *Sayles v. Blanc*, 19 L. J., Q. B. 19; 6 Eng. Ry. Cas. 79. See also *Cutting v. Damerel*, 23 Hun (N. Y.) 339.

2. **Transfers to Irresponsible Parties.**—*Bowden v. Johnson*, 107 U. S. 251; *Bowden v. Santos*, 1 Hughes (U. S.) 158; *Provident Sav. Inst. v. Jackson Place Skating, etc., Rink*, 52 Mo. 557; *McClaren v. Franciscus*, 43 Mo. 452; *Rider v. Morrison*, 54 Md. 429; *Central Agr., etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; 3 Am. & Eng. Corp. Cas. 78; *Mandion v. Fireman's Ins. Co.*, 11 Rob. (La.) 177; *Nathan v. Whitlock*, 9 Paige (N. Y.) 152; *Paine v. Stewart*, 33 Conn. 517; *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1; *Everhart v. Westchester, etc., R. Co.*, 28 Pa. St. 339; *Veiller v. Brown*, 18 Hun (N. Y.) 571; *Aultman's Appeal*, 98 Pa. St. 505; *Arthur v. Midland R. Co.*, 3 Kay & J. 204; *Ex parte Cox*, 4 De G. J. & S. 53; *Pugh & Sharman's Case*, L. R., 13 Eq. 566. In *Dauchy v. Brown*, 24 Vt. 210, *Isham, J.*, said: "The suggestion which has been made against this construction of the act, that a stockholder may fraudulently dispose of his stock to avoid liability, can have no controlling influence, for it has been too frequently decided to be considered as an open question, that such transfers as against creditors are absolutely void, that, as to them, they are to be considered still as members, and that an execution can be levied upon their personal and real estate, as

if no transfer had been made. Such was the decision in *Marcy v. Clark*, 17 Mass. 330; *Middletown Bank v. McGill*, 5 Conn. 70; and in *Roman v. Fry*, 5 J. J. Marsh (Ky.) 634."

The assignment to a fictitious person is a mere nullity. It transfers no right, simply because there is no real person to receive it on its passing from the original proprietor. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 127; 42 Am. Dec. 191.

3. *Wehrman v. Reakert*, 1 Cin. (Ohio) 230.

4. *Isham v. Buckingham*, 49 N. Y. 216; *Cutting v. Damerel*, 88 N. Y. 410; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *Murray v. Bush*, L. R., 6 H. L. 37; *Upton v. Burnham*, 3 Biss. (U. S.) 431; *Fyfe's Case*, L. R., 4 Ch. 768; *Lowe's Case*, L. R., 9 Eq. 589; *Nation's Case*, L. R., 3 Eq. 77.

5. *Whitney v. Butler*, 118 U. S. 655; *Ex parte Henderson*, 19 Beav. 107; *Shortridge v. Bosanquet*, 16 Beav. 84, *overruling Bosanquet v. Shortridge*, 4 Exch. 699; *White's Case*, L. R., 3 Eq. 86. But see *contra, In re Bachman*, 12 Nat. Bankr. Reg. 223; *Johnson v. Laffin*, 5 Dill. (U. S.) 65; *Cartmell's Case*, L. R., 9 Ch. 691; *Heritage's Case*, L. R., 9 Eq. 5; *Midland, etc., R. Co. v. Gordon*, 16 M. & W. 804; *Ex parte Hall*, 5 Railw. Cas. 624; *In re Anglo Indian, etc., Inst.*, *Smith's Case*, 7 Ry. & Corp. Law J. 57.

In *England*, failure of directors to assent will prevent the liability from divesting, though the stockholder has used every effort to transfer. *Chartre's Case*, 1 De G. & Sm. 581.

The transferee cannot claim exemption by reason of the company's act. *Ex parte Holmes*, 15 W. R. 188; nor by raising technical objections. *Royal Bank of India's Case*, L. R., 7 Eq. 91; *Burnes v. Pennell*, 2 H. L. Cas. 497.

6. *Sayles v. Bates*, 15 R. I. 342. See also *STOCK—Registration*, vol. 23, p. 582.

7. **Transfer to Corporation.**—*Ex parte Morgan*, 1 Macn. & G. 225; *Lawe's Case*, 1 De G. M. & G. 421; 21 L. J., N. S. Ch. 688; *Bennett's Case*, 5 De G. M.

*States*, while *bona fide* transfers to the corporation are generally sustained, they will not be if the concern is insolvent and the effect will be to imperil the security of corporate creditors.<sup>1</sup>

*b. UPON STATUTORY LIABILITY.*—Three distinct views have been adopted by the courts as to the time of the accrual of statutory liability and the effect of transfer thereon. Allowance must, of course, be made for the variation in form and language of the statutes imposing the liability, in accounting for the divergence of judicial interpretation. According to one view, those only are liable who were stockholders when the debt was contracted,<sup>2</sup> and while transfer will release them from debts subsequently incurred,<sup>3</sup> it will not have that effect upon those contracted during their membership;<sup>4</sup> again, the doctrine is announced that those who

& G. 284; *Ex parte Eyre*, 31 Beav. 177; *Ex parte Benham*, 12 L. T., N. S. 224; Walker's Case, L. R., 6 Eq. 30; *Ex parte Grady*, 1 De G. J. & S. 488; *Ex parte Cross*, 38 L. J. Ch. 583. But *semble*, if the transferrer is not aware that the purchase is for the company, he is not liable. *Hollway's Case*, 1 De G. & Sm. 777; nor where the company is empowered to deal in its own shares. *Ex parte Lane*, 1 De G. J. & S. 504. But such power cannot be delegated. *Cartmell's Case*, L. R., 9 Ch. 691. A transfer to a director is valid, though obtained by a threat of applying for a winding-up order. *Ex parte Reeve*, 7 L. T., N. S. 267.

One who transferred to the company shares which he held as security was held as a contributory. *Addison's Case*, L. R., 5 Ch. 294.

1. *Crandall v. Lincoln*, 52 Conn. 73; 52 Am. Rep. 560; *Gillet v. Moody*, 3 N. Y. 479; *Fraser v. Ritchie*, 8 Ill. App. 554; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; *Richmond v. Irons*, 121 U. S. 27; 17 Am. & Eng. Corp. Cas. 71; *Borland v. Haven*, 37 Fed. Rep. 394. *Compare Abeles v. Cochran*, 22 Kan. 405; 31 Am. Rep. 194; *Nathan v. Whitlock*, 9 Paige (N. Y.) 152. But see *Morgan v. Lewis*, 46 Ohio St. 1.

A receiver cannot sue a stockholder for unpaid subscriptions to stock surrendered in pursuance of a valid agreement with the corporation. *Republic L. Ins. Co. v. Swigert* (Ill. 1890), 32 Am. & Eng. Corp. Cas. 555. See *Stock—Reduction*, vol. 23, p. 582.

2. *Cases Holding Stockholders Liable Only for Debts Incurred During Their Membership.*—*Moss v. Oakley*, 2 Hill (N. Y.) 269; *Judson v. Rossie Ga-*

*lena Co.*, 9 Paige (N. Y.) 598; 38 Am. Dec. 569; *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Tracy v. Yates*, 18 Barb. (N. Y.) 152; *Phillips v. Therasson*, 11 Hun (N. Y.) 141; *Williams v. Hanna*, 40 Ind. 535; *Chesley v. Pierce*, 32 N. H. 388; *Larabee v. Baldwin*, 35 Cal. 155; *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Md. 492; *Fleeson v. Savage*, Silver Min. Co., 3 Nev. 157; *Windham Prov. Sav. Inst. v. Sprague*, 43 Vt. 502; *Freeland v. McCullough*, 1 Den. (N. Y.) 412; 43 Am. Dec. 685; *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Sayles v. Bates*, 15 R. I. 342; *Root v. Sinnock*, 120 Ill. 350; 19 Am. & Eng. Corp. Cas. 317; 60 Am. Rep. 558. See also *Story v. Furman*, 25 N. Y. 215; *Shalor, etc., Quarry Co. v. Bliss*, 27 N. Y. 298; *Davis v. Weed*, 44 Conn. 569; *Weber v. Fickey*, 47 Md. 196; *Devoas v. Gray*, 22 Ohio St. 159; *Young v. New York, etc., Steamship Co.*, 10 Abb. Pr. (N. Y.) 229; 15 Abb. Pr. (N. Y.) 69; *Chaffin v. Cummings*; 37 Me. 76; *Libby v. Tobey*, 82 Me. 397; 31 Am. & Eng. Corp. Cas. 526; *Bordman v. Osborn*, 23 Pick. (Mass.) 295; *Handrahan v. Cheshire Iron Works*, 4 Allen (Mass.) 396; *Mason v. Cheshire Iron Works*, 4 Allen (Mass.) 398; *Miliken v. Whitehouse*, 49 Me. 527; *Wheeler v. Faurot*, 37 Ohio St. 26.

In *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183, it was held that a stockholder was liable for debts contracted before, but payable after his membership ceased.

3. *Matthews v. Albert*, 24 Md. 527; *Tucker v. Gilman*, 121 N. Y. 189. *Compare cases in preceding note.*

4. *Wehrman v. Reakirt*, 1 Cin. (Ohio) 230. *Compare Brown v. Hitchcock*, 36 Ohio St. 667.

are stockholders when the action to enforce liability is commenced, are alone subject thereto;<sup>1</sup> while by another class of cases, usually construing provisions imposing liability upon "all stockholders," parties are held liable who owned stock either when the debt was contracted or when the action was commenced.<sup>2</sup> But even by this theory, stockholders cannot be held for debts contracted before they acquired membership,<sup>3</sup> though subsequent transfer will not relieve them.<sup>4</sup> Where registration is required, liability may not be removed by transfer until the transfer has been registered,<sup>5</sup> whichever of the preceding theories of liability is adopted.

**3. Enforcement—*a*. JUDGMENT AGAINST CORPORATION.**—It is the general rule, in enforcing the stockholders' liability, whether ordinary or statutory, that the creditor must have obtained a

**1. Stockholders at Commencement of Action Held Liable.**—*Middletown Bank v. Magill*, 5 Conn. 28; *Deming v. Bull*, 10 Conn. 409; *Cleveland v. Burnham*, 55 Wis. 598; *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Marcy v. Clark*, 17 Mass. 330; *McClaren v. Franciscus*, 43 Mo. 452; *Skrainka v. Allen*, 76 Mo. 384; *Longley v. Little*, 26 Me. 162.

This is the view favored by Mr. Morawetz, in his work on Corporations, where he says, § 888: "The right given by law to transfer shares in a corporation is held to include, by implication, a right to effect a complete novation of the contract of the holder with the other shareholders. The transferee is discharged from all liability to contribute to the company's capital, either for the benefit of the corporation, or for the benefit of creditors, and the transferee is rendered liable in his place. There is no reason why the right of transfer should not likewise be held to include a right to effect a novation of a special individual liability imposed upon the stockholders for the security of creditors alone. If it were held that each creditor of a corporation may pursue those particular persons who happened to be shareholders when the indebtedness arose, whether he has continued to be a shareholder or not, it would often become a matter of extreme difficulty, amounting to a practical impossibility, to adjust the rights of the past and present shareholders; and there would be no object to be gained by such a rule. The substantial rights of creditors are protected by the rule which invalidates a transfer as to creditors, unless a solvent transferee is sub-

stituted in place of the transferor; moreover, it cannot fairly be claimed that a person dealing with a corporation organized on the usual plan in the United States deals on the faith of the security offered by the individuals who happen to be shareholders at the time."

**2. "All Stockholders."**—*Curtis v. Harlow*, 12 Met. (Mass.) 3; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray (Mass.) 216; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Ohio St. 26; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78; 5 Am. & Eng. Corp. Cas. 75; *Mason v. Alexander*, 44 Ohio St. 318; *Reeder v. Maranda*, 66 Ind. 485; *Sayles v. Bates*, 15 R. I. 342; *Freeland v. McCullough*, 1 Den. (N.Y.) 414; 43 Am. Dec. 685; *Root v. Sinnock*, 120 Ill. 350; 19 Am. & Eng. Corp. Cas. 317; 60 Am. Rep. 558.

**3.** *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Sayles v. Bates*, 15 R. I. 342; note to *Prince v. Lynch*, 38 Cal. 528; 99 Am. Dec. 434.

**4.** *Brown v. Hitchcock*, 36 Ohio St. 667; *Mason v. Alexander*, 44 Ohio St. 318; *Wehrman v. Reakirt*, 1 Cin. (Ohio) 237.

**5.** *Brown v. Hitchcock*, 36 Ohio St. 667; *Harpold v. Stobart*, 46 Ohio St. 397; 15 Am. St. Rep. 618; *Irons v. Manufacturer's Nat. Bank*, 27 Fed. Rep. 591; *Reynell v. Lewis*, 15 M. & W. 517; *Landman v. Entwistle*, 7 Exch. 632; *Forrester v. Bell*, 10 I. R., C. L., 555; *Higgins v. Hopkins*, 3 Ex. 163; *Bailey v. Macauley*, 13 Q. B. 814; 66 E. C. L. 814; *Newton v. Belcher*, 12 Q. B. 921; 64 E. C. L. 919; *Carrick's Case*, 1 Sim. N. S. 505; *Ex parte Cottle*, 2 Macn. & G. 185; *Roberts' Case*, 2

judgment against the corporation with a return of *nulla bona* before he may sue the stockholder.<sup>1</sup> In *New Hampshire*<sup>2</sup> and *Florida*<sup>3</sup> this rule is abrogated by statute, and the same was formerly true in *California*.<sup>4</sup> In *Wisconsin* the statute has been construed as not requiring judgment against the corporation,<sup>5</sup> and the same has been held of ditch companies in *Indiana*.<sup>6</sup> In *South Carolina*, a judgment against the corporation has been held unnecessary to enforce a charter liability of five per cent. on each share.<sup>7</sup> In *Nebraska*, actions directly against the stockholders have been sanctioned by usage, though the question has not yet been squarely decided.<sup>8</sup> So, generally, the rule first stated does

Mac. & G. 192; *Wood v. Argyll*, 6 M. & G. 928; *Burnside v. Dayrell*, 3 Exch. 224; *Norris v. Cottle*, 2 H. L. Cas. 647.

1. **Remedy Against Corporation Must be First Exhausted.**—*Dauchy v. Brown*, 24 Vt. 209; *Harper v. Union Mfg. Co.*, 100 Ill. 225; *First Nat. Bank v. Greene*, 64 Iowa 445; *Wright v. McCormack*, 17 Ohio St. 86; *Stewart v. Lay*, 45 Iowa 604; *Hoyt v. Bunker* (Kan. 1893), 32 Pac. Rep. 126; *Toucey v. Bowen*, 1 Biss. (U. S.) 81; *Lane v. Harris*, 16 Ga. 217; *Drinkwater v. Portland Marine R. Co.*, 18 Me. 35; *Cambridge Waterworks v. Somerville Dyeing, etc., Co.*, 4 Allen (Mass.) 239; *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Hatch v. Burroughs*, 1 Woods (U. S.) 439; *Means' Appeal*, 85 Pa. St. 75; *Bayliss v. Swift*, 40 Iowa 648; *McClaren v. Franciscus*, 43 Mo. 452; *Wehrman v. Reakirt*, 1 Cin. (Ohio) 230; *Jackson v. Meek*, 87 Tenn. 69; 10 Am. St. Rep. 620; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Terry v. Anderson*, 95 U. S. 636; *Walser v. Seligman*, 21 Blatchf. (U. S.) 130; *Handy v. Draper*, 89 N. Y. 334; *Shellington v. Howland*, 53 N. Y. 371; *Freeland v. McCullough*, 1 Den. (N. Y.) 414; 43 Am. Dec. 685; *Andrew v. Vanderbilt*, 37 Hun (N. Y.) 468; *Lindsley v. Simonds*, 2 Abb. Pr., N. S. (N. Y.) 69; *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Munger v. Jacobson*, 99 Ill. 349; *Cutright v. Stanford*, 81 Ill. 240; *Lane v. Harris*, 16 Ga. 217; *Thornton v. Lane*, 11 Ga. 459; *Blake v. Hinkle*, 10 Yerg. (Tenn.) 218; *Remington v. Samana Bay Co.*, 140 Mass. 494; 12 Am. & Eng. Corp. Cas. 97; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Perkins v. Church*, 31 Barb. (N. Y.) 84; *Baxter v. Moses*, 77 Me. 465; 52 Am. Rep. 783; *Cleveland v. Burnham*,

55 Wis. 598; *Bank of U. S. v. Dallam*, 4 Dana (Ky.) 574; *Bartlett v. Pentland*, 1 B. & Ad. 704; 20 E. C. L. 475; *Clowes v. Brettell*, 10 M. & W. 506; *Winfield v. Barton*, 2 Dowl. N. S. 355; *Wingfield v. Peel*, 12 L. J. Q. B. 102. See also *Stone v. Wiggins*, 5 Met. (Mass.) 316; *Stedman v. Eveleth*, 6 Met. (Mass.) 114; *Leland v. Marsh*, 16 Mass. 389; *Marcy v. Clark*, 17 Mass. 330. See also *Bayliss v. Swift*, 40 Iowa 648; *Head v. Daniels*, 38 Kan. 1; *Peckham v. Van Wagenen*, 83 N. Y. 40; 38 Am. Rep. 392. *Compare Hospes v. Northwestern, etc., Mfg. Co.* (Minn. 1892), 36 Am. & Eng. Corp. Cas. 206.

But a return of *nulla bona* is unnecessary in any other county than that where the principal office of the corporation is located, though it may have property in other counties. *Ripley v. Evans*, 87 Mich. 217.

2. *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363.

3. *Gibbs v. Davis*, 27 Fla. 531.

4. *Morrow v. San Francisco Superior Court*, 64 Cal. 383. *Compare Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646.

5. *Sleeper v. Goodwin*, 67 Wis. 579; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797.

6. *Marion Tp., etc., Co. v. Norris*, 37 Ind. 424; *Shafer v. Moriarty*, 46 Ind. 9.

7. *Bird v. Calvert*, 22 S. Car. 292, where the court says: "The obligation in one sense may possibly be termed collateral, but we cannot see that in any sense it is secondary and enforceable only after judgment and a return of *nulla bona* against the corporation."

8. In the following cases, *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *White v. Blum*, 4 Neb. 555; *Smith v. Steele*, 8 Neb. 115; *Howell v. Roberts*, 29 Neb. 483.

not apply to a bankrupt, dissolved, or extinct corporation.<sup>1</sup> The return of *nulla bona* should be made in the state of the corporation's domicile.<sup>2</sup> When obtained, the judgment against the corporation is generally,<sup>3</sup> though not always,<sup>4</sup> conclusive evidence of the indebtedness, in a subsequent action against the stockholder. Under the *Minnesota* statute the liability of stockholders for corporate debts may be enforced upon the application of any creditor

1. **Corporation Insolvent or Extinct.**—Chamberlin v. Bromberg, 83 Ala. 576; McDonnell v. Alabama Gold L. Ins. Co., 85 Ala. 401; Paine v. Stewart, 33 Conn. 516; Gibbs v. Davis, 27 Fla. 531; Kimbro v. Bank of Fulton, 49 Ga. 419; Patterson v. Lynde, 112 Ill. 196; 10 Am. & Eng. Corp. Cas. 195; First Nat. Bank v. Greene, 64 Iowa 445; Stark v. Burke, 9 La. Ann. 341; Knight v. Frost, 14 Mo. App. 331; Dryden v. Kellogg, 2 Mo. App. 87; State Sav. Assoc. v. Kellogg, 52 Mo. 583; Remington v. Samana Bay Co., 140 Mass. 494; 12 Am. & Eng. Corp. Cas. 97; Chamberlain v. Huguenot Mfg. Co., 118 Mass. 532; Shellington v. Howland, 53 N. Y. 371; Ansonia Brass, etc., Co. v. New Lamp Chimney Co., 53 N. Y. 123; 13 Am. Rep. 476; Kincald v. Dwinelle, 59 N. Y. 548; Walton v. Coe, 110 N. Y. 109; Hardman v. Sage, 124 N. Y. 25; 36 Am. & Eng. Corp. Cas. 145; Camden v. Doremus, 3 How. Pr. (N. Y.) 515; Lovett v. Cornwell, 6 Wend. (N. Y.) 369; People v. Bartlett, 3 Hill (N. Y.) 570; Loomis v. Tift, 16 Barb. (N. Y.) 541; Walser v. Seligman, 21 Blatchf. (U. S.) 130; Hollingshead v. Woodward, 35 Hun (N. Y.) 410; Penniman v. Briggs, 1 Hopk. (N. Y.) 300; Slee v. Bloom, 19 Johns. (N. Y.) 456; 10 Am. Dec. 273; Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 479; Richards v. Beach, 5 N. Y. Supp. 574; Young v. Brice, 18 N. Y. St. Rep. 945; Hodges v. Silver Hill Min. Co., 9 Oregon 200; Morgan v. Lewis, 46 Ohio St. 1; Barrick v. Gifford, 47 Ohio St. 180; 21 Am. St. Rep. 798; Bronson v. Schneider (Ohio 1892), 33 N. E. Rep. 233; Moses v. Oconee Bank, 1 Lea (Tenn.) 398; Terry v. Tubman, 92 U. S. 156; Flash v. Conn, 109 U. S. 371; 3 Am. & Eng. Corp. Cas. 28; Reynolds v. Douglass, 12 Pet. (U. S.) 497; Toucey v. Bowen, 1 Biss. (U. S.) 81; Terry v. Anderson, 95 U. S. 628. See also Cuykendall v. Douglas, 19 Hun (N. Y.) 577.

But the mere fact that corporate property is insufficient to meet liabilities will not take a case out of the

rule. Younglove v. Kelly Island Lime Co. (Ohio, 1892), 33 N. E. Rep. 234.

2. Rocky Mt. Nat. Bank v. Bliss, 89 N. Y. 338; Dean v. Mace, 19 Hun (N. Y.) 391; Brice v. Munro, 5 Can. L. T. 130; Young v. Farewell (Ill. 1891), 36 Am. & Eng. Corp. Cas. 158; Patterson v. Lynde, 112 Ill. 196; 10 Am. & Eng. Corp. Cas. 195; Shickle v. Watts, 94 Mo. 410. Compare Jessup v. Carnegie, 80 N. Y. 441; 36 Am. Rep. 643.

3. Patterson v. Lynde, 112 Ill. 196; 10 Am. & Eng. Corp. Cas. 195; Steere v. Hoagland, 39 Ill. 264; McLure v. Benceni, 2 Ired. Eq. (N. Car.) 513. See also Conklin v. Furman, 57 Barb. (N. Y.) 484; 8 Abb. Pr. N. S. (N. Y.) 161; Miller v. White, 59 Barb. (N. Y.) 434; 10 Abb. Pr. N. S. (N. Y.) 385; Stephens v. Fox, 83 N. Y. 313.

A judgment against a corporation does not extinguish, suspend, or merge the liability of the stockholders; such liability is primary, and not conditional or contingent, and is unaffected by the suspension of the remedy against the corporation. Young v. Rosenbaum, 39 Cal. 646.

Judgment may be entered against defendants individually who are described as a certain company under a complaint, though they are not members of it, if the jury finds they are liable individually. Comanche Min. Co. v. Rumley, 1 Mont. 201.

4. Crandall v. Lincoln, 52 Conn. 73; 52 Am. Rep. 560; Johnson v. Laffin, 5 Dill. (U. S.) 65; Daniell's Case, 22 Beav. 43; Munt's Case, 22 Beav. 55; Bennett's Case, 5 De G. M. & G. 284; *In re* Vale of North & South Wales Brewery Co., 3 De G. & Sm. 244; Richmond's Case, 3 De G. & S. 96; Lawe's Case, 1 De G. M. & G. 421; *In re* Royal British Bank, 3 De G. & J. 387.

A stockholder has all the rights as to plea and amendments, and all defenses to the merits, which he would have in an ordinary action on a contract; and is not concluded by a judgment against the corporation upon any issue material to his defense. Heard v. Sibby, 52 Ga. 310.

who is a party to an action against the corporation, though the judgment creditor who instituted such action did not demand that relief.<sup>1</sup> The liability may, after the death of a stockholder, be enforced against his estate.<sup>2</sup>

*b. STATUTE OF LIMITATIONS — (1) When It Begins to Run—*  
**(a) Where Execution Against the Company Must be Returned Unsatisfied.**—In some states it is provided by statute that a return of *nulla bona* against the corporation must be made before proceedings against the stockholders will lie. In others the same requirement exists by virtue of judicial construction. In these jurisdictions it is obvious that the cause of action does not normally arise, and, hence, that the statute does not begin to run until such a return of the execution.<sup>3</sup> Nevertheless, where such preliminary proceedings would regularly be required, but are rendered unnecessary by the insolvency of the corporation, that condition marks the accrual of the cause of action against the stockholder, and from that time the statute begins to run.<sup>4</sup> But insolvency such as will set the statute running must be more than mere inability of the corporation to pay its debts; some legal proceeding is necessary by which corporate property has been applied to such payment.<sup>5</sup>

**(b.) Where Stockholders May be Sued Immediately and Primarily.**—In those states where the return of an execution is not required before suing a stockholder, the right of action, of course, accrues upon the maturity of a corporate debt. In *California* stockholders are

1. *Arthur v. Willius*, 44 Minn. 409.

2. *Nolan v. Hazen*, 44 Minn. 478.

3. In *Younglove v. Kelly Island Lime Co.* (Ohio, 1892), 33 N. E. Rep. 234, the court said: "As a general rule the creditor's right of action against the stockholders of a corporation is not complete, so as to set the Statute of Limitations running, until judgment has been recovered against the corporation, and execution has been returned without satisfaction. The reason is, the corporate property is the primary fund for the payment of the debts of the corporation, and the statutory liability of the stockholders a security which can be resorted to only after the creditor's remedy against the corporation has been exhausted."

In *Handy v. Draper*, 89 N. Y. 336, *Andrews, C. J.*, said: "The claim that the last clause of the section applies only to actions against persons who have ceased to be stockholders, makes the provision in the first part of the section which exempts an existing stockholder from liability, unless a suit 'for the collection of the debt shall be brought against such company within one year after the debt shall become

due,' unnecessary and useless. No reason can be perceived for the requirement that a suit shall be first brought against the company as a condition of bringing an action against a stockholder, unless it was also intended that the remedy against the company, by the issuing of a return of an execution should be first exhausted." See also *Kincaid v. Dwinelle*, 59 N. Y. 548; *Pringle v. Woolworth*, 90 N. Y. 511; *Lindsley v. Simonds*, 2 Abb. Pr. N. S. (N. Y.) 69; *Dean v. Mace*, 19 Hun (N. Y.) 391; *Merritt v. Reid*, 13 N. Y. Wkly. Dig. 453; *Longley v. Little*, 26 Me. 162; *State v. Board of R. Com'rs*, 41 N. J. L. 249; *Barrick v. Gifford*, 47 Ohio St. 180; 31 Am. & Eng. Corp. Cas. 484; 21 Am. St. Rep. 798.

4. *Bronson v. Schneider* (Ohio, 1892), 33 N. E. Rep. 233; *Younglove v. Kelly Island Lime Co.* (Ohio, 1892), 33 N. E. Rep. 234; *Barrick v. Gifford*, 47 Ohio St. 180; 31 Am. & Eng. Corp. Cas. 484; 21 Am. St. Rep. 798; *Morgan v. Lewis*, 46 Ohio St. 1.

5. *Bronson v. Schneider* (Ohio, 1892), 33 N. E. Rep. 233; *Younglove v. Kelly Island Lime Co.* (Ohio, 1892), 33 N. E. Rep. 234.



liable as principals, not as sureties,<sup>1</sup> and the liability accrues both against them and the corporation simultaneously.<sup>2</sup> The liability of stockholders is not affected by suspension of the remedy against the corporation,<sup>3</sup> and judgment against the latter does not extend the time for bringing suit against the stockholder, nor create a new liability.<sup>4</sup>

(2) *Period of the Limitation.*—Statutes imposing a personal liability upon stockholders occasionally provide a limit within which actions may be brought to enforce such liability.<sup>5</sup> More frequently, however, they are silent on this point and the question then arises, What section of the general Statute of Limitations will govern the action? Where the liability imposed is contractual in its nature, it is the general rule that actions to enforce it are barred only in the same time as other suits grounded upon contracts.<sup>6</sup> In *Nebraska* it is held that an action to enforce a stockholder's liability for failure to publish annual notice of corporate debts, is governed by that section of the Statute of Limitations which applies to the enforcement of contracts not in writing.<sup>7</sup> Where, however, the liability imposed is penal, that shorter period of the statute pertaining to penalties will govern.<sup>8</sup> The Federal courts, in suits to enforce a stockholder's statutory liability, apply the Statute of Limitations of the state which creates the corporation and imposes the liability.<sup>9</sup> So an action by the receiver of a national bank for assessments is governed by the Statute of Limitations of the state where the bank is located.<sup>10</sup> Whether the liability is sought to be enforced at law or in equity, the same section of the Statute of Limitations is usually held to govern.<sup>11</sup>

1. Hyman v. Coleman, 82 Cal. 650.  
2. Davidson v. Rankin, 34 Cal. 503; Mitchell v. Beckman, 64 Cal. 117; 1 Am. & Eng. Corp. Cas. 40.  
3. Young v. Rosenbaum, 39 Cal. 646.  
4. Larrabee v. Baldwin, 35 Cal. 168; Stilphen v. Ware, 45 Cal. 110.  
5. Baker v. Backus, 32 Ill. 79; Shellington v. Howland, 53 N. Y. 371, construing the New York Manufacturing Corporation Act of 1848; Handy v. Draper, 89 N. Y. 334; Hollingshead v. Woodward, 107 N. Y. 96; King v. Duncan, 38 Hun (N. Y.) 461; Paine v. Stewart, 33 Conn. 516.  
6. Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167; Baker v. Atlas Bank, 9 Met. (Mass.) 982; Com. v. Cochituate Bank, 3 Allen (Mass.) 42; Corning v. McCullough, 1 N. Y. 47; 49 Am. Dec. 287; Freeland v. McCulloch, 1 Den. (N. Y.) 422; 43 Am. Dec. 685; Wiles v. Suydam, 64 N. Y. 173; Knox v. Baldwin, 80 N. Y. 610; Mappier v. Mortimer, 11 Abb. Pr., N. S. (N. Y.) 455; Lewis v. Ryder, 13

Abb. Pr. (N. Y.) 1; Lindsley v. Simmonds, 2 Abb. Pr., N. S. (N. Y.) 69; Merchants, etc., Co. v. Bliss, 21 How. Pr. (N. Y.) 366; Cuykendall v. Douglas, 19 Hun (N. Y.) 577; Hawkins v. Iron Valley Furnace Co., 40 Ohio St. 507; Carrol v. Green, 92 U. S. 509; Terry v. McLure, 103 U. S. 442.  
7. Howell v. Roberts, 29 Neb. 483; Coy v. Jones, 30 Neb. 798.  
8. Gridley v. Barnes, 103 Ill. 211; Diversy v. Smith, 103 Ill. 378; Cable v. McCune, 26 Mo. 380; 72 Am. Dec. 214. Compare Duckworth v. Roach, 81 N. Y. 49; Lawler v. Burt, 7 Ohio St. 341.  
9. Andrews v. Bacon, 38 Fed. Rep. 777; following Fourth Nat. Bank v. Francklyn, 120 U. S. 747; 16 Am. & Eng. Corp. Cas. 615; Price v. Yates, 7 W. N. C. (Pa.) 51. Compare Glenn v. Liggett, 135 U. S. 548.  
10. Butler v. Poole, 44 Fed. Rep. 586.  
11. Baker v. Atlas Bank, 9 Met. (Mass.) 182; Com. v. Cochituate Bank, 3 Allen (Mass.) 42; Bank of Pough-

c. ENFORCEMENT OF STATUTORY LIABILITY IN FOREIGN JURISDICTIONS—(1) *In General*.—The statutory liability of stockholders is governed entirely by the *lex domicilii* of the corporation.<sup>1</sup> But the statutes of a state do not operate extra-territorially *proprio vigore*,<sup>2</sup> and the service of process outside a state will not confer jurisdiction on its courts to enforce a liability imposed by its statutes.<sup>3</sup> Moreover, it is said that the enforcement of such statutes in another jurisdiction must depend on several considerations: As whether any wrong or injury will be done to the citizens of the state in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees.<sup>4</sup> Probably a more important consideration than any of those above enumerated, is whether the liability imposed by the statute is penal or contractual. The distinction between these two species of liability is elsewhere discussed,<sup>5</sup> but it is of special importance in this connection because it is the rule that a statute imposing a merely penal liability has no extra-territorial force.<sup>6</sup> With regard to the

keepsie *v.* Ibbotson, 24 Wend. (N. Y.) 473; Lindsay *v.* Hyatt, 4 Edw. Ch. (N. Y.) 104; Van Hook *v.* Whitlock, 3 Paige (N. Y.) 409; Carrol *v.* Green, 92 U. S. 509; Terry *v.* McLure, 103 U. S. 442.

1. In First Nat. Bank *v.* Gustin, etc., Min. Co., 42 Minn. 327; 30 Am. & Eng. Corp. Cas. 122, the court, by Mitchell, J., said: "It is elementary law that, where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all the laws of the state under which the corporation is organized and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in this state, but because he has voluntarily agreed to the terms of the company's constitution."

In Payson *v.* Withers, 5 Biss. (U. S.) 278, it is said: "It will not do when a citizen of a state subscribes to the capital stock of a foreign corporation, to say he was ignorant of the terms of the act which created that corporation. He is presumed to know what those terms are. They are created by the law of another state, and he, for the purpose of assuming his obligation, in a certain sense, goes into another state and casts off for the time the vesture which his own state throws around him, and puts on that of the other state, and is bound

by the obligations which the legislature of that state has imposed upon the corporation, and the privileges which it has granted, and the conditions and terms of the grant." See also Second Nat. Bank *v.* Hall, 35 Ohio St. 159; Seymour *v.* Sturgess, 26 N. Y. 134; Merrick *v.* Van Sanvoord, 34 N. Y. 208; Jessup *v.* Carnegie, 80 N. Y. 441; 36 Am. Rep. 643; McDonough *v.* Phelps, 15 How. Fr. (N. Y.) 372; *E\* parte* Van Riper, 20 Wend. (N. Y.) 614; Hill *v.* Beach, 12 N. J. Eq. 31; Bateman *v.* Service, L. R., 6 App. Cas. 386; Drinkwater *v.* Portland Marine R. Co., 18 Me. 35; Aultman's Appeal, 98 Pa. St. 505.

2. New Haven Nail Co. *v.* Linden Spring Co., 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 71.

3. Wilson *v.* St. Louis, etc., R. Co. (Mo. 1891), 36 Am. & Eng. Corp. Cas. 290; Wilson *v.* Seligman, 36 Fed. Rep. 154.

4. By Devens, J., in New Haven Nail Co. *v.* Linden Spring Co., 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 71.

5. See *supra*, this title, *Additional or Statutory Liability*.

6. Providence Steam Engine Co. *v.* Hubbard, 101 U. S. 188. In this case a statute of Connecticut imposed upon corporate officers a liability for failure to file with the town clerk a certificate showing the financial condition of the company. The court in construing this said: "Repeated instances have

other species of liability—the contractual—there is a diversity of opinion among the courts of last resort in the *United States* as to whether a statute imposing it operates outside the state where it has been enacted.

(2) *Jurisdictions Where Liability Imposed by a Foreign Statute Will be Enforced.*—The Federal courts hold that such a statute may be enforced in other states.<sup>1</sup> In *Minnesota*, the rule is announced that the “liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary

occurred where suit was brought in one state to enforce the statute liability for the debts of a corporation created by the legislature of another state, in all which it is held that the statute is penal, and that it can only be enforced in the state where the statute was passed. *Halsey v. McLean*, 12 Allen (Mass.) 438; 90 Am. Dec. 157; *Derrickson v. Smith*, 27 N. J. L. 166; *Sturges v. Burton*, 8 Ohio St. 215; 12 Am. Dec. 582; *First Nat. Bank v. Price*, 33 Md. 387; 3 Am. Rep. 204; *Irvine v. McKeon*, 23 Cal. 472. Corresponding decisions have been made in other courts, and to such an extent as to justify the remark that the rule is universal. *Bird v. Hayden*, 1 Robt. (N. Y.) 383; *Moies v. Sprague*, 9 R. I. 541.”

In *Flash v. Conn*, 109 U. S. 371; 3 Am. & Eng. Corp. Cas. 28, the court, by Woods, J., said: “It is well settled, and is not denied by plaintiff’s counsel, that the penal laws of one state can have no operation in another. They are strictly local and affect nothing more than they can reach. The *Antelope*, 10 Wheat. (U. S.) 66; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338; *Western Transp., etc., Co. v. Kilderhouse*, 87 N. Y. 430; *Lemmon v. People*, 20 N. Y. 562; *Henry v. Sargeant*, 13 N. H. 321; 40 Am. Dec. 146; *Story, Conflict of Laws*, § 621, 8th ed.” Commenting on the above, *Lowell, J.*, in *Cuykendall v. Miles*, 10 Fed. Rep. 342, said: “There is a *dictum* of Mr. Justice Clifford that all such statutes are penal, and can only be enforced in the state which passed them. *Providence Steam Engine Co v. Hubbard*, 101 U. S. 188. I agree with the plaintiff’s argument that the authorities which the learned judge cites decide that point only in respect to officers of corporations made liable for a neglect of duty. *Halsey v. McLean*, 12 Allen (Mass.) 438; 90 Am. Dec. 157; *Derrickson v. Smith*, 27 N. J. L. 166; *Sturges v. Burton*, 8 Ohio St. 215; 72 Am. Dec. 582.” See also *Sayles*

*v. Brown*, 40 Fed. Rep. 8; *Lowry v. Inman*, 46 N. Y. 127.

1. *Tinker v. Van Dyke*, 1 Flipp. (U. S.) 532; *Flash v. Conn*, 109 U. S. 371; 3 Am. & Eng. Corp. Cas. 28. In the last named case, the defendant, Conn., was a citizen of *Florida*, and was a stockholder in a corporation organized under the *New York* act of 1848, which imposed upon stockholders a double liability “until the whole amount of capital stock fixed and limited by such company shall have been paid in and a certificate thereof shall have been made and recorded.” To enforce this liability the action was brought in *Florida* in the first instance and without the recovery of a judgment in *New York*. The supreme court held that the liability was not penal, and, after citing the *New York* decisions, said: “We think this is a case where the construction of the state court is entitled to great, if not conclusive, weight with us. It is the settled construction of a law of the state upon which the rights and liabilities of a large number of its citizens must depend. If the liability of a stockholder under section 10, arises upon contract, the six years’ limitation applies to it; if the liability is in the nature of a penalty, the three years’ limitation applies. It is clear that confusion and uncertainty would result should the state and Federal courts place different constructions on the section. Such a result ought, if possible, to be avoided. . . . If this were a case arising in the State of *New York* we should, therefore, follow the construction put upon the statutes by the court of that state. The circumstance that the case comes here from the State of *Florida* should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation upon the statute in a case arising in *New York*, and a different interpretation in a case arising in *Florida*. Our conclusion, there-

parties,"<sup>1</sup> and a similar doctrine prevails in *Kansas*.<sup>2</sup> In *New York*, it is said that an absolute liability imposed by statute upon stockholders "is like other obligations, assumed in the form prescribed by the laws of the place where made, and being valid there, is enforceable everywhere."<sup>3</sup> But it must appear definitely that the liability sought to be enforced is not penal, nor imposed after the debt was contracted.<sup>4</sup> Moreover, if the courts of last resort of the state where the statute was enacted construe it as imposing no liability, the *New York* courts will not review the ruling or entertain jurisdiction to enforce a liability flowing from the statute.<sup>5</sup> In *Connecticut*,<sup>6</sup> *Missouri*,<sup>7</sup> and *Pennsylvania*,<sup>8</sup> the courts have entertained jurisdiction to enforce a liability imposed upon stockholders by the laws of other states. In *Georgia*, it is held that a trustee appointed by a court of competent jurisdiction may bring suits for unpaid subscriptions against non-resident creditors in their own states, though they have not been personally served with notice of the suit against the corporation.<sup>9</sup>

(3) *Jurisdictions Where Liability Imposed by a Foreign Statute Will Not be Enforced*.—*Massachusetts* decisions have been most

fore, is that this action was not brought to enforce a liability in the nature of a penalty."

1. *Minnesota*.—First Nat. Bank v. Gustin, etc., Min. Co., 42 Minn. 327; 30 Am. & Eng. Corp. Cas. 122; following Merchants' Nat. Bank v. Bailey Mfg. Co., 34 Minn. 323; 16 Am. & Eng. Corp. Cas. 441.

2. *Kansas*.—In *Howell v. Manglesdorf*, 33 Kan. 199, the court, by Johnston, J., said: "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. *Flash v. Conn*, 109 U. S. 371; 3 Am. & Eng. Corp. Cas. 28; *Dennick v. Central R. Co.*, 103 U. S. 11; 1 Am. & Eng. R. Cas. 309; *McDonough v. Phelps*, 15 How. Pr. (N. Y.) 372; *Seymour v. Sturgess*, 26 N. Y. 134."

3. *New York*.—*Lowry v. Inman*, 46 N. Y. 120. Compare *Ex parte Van Riper*, 20 Wend. (N. Y.) 614.

4. In *Pattison v. Baker*, 34 How. Pr. (N. Y.) 180, a mere allegation that defendant "under and by virtue of a law or laws" of another state is "liable" as a stockholder, etc., was held insufficient.

5. *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643. In this case an ac-

tion was brought in *New York* against stockholders in an *Iowa* corporation upon a note executed by it. Defendants were sought to be charged for failure to file the articles of incorporation with the secretary of state. The supreme court of *Iowa* held, in a decision rendered after the commencement of the action, and by a divided court, that no personal liability resulted from such failure. It was contended on behalf of the creditor that earlier *Iowa* decisions placed a different construction upon the statute, but the court said: "We are not called upon in this case to determine whether the court of *Iowa* was right in the construction given to the various provisions of the statute relating to the subject, and it is too late to renew a discussion of that question in the case now presented. The decision must therefore be accepted as a correct determination of the question involved, and as an exposition of the law as it existed in that state at the time it was made. Its authority is binding and conclusive, and, as we have seen, we cannot disregard it or hold that it is not in point, without overruling principles which have long been settled and acquiesced in."

6. *Paine v. Stewart*, 33 Conn. 516.

7. *Hodgson v. Cheever*, 8 Mo. App. 318.

8. *Aultman's Appeal*, 98 Pa. St. 505.

9. *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156.

frequent and emphatic on this side of the controversy. It is said in a recent adjudication from that state that "the question can hardly be considered an open one in this commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other states under statutes of these states."<sup>1</sup> This doctrine is based, not upon the view that such an action is penal, or opposed to the policy of the *Massachusetts* laws, but that "it is a suit against a foreign corporation which involves the relation between its stockholders, and in which complete justice can only be done by the courts of the jurisdiction where the corporation was created."<sup>2</sup> It is even held that such a suit will not lie, even though the foreign corporation appear by its attorney.<sup>3</sup> So the *Massachusetts* court will not entertain jurisdiction of a suit by a non-resident against an insurance company of still another state, though doing business and having an agent in *Massachusetts*.<sup>4</sup> And the members of a foreign joint-stock company may be sued directly as partners, though its charter provides for a judgment first against its officers.<sup>5</sup> Nevertheless, a bill of discovery will lie in *Massachusetts* against the officers of a foreign corporation to compel a disclosure of the names and interests of its stockholders, and ancillary to a suit in the state of its domicile to enforce the liability there enforced.<sup>6</sup>

In *Illinois*, a liability imposed upon stockholders by the laws of another state will not be enforced until judgment has been first rendered in the domestic forum.<sup>7</sup> The jurisdiction of courts in *Maine* to enforce such statutes has been doubted.<sup>8</sup> In *New Hampshire* it is held that the principle of interstate comity does not require effect to be given the statutes of another state imposing liability, where there is no showing as to what process it is enforced by where it is imposed, and none of the stockholders reside in *New Hampshire*.<sup>9</sup> A bill in equity cannot be maintained

1. *Massachusetts*.—*Bank of North America v. Rindge*, 154 Mass. 203; 36 Am. & Eng. Corp. Cas. 154. See also *New Haven Nail Co. v. Linden Spring Co.*, 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 17; *Halsey v. McLean*, 12 Allen (Mass.) 438; 90 Am. Dec. 157; *Smith v. Mutual L. Ins. Co.*, 14 Allen (Mass.) 336; *Kansas, etc., Constr. Co. v. Topeka, etc., R. Co.*, 135 Mass. 34; 10 Am. & Eng. R. Cas. 495; 46 Am. Rep. 439; *Hutchins v. New England Coal Min. Co.*, 4 Allen (Mass.) 580; *Jones v. Sisson*, 6 Gray (Mass.) 288; *Penobscot, etc., R. Co. v. Bartlett*, 12 Gray (Mass.) 244; 71 Am. Dec. 753; *Blackstone Mfg. Co. v. Blackstone*, 13 Gray (Mass.) 488; *Post v. Toledo, etc., R. Co.*, 144 Mass. 341; 19 Am. & Eng. Corp. Cas. 355; 59 Am. Rep. 86; *Erickson v. Nesmith*, 4 Allen (Mass.) 233.

2. *Post v. Toledo, etc., R. Co.*, 144 Mass. 341; 19 Am. & Eng. Corp. Cas. 355; 59 Am. Rep. 86.

3. *New Haven Nail Co. v. Linden Spring Co.*, 142 Mass. 349; 13 Am. & Eng. Corp. Cas. 71.

4. *Smith v. Mutual L. Ins. Co.*, 14 Allen (Mass.) 336.

5. *Taft v. Ward*, 106 Mass. 518.

6. *Post v. Toledo, etc., R. Co.*, 144 Mass. 341; 19 Am. & Eng. Corp. Cas. 355; 59 Am. Rep. 86.

7. *Patterson v. Lynde*, 112 Ill. 196; 10 Am. & Eng. Corp. Cas. 195; *Young v. Farewell* (Ill. 1891), 36 Am. & Eng. Corp. Cas. 158.

8. *Drinkwater v. Portland Marine R. Co.*, 18 Me. 35.

9. So held in a recent case in that state—*Rice v. Merrimack Hosiery Co.*, 56 N. H. 114.

in *West Virginia* to determine the extent of the liability of stockholders in a foreign corporation.<sup>1</sup> In *Wisconsin* it has been decided recently that its courts have no jurisdiction over actions against stockholders in a corporation organized under the statutes of another state which provide that the individual liability may be enforced by *assumpsit*.<sup>2</sup>

(4) *Remedies Are Strictly Local*.—But while the courts are thus divided upon the question of enforcing a right conferred by a foreign statute, there is an agreement among them that the remedy prescribed thereby is confined in its operation to the limits of the sovereignty creating the corporation, and is without extra-territorial force.<sup>3</sup> Accordingly, a provision that the liability shall be enforced by bill in equity,<sup>4</sup> or by the common-law action of *assumpsit*,<sup>5</sup> has no binding obligation beyond the state of its enactment.

d. REMEDIES.—A suit in equity is the most usual,<sup>6</sup> and in

1. *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

2. In *May v. Black*, 77 Wis. 101, the court, by Orton, J., said: "The courts of this state have no jurisdiction in such a case, and it is confined to the courts of the state of *Michigan*, under whose laws the corporation was created, and by which it is governed. There are two reasons in the act itself why this is so: (1) No jurisdiction can be obtained to render a personal judgment against the corporation anywhere else; (2) actions are limited to a particular place in that state. But it is a principle of law that does not appear to be questioned, that where a special remedy against stockholders is presented by the statute under which the corporation is formed, it must be enforced in the courts of that state exclusively."

3. *Lowry v. Inman*, 46 N. Y. 126. The same doctrine is announced in *Brown v. Eastern State Co.*, 134 Mass. 590; 3 Am. & Eng. Corp. Cas. 120; *Bank of North America v. Rindge*, 154 Mass. 203; 36 Am. & Eng. Corp. Cas. 154; *Christensen v. Eno*, 106 N. Y. 97; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *May v. Black*, 77 Wis. 101.

4. *Erickson v. Nesmith*, 4 Allen (Mass.) 233; *Erickson v. Nesmith*, 15 Gray (Mass.) 221; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

5. *May v. Black*, 77 Wis. 101.

6. *The Remedy in Chancery*.—Curry v. Woodward, 53 Ala. 371; *Allen v. Montgomery, R. Co.*, 11 Ala. 437; *Harmon v. Page*, 62 Cal. 448; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593;

*Hightower v. Thornton*, 8 Ga. 486; *Hightower v. Mustian*, 8 Ga. 506; *Winclock v. Turpin*, 96 Ill. 135; *Hickling v. Wilson*, 104 Ill. 54; *Crawford v. Rohrer*, 59 Md. 599; 1 Am. & Eng. Corp. Cas. 81; *Shickle v. Watts*, 94 Mo. 410; 21 Am. & Eng. Corp. Cas. 561; *Mathez v. Neidig*, 72 N. Y. 100; *Dayton v. Borst*, 31 N. Y. 435; *Mann v. Pentz*, 3 N. Y. 415; *Stephens v. Fox*, 83 N. Y. 313; *Griffith v. Mangam*, 73 N. Y. 611; *Christensen v. Eno*, 106 N. Y. 97; *Judson v. Rossie Galena Co.*, 9 Paige (N. Y.) 598; 38 Am. Dec. 569; *Van Pelt v. U. S. Metallic, etc. Co.*, 13 Abb. Pr. (N. Y.) 331; *Sherwood v. Buffalo, etc., R. Co.*, 12 How. Pr. (N. Y.) 137; *Hammond v. Hudson Riv., etc., Co.*, 11 How. Pr. (N. Y.) 33; *Ogilvie v. Knox Ins. Co.*, 22 How. Pr. (N. Y.) 380; *Henry v. Vermillion, etc., Turnpike Co.*, 17 Ohio 187; *Miers v. Zanesville, etc., Turnpike Co.*, 11 Ohio 273; *Germantown, etc., R. Co. v. Fittler*, 60 Pa. St. 124; 100 Am. Dec. 546; *Johnston v. Markle Paper Co.* (Pa. 1893), 25 Atl. Rep. 560; *Adler v. Milwaukee Brick Mfg. Co.*, 13 Wis. 57; *Marsh v. Burroughs*, 1 Woods (U. S.) 463; *Louisiana Paper Co. v. Waples*, 3 Woods (U. S.) 34; *Holmes v. Sherwood*, 3 McCrary (U. S.) 405; *Sanger v. Upton*, 91 U. S. 56; *Hatch v. Dana*, 101 U. S. 205; *Patterson v. Lynde*, 106 U. S. 519; 10 Am. & Eng. Corp. Cas. 195; *Brown v. Fisk*, 23 Fed. Rep. 228. See also *Emmert v. Smith*, 40 Md. 123.

In *Pfohl v. Simpson*, 74 N. Y. 143, it was said: "A suit in equity laying hold of all the stockholders in like category, and promoted for the benefit of all cred-

some instances the exclusive,<sup>1</sup> remedy for the purpose of enforcing the subscription liability and also the statutory liability.<sup>2</sup> But the right to insist upon the choice of equity as the *forum* may be waived.<sup>3</sup> In other jurisdictions an action at law by the creditor lies to collect unpaid subscriptions,<sup>4</sup> and even to enforce a statutory liability.<sup>5</sup> Unpaid subscriptions are also subject to garnishment<sup>6</sup> and attachment,<sup>7</sup> if calls have been made.<sup>8</sup> *Mandamus* is sometimes employed in *England*<sup>9</sup> to enforce liability, but is of

iters having like interest, is peculiarly adapted to work out exactly just and equitable results. . . . The object and effect is to bring to one forum the determination of rights, which must, if prosecuted separately, more or less conflict to mutual harm. Before that one forum, in one suit, the respective rights and respective liabilities can be ascertained and determined, and each get his own, and be subjected to his own, and not another's. And the equities between the respective stockholders can also be adjusted and settled."

1. *Jones v. Jarman*, 34 Ark. 323; *Smith v. Huckabee*, 53 Ala. 191; *Friend v. Powers*, 93 Ala. 114; *Harris v. First Parish*, 23 Pick. (Mass.) 112; *Knowlton v. Ackley*, 8 Cush. (Mass.) 93; *Erickson v. Nesmith*, 15 Gray (Mass.) 221; *Spear v. Grant*, 16 Mass. 9; *Hodges v. Silver Hill Min. Co.*, 9 Oregon 200; *Umsted v. Buskirk*, 17 Ohio St. 113; *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *Terry v. Little*, 101 U. S. 216; *Andrews v. Bacon*, 38 Fed. Rep. 777. See also *Griffith v. Mangam*, 42 N. Y. Super. Ct. 369; *Mann v. Pentz*, 3 N. Y. 416; *Burch v. Taylor*, 1 Wash. 245; *Andrews v. Bacon*, 38 Fed. Rep. 777.

In *New Jersey*, a creditor must file a general creditor's bill, and cannot proceed for himself alone. *Bickley v. Schlag*, 46 N. J. Eq. 533; 31 Am. & Eng. Corp. Cas. 523.

2. *Smith v. Huckabee*, 53 Ala. 191; *Harris v. First Parish*, 23 Pick. (Mass.) 112; *Coleman v. White*, 14 Wis. 700; 80 Am. Dec. 797; *Patterson v. Lynde*, 106 U. S. 519; 10 Am. & Eng. Corp. Cas. 195. See also *Ladd v. Cartwright*, 7 Oregon 329; *Terry v. Little*, 101 U. S. 216.

3. *Buffington v. Bardon*, 80 Wis. 635.

4. **Actions at Law.**—*Allen v. Montgomery R. Co.*, 11 Ala. 437; *McCarthy v. Lavasche*, 89 Ill. 270; 31 Am. Rep. 83; *White v. Blum*, 4 Neb. 555; *Freeman v. Winchester*, 18 Miss. 577; *Persch v. Simmons*, 3 N. Y. Supp. 383; *Faull v. Alaska Gold, etc.*, Min. Co., 8 Sawy.

(U. S.) 420; *Bank of U. S. v. Dallam*, 4 Dana (Ky.) 574.

5. *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep. 547; *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202; *Wiles v. Suydam*, 64 N. Y. 173; *Shellington v. Howland*, 53 N. Y. 371; *Handy v. Draper*, 89 N. Y. 334; *Rocky Mt. Nat. Bank v. Bliss*, 89 N. Y. 338; *Mathez v. Neidig*, 72 N. Y. 100; *Weeks v. Love*, 50 N. Y. 568; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Van Hook v. Whitlock*, 3 Paige (N. Y.) 409; *Strong v. Wheaton*, 38 Barb. (N. Y.) 616.

Under the *Maryland Code*, liability may be enforced in an action at law by one creditor, even where there are others. *Norris v. Johnson*, 34 Md. 485. And such liability is not in the nature of a penalty, but is in so far an obligation *ex contractu* as to be within the spirit and intent of a statute authorizing summary proceedings in actions *ex contractu*. *Norris v. Wrenschall*, 34 Md. 492.

6. **Garnishment.**—*Curry v. Woodward*, 53 Ala. 371; *Bingham v. Rushing*, 5 Ala. 403; *Meints v. East St. Louis, etc., Co.*, 89 Ill. 48; *Brown v. Union Ins. Co.*, 3 La. Ann. 177; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594; *Rand v. White Mountains R. Co.*, 40 N. H. 79; *Hays v. Lycoming F. Ins. Co.*, 99 Pa. St. 621.

7. In *re Queensland, etc., Co.*, 58 L. T. Rep. 878.

8. *Bingham v. Rushing*, 5 Ala. 403; *Coalsfield Coal Co. v. Peck*, 98 Ill. 139; *Meints v. East St. Louis, etc., Co.*, 89 Ill. 48; *Langford v. Ottumwa Water-power Co.*, 59 Iowa 283; *Brown v. Union Ins. Co.*, 3 La. Ann. 177; *Bunn's Appeal*, 105 Pa. St. 49; 3 Am. & Eng. Corp. Cas. 1; *Peterson v. Sinclair*, 83 Pa. St. 250; *Chandler v. Siddle*, 10 Nat. Bankr. Reg. 236.

9. **Mandamus.**—*Queen v. Victoria Park Co.*, 1 Ad. & El., N. S. 288; *Queen v. Ledgard*, 1 Ad. & El., N. S. 616; *King v. St. Katherine Dock Co.*, 4 B. & Ad. 360.

doubtful propriety in the *United States*.<sup>1</sup> A prescribed statutory form of remedy is held to be exclusive and not cumulative.<sup>2</sup>

e. JOINDER OF PARTIES.—(See also PARTIES TO ACTIONS, vol. 17, p. 470).—Where stockholders are made "jointly and severally liable" by statute,<sup>3</sup> or where the liability is for a sum certain,<sup>4</sup> a separate action may be maintained against each one. So, where the liability is limited and unequal,<sup>5</sup> or is exclusively at law and has not been enlarged by statute,<sup>6</sup> the stockholders cannot be jointly sued. But to enforce a partnership liability, all must be sued,<sup>7</sup> and a provision making stockholders "personally holden," has been held to impose a joint liability.<sup>8</sup> Where the stockholders are "equally and ratably liable to the extent of their respective shares," a judgment by default cannot be taken against a single stockholder for the full amount of the debt.<sup>9</sup> In *Alabama* all stockholders must be joined as defendants.<sup>10</sup> In *Wisconsin* the corporation though a proper, is not a necessary party.<sup>11</sup>

f. DEATH OF PARTIES.—The liability of a stockholder, at least

1. *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Dalton, etc., R. Co. v. McDaniel*, 56 Ga. 191; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571; *Hatch v. Dana*, 101 U. S. 205.

2. **Statutory Form Exclusive.**—*Knowlton v. Ackley*, 8 Cush. (Mass.) 93; *Erickson v. Nesmith*, 15 Gray (Mass.) 221; *Allen v. Walsh*, 25 Minn. 543; *Lowry v. Inman*, 46 N. Y. 119; *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43; *Hoard v. Wilcox*, 47 Pa. St. 51; *Youghiogeny Shaft Co. v. Evans*, 72 Pa. St. 331; *Windham Prov. Sav. Inst. v. Sprague*, 43 Vt. 502; *Dauchy v. Brown*, 24 Vt. 197; *Bassett v. St. Alban's Hotel Co.*, 47 Vt. 313; *Morley v. Thayer*, 3 Fed. Rep. 737; *Haskins v. Harding*, 2 Dill. (U. S.) 99; *Pollard v. Bailey*, 20 Wall. (U. S.) 520. See also *Grose v. Hilt*, 36 Me. 22; *Potter v. Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428; *Andrews v. Calender*, 13 Pick. (Mass.) 484; *Diven v. Lee*, 36 N. Y. 302; *Wehrman v. Reakirt*, 1 Cin. (Ohio) 230.

3. *Grund v. Tucker*, 5 Kan. 70; *Norris v. Johnson*, 34 Md. 485; *Matthews v. Albert*, 24 Md. 527; *Bond v. Appleton*, 8 Mass. 472; 5 Am. Dec. 111. See also *Culver v. Third Nat. Bank*, 64 Ill. 528; *Bullard v. Bell*, 1 Mason (U. S.) 243; *Borland v. Haven*, 37 Fed. Rep. 394.

4. *Paine v. Stewart*, 33 Conn. 516; *Boyd v. Hall*, 56 Ga. 563; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Perry v. Turner*, 55 Mo. 418; *Garrison v. Howe*, 17 N. Y. 458; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Ab-*

*bott v. Aspinwall*, 26 Barb. (N. Y.) 202; *Terry v. Little*, 101 U. S. 216.

5. In *Abbey v. Grimes Dry Goods Co.* (Kan. 1890), 31 Am. & Eng. Corp. Cas. 538, the court said: "The rule that stockholders of a corporation cannot be joined as defendants necessarily rests upon the ground that the liability is for different sums, and each stockholder might have a distinct and separate defense. Where the liability of stockholders is confined to the extent or amount of their stock, or is in proportion to their stock, the liability, being unequal and limited, is several." *Shafer v. Moriarty*, 46 Ind. 9; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1; *Crease v. Babcock*, 10 Met. (Mass.) 525; *Pettibone v. McGraw*, 6 Mich. 441; *Lane v. Harris*, 16 Ga. 217; *Adkins v. Thornton*, 19 Ga. 325; *Mor. Priv. Corp.*, § 901; *Pom. Rem.*, § 317." 6. *Paine v. Stewart*, 33 Conn. 516; *Perry v. Turner*, 55 Mo. 418; *In re Hollister Bank*, 27 N. Y. 393; *Abbot v. Aspinwall*, 26 Barb. (N. Y.) 202; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473.

7. *Allen v. Sewall*, 2 Wend. (N. Y.) 327. 8. *Windham Prov. Sav. Inst. v. Sprague*, 43 Vt. 502.

9. *Buenz v. Cook*, 15 Colo. 38; *Reynolds v. Feliciana Steamboat Co.*, 17 La. 397.

10. *Friend v. Powers*, 93 Ala. 114.

11. *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep. 547.



where it is contractual,<sup>1</sup> generally survives him, and his estate succeeds not only to the rights, but also to the obligations which flow from the ownership of his shares.<sup>2</sup> The personal representative may relieve himself only by transfer,<sup>3</sup> and the liability may be continued by an authorized extension of the charter, though the latter would otherwise have expired after the stockholder's death.<sup>4</sup> Where the liability attaches before letters testamentary are granted, it is impressed upon all the assets of the estate and follows them into the hands of devisees and legatees.<sup>5</sup> But where an executor distributes the assets before any liability has accrued, the beneficiaries of the estate who have thus received them cannot be subsequently held.<sup>6</sup> In prosecuting in the probate court a claim against the stockholder arising out of liability, it is not necessary to make the corporation a party where execution against it has already been returned unsatisfied.<sup>7</sup>

Upon the death of one of two joint creditors of a corporation, the entire right of action against the stockholders vests in the survivor, and the fact that the decedent himself was a stockholder and that his estate is liable, is no defense to such an action.<sup>8</sup> In *Massachusetts*, there appears to be an exception to the general

1. *Cochran v. Weichers*, 119 N. Y. 399.

2. In *Bailey v. Hollister*, 26 N. Y. 116, Gould, J., says: "Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds not from any new contract made by or on behalf of the estate, but is inherent in the property itself. To avoid it the estate must part from the property; must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives, as it bound him, as long as the relation of stockholder existed." See to the same effect, *Richmond v. Irons*, 121 U. S. 27; 17 Am. & Eng. Corp. Cas. 71; *Flash v. Conn*, 109 U. S. 371; 3 Am. & Eng. Corp. Cas. 28; *Witters v. Sowles*, 32 Fed. Rep. 130; *Davis v. Weed*, 44 Conn. 569; *Nolan v. Hazen*, 44 Minn. 478; *Cochran v. Weichers*, 119 N. Y. 399; *Chase v. Lord*, 77 N. Y. 1. Compare *Miller v. New York*, 15 Wall. (U. S.) 479; *Pennsylvania College Cases*, 13 Wall. (U. S.) 216.

3. *Bailey v. Hollister*, 26 N. Y. 112.

4. *Bailey v. Hollister*, 26 N. Y. 112. Compare *Davis v. Weed*, 44 Conn. 581; *Miller v. New York*, 15 Wall. (U. S.) 497.

5. *Davis v. Weed*, 44 Conn. 369; *Witters v. Sowles*, 32 Fed. Rep. 130.

6. *Witters v. Sowles*, 32 Fed. Rep. 136.

7. In *Nolan v. Hazen*, 44 Minn. 478, the court said: "There is no conceivable necessity for or use of making the corporation a party to the second action, for its liability has been determined in the former action, and this would be conclusive, at least as against it, even if it were made a party to the subsequent action against the stockholder; and so far as exhausting the remedy against the corporation, that has been already done. Hence we are of opinion that, were Sleeper living, an action would in this case lie against him without joining the corporation as a party. And if this is so, it is not, and cannot be, questioned but that the claim is provable in probate court against his estate."

8. In *Newberry v. Robinson*, 41 Fed. Rep. 458, the court said: "In the plaintiff's brief, and in argument, he and McMillan are mentioned as having been partners in the transaction; but in the bill they are set up as merely joint creditors. In either case upon his death the debt against the corporation survived to McMillan. 1 Chit. Pl. 11; 2 Redf. Wills 172; Wood, Coll-

doctrine above set forth. It is there held that the death of a stockholder who was summoned in an action against the corporation abates the proceeding against him.<sup>1</sup>

*g. PRIORITY AMONG CREDITORS*—(1) *Where Actions by Individual Creditors Are Authorized*.—The law generally favors the vigilant creditor,<sup>2</sup> and where an action at law is provided to enforce the statutory liability, it may be prosecuted separately by each creditor.<sup>3</sup> Under such a provision the claim of the one first suing generally takes priority as regards that particular defendant, over the claims of other creditors.<sup>4</sup> It has been held in *Maine*, that where another creditor obtains by a different remedy an earlier judgment, it is junior to that of the first suitor,<sup>5</sup> but a doctrine almost exactly opposite appears to obtain in *Missouri*.<sup>6</sup> In *Illinois* also it has been held that one who failed to obtain a senior judgment only because his action was enjoined at the instance of fellow creditors has no prior lien.<sup>7</sup>

(2) *Where Suits Are in Behalf of All Creditors*.—But priority among corporate creditors is repugnant to the notion of one remedy for all creditors and that in equity. Under the trust fund doctrine all creditors are entitled to share alike the unpaid subscriptions,<sup>8</sup> and where the statute makes the liability a common fund for the payment of certain debts, individual creditors may be enjoined from prosecuting actions which would result in giving

yer, Partn. 952. This survivorship so completely vested this debt in the survivor that it could be joined in a suit with his own individual debts, and his individual liability could be set off against it. *Slipper v. Stidstone*, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582; *Wood, Collv. Partn.* 1105."

1. In *Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488, *Dewey, J.*, said: "The object of the summons to the stockholder, required by the statute, was to secure the property of individuals from being taken on execution without their having been notified of the claim against them as such. This provision, of course, was for a living stockholder. No right existed to levy such execution against a corporation upon the estate of a deceased stockholder. The executor of such deceased stockholder is not to be summoned in the action against the corporation by reason of any liability that might have attached to his testator while living, with the purpose of authorizing an execution to be levied upon the executor or any estate in his hands. No legitimate purpose therefore exists for summoning the executor to take upon himself the defense of the suit as against his testator. All

further proceedings as against *Joel Bowker* are abated by his death, and a judgment against the corporation will not authorize a levy upon the estate of the deceased in the hands of his executor. This peculiar form of liability does not survive." See also *Child v. Coffin*, 17 Mass. 64; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Gray v. Coffin*, 9 Cush. (Mass.) 199. *Compare Cummings v. Wright*, 11 Mo. App. 348; *Donnelly v. Hodgson*, 13 Mo. App. 15.

2. *Miers v. Zanesville, etc., Turnpike Co.*, 11 Ohio 273.

3. *Weeks v. Love*, 50 N. Y. 568. *Compare Garrison v. Howe*, 17 N. Y. 458.

4. *Wells v. Robb*, 43 Kan. 201; *Hoyt v. Bunker* (Kan. 1893), 32 Pac. Rep. 126; *Jones v. Wiltberger*, 42 Ga. 575; *Lowry v. Parsons*, 52 Ga. 356; *Thebus v. Smiley*, 110 Ill. 316; *Cole v. Butler*, 43 Me. 401; *Ingalls v. Cole*, 47 Me. 541; *Marsh v. Burroughs*, 1 Woods (U. S.) 463.

5. *Cole v. Butler*, 43 Me. 401.

6. *State Saving Assoc. v. Kellogg*, 63 Mo. 540; *Marks v. Mulhall*, 13 Mo. App. 590; *Bittner v. Lee*, 25 Mo. App. 559.

7. *Chicago v. Hall*, 103 Ill. 342.

8. *Wetherbee v. Baker*, 35 N. J. Eq. 501. *Compare Mathis v. Pridham* (Tex. App. 1892), 20 S. W. Rep. 1015.

them a disproportionate share in the security.<sup>1</sup> Where the liability is enforced in equity alone, its enforcement is for the benefit of all with no distinction between judgment and general creditors.<sup>2</sup> So where a statute imposes a liability upon stockholders "for the purpose of securing the creditors" and proceedings are instituted by a part for all, no one creditor can acquire priority, even by a separate action.<sup>3</sup> Neither can such priority be attained upon the motion of an individual creditor while a general suit against a stockholder is pending.<sup>4</sup>

*h.* CONTRIBUTION BETWEEN STOCKHOLDERS.—See CONTRIBUTION, vol. 4, p. 7; MANUFACTURING CORPORATIONS, vol. 14, p. 306.

*V.* TERMINATION OF MEMBERSHIP.—See DISFRANCHISEMENT, vol. 5, p. 684.

**STOCK IN TRADE**—(See also EFFECTS, vol. 6, p. 194).—See note 5.

1. In *Eames v. Doris*, 102 Ill. 350, the court said: "The liability under section nine is created for all losses and deficiencies as to the trust funds and saving funds deposited, that is, as to the depositors of trust funds and savings funds. The liability constitutes a fund for the benefit of all of these two classes of creditors, and they are entitled to share in it in proportion to the amount of their debts. The debts here largely exceed the assets and this liability combined, so that the fund will be insufficient to discharge all of the claims upon it. If individuals of these two classes of savings and trust depositors be allowed to prosecute their separate suits, they may recover payment of their demands in full, while others of the classes, having claims equally equitable, may be enabled to obtain no payment whatever, or but a partial one. Hence the propriety, in the case of such a deficiency in a common fund for the common benefit of creditors, of a proceeding in equity by one or more in behalf of all the creditors, in order that the equitable principle that equity is equity, may be applied; that single creditors, by individual suits, may be prevented from an appropriation to themselves of the entire or unequal benefit of the security, to the exclusion of others equally entitled, and that there may be a collection and *pro rata* distribution of the whole fund among all the creditors."

2. *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401.

3. *Wright v. McCormack*, 17 Ohio St. 87.

4. *Donnelly v. Mulhall*, 12 Mo. App. 139; *Marks v. Hardy*, 86 Mo. 232.

5. An *Indiana* statute required the president, or other accounting officer, of every railroad company in the State to furnish the auditor of the county in which the principal office of the road was situated, a list of "stock for taxation." It was held that the word "stock" as here used did not mean the subscriptions of stock, but the actual, tangible property of such company. The court, by Perkins, J., said: "The word stock is used both in common parlance and statutory enactments in a variety of senses, some broader, some more limited. Its use may open a wide field for the work of interpretation, and require a close consideration of the whole subject-matter in relation to which it is applied. We speak of the goods of a merchant, as his stock; of the lumber and materials of the manufacturer, as his stock of raw materials; of the cattle, hogs, etc., of the farmer, as his stock; of the cars, locomotives, etc., of the railroad companies, as their stock of these articles respectively; and we speak of the subscriptions and shares in these companies as stock, though these are more properly, it would seem, denominated the capital stock of such corporations." *State v. Hamilton*, 5 Ind. 313. See also *Floyd Co. v. New Albany, etc., R. Co.*, 11 Ind. 570; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380.

A testator by his will gave his plantation and tannery with "all the stock of every kind." It was held that the term "stock" included leather in the

**STOCK YARDS**—(See also **CARRIERS OF LIVE STOCK**, vol. 3, p. 1.)**I. Definition, 900.****II. Rights, Duties, and Liabilities, 900.**

**I. DEFINITION.**—A stock yard is an inclosure connected with a railroad, slaughterhouse, or market, for the distribution, assorting, sale, or temporary keeping of live stock.<sup>1</sup>

**II. RIGHTS, DUTIES, AND LIABILITIES.**—The business of a stock yard company, except in the character of the property which is the subject of bailment, is similar to that of a warehouseman, and it may not be compelled in the absence of contract to receive stock of any person or corporation.<sup>2</sup>

vats. *Cameron v. Commissioners*, 1 Ired. Eq. (N. Car.) 437.

A *Mississippi* statute fixed a privilege tax upon each store in proportion to the "stock" carried therein. It was held, that "stock," as here used, comprised only the goods, etc., kept by the merchant for sale in the course of business, and did not include cotton taken by the merchant in payment of debts. *Harness v. Williams*, 64 Miss. 600.

**Stock in Trade.**—As to what a policy on the "stock in trade" of a merchant or mechanic will cover, see **FIRE INSURANCE**, vol. 7, p. 1006.

Upon a dissolution of partnership and division of the "stock in trade," property, etc., it was held, that the goodwill was not within the phrase "stock in trade." *Chapman v. Hayman*, 1 Times Rep. 397.

A testator was a barge-builder, and, according to the custom of that trade, would sometimes on the sale of a new barge accept an old one in part payment, which he would repair and let out on hire. At the time of his death he had five such barges, and it was held, that these barges passed under a bequest of his "stock in trade as a barge-builder." *In re Richardson*, 50 L. J. Ch. 488.

Where one carried on the business of selling United States internal revenue stamps, it was held that the revenue stamps which he had on hand were not subject to taxation under *Massachusetts* Gen. St., ch. 11, § 12, as "stock in trade." *Polfrey v. Boston*, 101 Mass. 329.

For the scope of the term as used in exemption laws, see **EXECUTIONS**, vol. 7, p. 135n.; **ATTACHMENT**, vol. 1, p. 917. See also *In re Jones*, 2 Dill. (U. S.) 343; *Hillyer v. Remore*, 42 Minn.

254; *Martin v. Bond*, 14 Colo. 466; *Bequillard v. Bartlett*, 19 Kan. 382.

**Stock on Hand.**—(See also **HAND**, vol. 9, p. 262).—A chattel mortgage on the "stock on hand" of a baker does not sufficiently describe the property. *Rocheleau v. Boyle* (Mont.), 28 Pac. Rep. 872.

**"Stock of Ladies' Notions."**—A mortgage described the goods as "the general stock of millinery, stock of ladies' notions, consisting of hats," etc., "and all other goods now on hand or to be purchased and used in the business of a general millinery store." It was held that by the phrase, "stock of ladies' notions," only such property was conveyed as is described immediately following such phrase, and that by the last clause was meant only such millinery as might be on hand for sale, or might be purchased for sale, or might be made up for sale. *Chapin v. Garretson* (Iowa), 52 N. W. Rep. 104.

1. *Century Dictionary*.

2. In *Delaware*, etc., *R. Co. v. Central Stock Yards Co.*, 43 N. J. Eq. 74; 31 Am. & Eng. R. Cas. 82, the complainants were refused an injunction to compel defendants to receive at their yards from the complainants live stock carried over their road and consigned for delivery at defendants' yard, because the question whether the defendants were subject to any duty to the complainants was, as a matter of law, unsettled, and also because the injunction asked for was mandatory in its character, and such writs are never granted until a final hearing. In the opinion, it was said that "the defendants stand, in respect to their legal duties, in a position very similar to that which a common carrier occupies—bound to serve all, who have a right to demand their service, to the best of

The fact that the business of buying and selling live stock at a certain market, established and maintained by a stock yard company, itself a private corporation, and not engaged in buying and selling live stock, is of such a magnitude as to have an influence upon the commerce of the country, will not justify the courts in declaring it a public market, and applying to it any rules of public policy peculiar to public markets.<sup>1</sup>

In the operation of a railroad which a stock yard is authorized to construct to connect with other railroads, it is subject to the same responsibilities as railroad companies, and is liable for the negligence of another corporation using it by permission.<sup>2</sup>

An injunction will issue in favor of a stock yard company to prevent unjust railroad discrimination;<sup>3</sup> and in one instance an injunction was granted to restrain the withdrawal of railway connections with an old established stock yard, the withdrawal being attempted to aid in the erection of a monopoly at another point.<sup>4</sup>

their ability, and on equal terms as to compensation."

But in *Delaware, etc., R. Co. v. Central Stock Yard Co.*, 46 N. J. Eq. 280; 37 Am. & Eng. R. Cas. 607, Van Fleet, V. C., referring to his language quoted above, said: "This opinion . . . was based on an assumption that there was a strong and close similitude between a railroad or canal company, in their character as a common carrier, and the defendants, both in respect to the powers which each might exercise, and the duties which each were bound to perform for the public. But it is now entirely clear that such is not the fact. Between the defendants and a railroad or canal company there is not the slightest analogy. . . . The business of the defendant has no exact counterpart or model in any of the established instruments of commerce or agencies used by the public in the transaction of business." The denial of the injunction was put upon the ground of the analogy between the defendants' business and that of a warehouseman; and, further, the presence in the defendants' charter of a provision authorizing them to make contracts with the several railroad companies having a terminus in Hudson county, for the transportation and delivery of live stock at their yards, in the opinion of the court, showed clearly that the legislature did not intend that the defendants should be subject to any duty to railroad companies in that respect, except such as they should voluntarily assume by contract.

Where, however, the yards are main-

tained by the railroad company itself, and the cattle have been placed in them by the direction of the carrier's agent for immediate shipment, and part of them have been actually placed in the cars, the cattle are to be considered as having been received by the carrier for shipment and held by him as a common carrier and not as a warehouseman. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. Rep. 568.

1. *American Live Stock Commission Co. v. Chicago L. S. Exchange* (Ill. 1892), 32 N. E. Rep. 274.

2. *Pennsylvania Co. v. Ellett*, 132 Ill. 654; 42 Am. & Eng. R. Cas. 64.

3. In *M'Coy v. Cincinnati, etc., R. R. Co.*, 13 Fed. Rep. 3, it was held that a railroad company may not bind itself to deliver to a particular stock yard all live stock coming over its line to a certain point, but is bound to transport over its road and deliver to all stock yards at such point, reached by its tracks or connections, all live stock consigned, or which shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors, and the performance of this duty may be enforced by injunction at the instance of the proprietor of the yards discriminated against.

4. *Coe v. Louisville, etc., R. Co.*, 3 Fed. Rep. 775.

**Breach of Contract—Evidence as to Measure of Damages.**—Where a person agrees to construct stock yards, and a railroad company agrees to send all stock to those yards, unless otherwise ordered by the shippers, if the com-

A stock yard company may be prevented by injunction from conducting its business in such a manner as materially to affect the health or property of persons living in the vicinity.<sup>1</sup>

Stock left in the custody of the company may be sold when no owner can be found, and when, from the perishable nature of the property, a necessity for sale arises.<sup>2</sup>

When a railroad company holds itself out as a carrier of live stock, it is obliged to provide suitable facilities, such as yards or pens, for receiving and discharging the stock, and for these, it may not, in addition to the customary and legitimate charges for transportation, make a special charge.<sup>3</sup> And it may not absolve itself from its statutory duty to provide suitable facilities, by showing that the yards or pens were so badly constructed as to make it contributory negligence on the part of the shipper to use them.<sup>4</sup>

**STONE.**—See note 5.

pany takes stock to other yards not specially ordered there, it violates its contract, and is responsible in damages, and evidence as to the number of car loads taken to other yards is admissible in fixing the measure thereof. *Terre Haute, etc., R. R. Co. v. Struble*, 109 U. S. 381; 16 Am. & Eng. R. R. Cas. 597.

1. *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq. 296.

But in *London, etc., R. R. Co. v. Truman*, 11 App. Cas. 45; 25 Am. & Eng. R. R. Cas. 116, the court refused to enjoin a railroad company from maintaining cattle yards near the plaintiff's residence, on the ground that the same was a nuisance, it appearing that the yards were maintained on land acquired by the company under a statute for such purposes.

2. *Mill Creek v. Brighton Stock Yard Co.*, 27 Ohio St. 435.

3. *Covington Stock yard Co. v. Keith*, 139 U. S. 128; 49 Am. & Eng. R. R. Cas. 149. In this case Harlan, J., for the court, said: "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load or unload and deliver such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shippers for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a

reasonable time after they are unloaded from the cars."

4. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270. In this case a statute in the following terms was construed as making it incumbent upon a railroad to provide pens or yards for the shipment of cattle: "Each and every railroad company is hereby required to erect at each and every depot, station, or place established by such company for the reception and delivery of freight, suitable buildings or inclosures to protect produce, goods, wares and merchandise, and freight of every description from damage by exposure to the weather or otherwise." *Texas Rev. Stat.*, art. 4236.

**Damages to Stock from Exposure—Liability of Carrier.**—In *Feinberg v. Delaware, L., etc., R. Co.*, 20 Atl. Rep. 33, the plaintiff's live stock was accepted, freight paid, and receipt given, for transportation, without express contract for limitation of liability; being delayed by a snowstorm, they were removed from the cars to the defendant's stock yards, where some died, and others were injured by cold and exposure due to insufficient shelter. The defendant was held liable for damages as a common carrier. And it was further held that the mere fact of giving a free pass to a servant of the shipper in order that he might accompany the stock would not relieve the company of responsibility.

5. A statute imposed a toll upon "goods, wares, and merchandise," and a lower toll upon "stone." It was held that blocks of stone squared and reduced to certain dimensions was

**STOPPAGE.**—In the old books set-off is sometimes called stoppage, because the amount sought to be set off was stopped or deducted from the cross demand.<sup>1</sup>

**STOPPAGE IN TRANSITU.**—(See also BILL OF LADING, vol. 2, p. 223; CARRIERS OF GOODS, vol. 2, p. 770; EXPRESS COMPANIES, vol. 7, p. 539; SALES, vol. 21, p. 444.)

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**I. DEFINITION.**—Stoppage *in transitu* is a resumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired actual possession of them.<sup>2</sup> The right of stoppage *in transitu* is the right which the vendor, when he sells goods on credit to another, has of resuming the possession of the goods, while they are in the hands of a carrier or middleman, in their transit to the consignee or vendee, and before they arrive into his actual possession, or at the destination which he has appointed for them, on his becoming bankrupt or insolvent.<sup>3</sup> This is a right which arises solely upon the insolvency

"stone" within the statute, and not merchandise, and therefore subject to the lower toll. *Fisher v. Lee*, 12 A. & E. 622; 40 E. C. L. 136.

1. *Byles on Bills* 349; *Jeffs v. Wood*,

2 P. Wms. 128. See also SET-OFF, vol. 22, p. 209.

2. *Bouv. L. Dict.*, citing *Newhall v. Vargas*, 15 Me. 314.

3. 2 Kent's Com. 540.

of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts.<sup>1</sup>

**II. WHO MAY EXERCISE THE RIGHT.**—The right may be exercised by the seller, or by any one standing in that relation to the goods, as, for example, a factor or purchasing agent, who buys for his principal upon his own credit;<sup>2</sup> and may be exercised as well

1. Benj. on Sales, § 828, citing *D'Aquila v. Lambert*, 2 Eden 77.

The history of the law of stoppage *in transitu* is given by Lord Abinger in *Gibson v. Carruthers*, 8 M. & W. 337. The right was recognized in *Wiseman v. Vandeputt*, 2 Vern. 202, in 1690; and again in *Snee v. Prescott*, 1 Atk. 245. It was recognized by a common-law court in *Burghall v. Howard*, 1 H. Bl. 366, n., in 1755 by Lord Mansfield.

The right has been defined by Shaw, C. J., in *Rawley v. Bigelow*, 12 Pick. (Mass.) 313; 23 Am. Dec. 607, to be "an extension of the right of lien which, by the common law, a vendor has upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law." See also *Grout v. Hill*, 4 Gray (Mass.) 366; *Potts v. New York, etc., R. Co.*, 131 Mass. 457; 3 Am. & Eng. R. Cas. 424; 41 Am. Rep. 247; *Atkins v. Colby*, 20 N. H. 154; 33 Am. Dec. 617; *Jordan v. James*, 5 Ohio 99; *Patten's Appeal*, 45 Pa. St. 158; 84 Am. Dec. 479; *Bloxam v. Sanders*, 4 B. & C. 948; 10 E. C. L. 477; *Edwards v. Brewer*, 2 M. & W. 375; *Hodgson v. Loy*, 7 T. R. 440; *Tucker v. Humphrey*, 1 M. & P. 392. But Lord Abinger said, in *Gibson v. Carruthers*, 8 M. & W. 338, that "although the question of stoppage *in transitu* has been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner. In courts of equity it has been a received opinion that it was founded upon some principle of common law; in courts of law, it has been just as much the practice to call it a principle of equity, which the common law has adopted."

2. *Snee v. Prescott*, 1 Atk. 245; *D'Aquila v. Lambert*, Amb. 399; *Inglis v. Usherwood*, 1 East 515.

A foreign factor or commission merchant, who, for a commission only to himself, purchases upon his own credit, and ships upon the credit which he

gives to his employer, is a consignor or seller entitled to the benefit of this rule. *Ilseley v. Stubbs*, 9 Mass. 71; 6 Am. Dec. 29; *Seymour v. Newton*, 105 Mass. 275; *Newhall v. Vargas*, 13 Me. 103; 29 Am. Dec. 489; *Feise v. Wray*, 3 East 93; *Imperial Bank v. London, etc., Dock Co.*, 5 Ch. Div. 195; and the right may be exercised by one who pays the price of goods for the buyer and takes from him an assignment of the bill of lading as security for his advancement. *Gossler v. Schepeler*, 5 Daly (N. Y.) 476.

In *Feise v. Wray*, 3 East 93, it was claimed that the factor was but an agent with a lien, but Lord Ellenborough held that he might be considered as a vendor who had first bought the goods and then sold them to his correspondent at cost, plus his commission. And this principle has been recognized in *Patten v. Thompson*, 5 N. & S. 350; *Ogle v. Atkinson*, 5 Taunt. 759; *Oakford v. Drake*, 2 F. & F. 493; *Tucker v. Humphrey*, 4 Bing. 516; 15 E. C. L. 63; *Turner v. Liverpool Dock*, 6 Exch. 543; 20 L. J. Exch. 393; *Ellershaw v. Magniac*, 6 Exch. 570; *Ireland v. Livingston*, L. R., 5 H. L. 395; *The Tigress*, 32 L. J. Adm. 97; *Ex parte Banner*, 2 Ch. Div. 278, c. a.; *Cassaboglou v. Gibb*, 11 Q. B. D. 797, c. a.; *Ex parte Miles*, 15 Q. B. D. 39, c. a.; *Phelps v. Comber*, 29 Ch. D. 826, c. a.; *Ex parte Francis*, 35 L. T. 577.

An agent who purchases goods in his own name is in the position of a seller, and has the right to stop *in transitu*. *Hawkes v. Dunn*, 1 Tyr. 413. But the agent must pay for the goods and not leave any liability for payment on the part of the principal; otherwise he is not entitled to stop *in transitu*. *Oakford v. Drake*, 2 F. & F. 493. And where one sells goods through an agent to another, and they are shipped to the purchaser, the agent has no right to stop the goods because his principal owes him on account of money advanced in their purchase. *Gwyn v. Richmond*, etc., R. Co., 85 N. Car.



through an agent or any one properly authorized by the seller, as by the seller in person.<sup>1</sup>

**III. UNDER WHAT CIRCUMSTANCES RIGHT MAY BE EXERCISED.**—To enable the seller to exercise the right of stoppage *in transitu*, the

427; 6 Am. & Eng. R. Cas. 452; 39 Am. Rep. 708.

But the seller can only exercise the right against his own buyer; thus, *F.*, a merchant at Dardanelle, ordered goods of *W. B. & Co.*, merchants at St. Louis. They sent the order to *L. A. & Co.*, merchants at New Orleans, with directions to ship the goods to *F.* at Dardanelle, and send them the bill and bill of lading. *L. A. & Co.* filled the order, shipped the goods to *F.* and sent the bill and bill of lading to *W. B. & Co.*, and charged the goods to them, and they charged them to *F.* During the transit *W. B. & Co.* failed, and *L. A. & Co.*, claiming the right of stoppage *in transitu*, demanded the goods of the *M. & L. R. R. Co.*, who were transporting them to *F.*, and the company delivered them up to them. *F.* then sued the company for the value of the goods. It was held that *L. A. & Co.* were not the vendors of *F.*; there was no privity between him and them, and they had no right to stop the goods, and the defendant was liable to *F.* for their value. *Memphis, etc., R. Co. v. Freed*, 38 Ark. 614; 9 Am. & Eng. R. Cas. 212.

A principal consigning goods to his factor may stop them *in transitu* on the factor becoming insolvent, and that notwithstanding he may be indebted to the factor for advances on the consignment. *Kinloch v. Craig*, 3 T. R. 119; *Wright v. Campbell*, 4 Burr. 2047; or that the factor has a joint interest with him therein. *Newsom v. Thornton*, 6 East 17.

It was held that a mere surety for the purchase price of the goods cannot exercise the right, even though he may be entitled to a commission on the amount, for there exists no primary liability for the price; *Siffken v. Wray*, 6 East 371; but by 19 and 20 Victoria, the right is now given in *England* to this surety. And the right cannot be exercised by one having only a lien upon the goods without any property in them. *Sweet v. Pym*, 1 East 4; *Lena-hart v. Cooper*, 3 Bing. N. Cas. 99; 32 E. C. L. 55; *Molloy v. Hay*, 3 M. & R. 396; *Freeman v. Burch*, 3 Q. B. 492, n.; 43 E. C. L. 835.

A party to whom the bill of lading

has been transferred *bona fide*, may stop the goods. *Morison v. Gray*, 2 Bing. 260; 9 E. C. L. 405; 9 Moore 484 (but see *Waring v. Cox*, 1 Camp. 369); and so also may a person who has only an interest in and a right to receive a certain portion of the goods, though not holding a bill of lading. *Jenkyns v. Usborne*, 8 Scott N. R. 505; 7 M. & G. 678; 49 E. C. L. 678.

Where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them *in transitu*, and give them a new direction adversely to his principal; but if he gives them a fresh destination in furtherance of the usual course of business of the principal, they pass to the assignees as in the order and disposition of the bankrupt. *Hawkes v. Dunn*, 1 Tyr. 413; 1 C. & J. 519.

**1. Exercise of Right by Agent.**—Any agent, who has the power to act for the consignor, either generally or for the purposes of the consignment in question, may stop goods in transit without any authority specially directed to that end, or empowering him to adopt that particular measure. *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 589; *Seymour v. Newton*, 105 Mass. 275; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 180; *Newhall v. Vargas*, 13 Me. 93; 29 Am. Dec. 489; *Whitehead v. Anderson*, 9 M. & W. 518; *Hutchings v. Nunes*, 1 Moore P. C., N. S. 243; and even where one acts without authority in making the stoppage, it will be good, if subsequently ratified by the seller before the buyer or his assignee obtains possession of, or makes any demand for, the goods. *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *distinguishing Bird v. Brown*, 4 Exch. 786; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188.

But the ratification, to avail the seller, must be made before the buyer demands the goods. *Bird v. Brown*, 4 Exch. 786; *Davis v. McWhirter*, 40 U. C. Q. B. 508; or obtains possession of them. *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 589.

And it has been held a sufficient ratification, where a letter, giving authority to the agent, had been mailed several days before he assumed to act, though

goods must be unpaid for, must be in transit or in the hands of a third person, and the buyer must be insolvent.<sup>1</sup>

1. **Goods Must be Unpaid For**—*a.* EFFECT OF PART PAYMENT.—Part payment by the buyer has only the effect of diminishing the claim *pro tanto* on the goods detained, and does not affect the seller's right of stoppage for the protection of the price remaining unpaid;<sup>2</sup> nor is he, in order to exercise this right, bound to refund what he may have received in part payment.<sup>3</sup>

*b.* PAYMENT BY NOTE OR BILL.—The seller does not lose his right of stoppage by accepting bills or notes for the purchase price, unless it has been agreed that it should be regarded as absolute payment,<sup>4</sup> and this notwithstanding he may have negoti-

it did not reach him until several days thereafter. *Hutchings v. Nunes*, 1 Moore P. C., N. S. 243.

1. *More v. Lott*, 13 Nev. 379; *Walsh v. Blakeley*, 6 Mont. 194; *Schuster v. Carson*, 28 Neb. 612; *Wood v. Roach*, 2 Dall. (U. S.) 180; 1 Am. Dec. 276; *Walley v. Montgomery*, 3 East 585; *Wilmschurst v. Bowker*, 7 M. & G. 882; 49 E. C. L. 882; *Story on Sales* (4th ed.), § 327; *Tiedeman on Sales*, § 127.

2. *Newhall v. Vargas*, 13 Me. 108; 29 Am. Dec. 489; *Hodgson v. Loy*, 7 T. R. 440; *Feise v. Wray*, 3 East 93; *Edwards v. Brewer*, 2 M. & W. 375; *Van Casteel v. Booker*, 2 Exch. 702.

But where the contract is apportionable, the seller can only claim the right of stoppage over that portion of the goods which remains unpaid for. *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 5 Ch. Div. 205.

3. *Newhall v. Vargas*, 13 Me. 108; 29 Am. Dec. 489.

4. In *Newhall v. Vargas*, 13 Me. 103; 29 Am. Dec. 489, the goods for a return cargo were paid for by bills drawn by the master of the vessel on the owner, payable to the seller, and the court held that they were not equivalent to payment, but mere evidence of the debt due the seller, and did not deprive him of any remedy authorized by law where the buyer became insolvent; and although by the form of the bills the master made himself personally liable, there was no reason to suppose that his security was relied on by the seller, or that by accepting the bills he waived other remedies.

In *Donath v. Broomhead*, 7 Pa. St. 301, where goods arrived at their port of destination and the buyer paid the freight and gave his note for the price, but the goods, in consequence of the loss of the invoice, were stored in the cus-

tom-house and remained there until the dishonor of the note, the right of stoppage was held to remain.

In *Bell v. Moss*, 5 Whart. (Pa.) 189, the seller shipped the goods from Leghorn to the buyer in Philadelphia and drew on the buyer's agent in London, who, in a letter to the seller had recognized the credit, for the purchase price. The buyer failed and the London agent declined to accept the bill, and it was held that the seller might stop the goods in transit, *Gibson, C. J.*, in delivering the opinion of the court, saying: "As nothing but an extinguishment of the debt is satisfaction between the buyer and seller, I would say that a power to check for a deposit in bank would not be payment to suspend the right of stoppage, unless it were so agreed, and the deposit were actually placed to the drawer's account—certainly it would not produce that consequence if the deposit might be withdrawn or the consignor's check might be refused. On the principle of substituting the London house as the debtor, the bills, drawn as they were by the consignors, would have exonerated the consignees from all responsibility whatever; but it has not been said that an action would not have been maintainable against them on the contract of sale, and why might they not proceed as well by an enforcement of their lien? If the drawing of a bill had the effect of merging every previous responsibility, the right of stoppage, which is incident to the consignee's liability on the contract of sale, would be extinguished by it in every case; but that it is followed by no such consequence is shown, among other instances, by *Feise v. Wray*, 3 East 94, in which the right was sustained, though an indorsed bill, drawn by the consignor and accepted by the consignee,

ated the bills so that they are outstanding in the hands of third parties;<sup>1</sup> nor need the notes be tendered back before stopping the goods.<sup>2</sup>

**2. Goods Must be in Transit.**—The goods must be in transit, for, if the transit has not begun, the seller's right of retention, if such right exists, is based on some other right than that of stoppage *in transitu*.<sup>3</sup>

had still a month to run. This would prove, were an authority wanted for so plain a principle, that liability on the original contract is not supplanted by a security given for the price; as is instanced also by the giving of the buyer's own note or bill, which, though it operates as an extension of the credit, extinguishes not the original contract; as well as by payment in the bills of a third person, which is not absolute satisfaction unless it were declared so by the terms of the bargain."

In the recent case of *Alnis v. Ayres*, 62 Hun (N. Y.) 376, the facts were almost identical with *Bell v. Moss*, 5 Whart. (Pa.) 189, the buyer's London agent having accepted the draft and, on the failure of his principal, refused to pay it, and the seller was allowed to stop the goods, the court saying: "It is perfectly well settled that the vendor's right of stoppage *in transitu* is not lost by his having received the acceptances of the vendee, even though he may have negotiated the bills so that they are outstanding in third hands unmaturing."

In *Clapp v. Sohmer*, 55 Iowa 273, it is said that "A promissory note cannot be regarded as a payment unless it has been expressly received as such." And see *Arnold v. Delano*, 4 Cush. (Mass.) 33; 50 Am. Dec. 754; *Lewis v. Mason*, 36 Up. Can. Q. B. 590; *Dixon v. Yates*, 5 B. & Ad. 345; 27 E. C. L. 86; *Feise v. Wray*, 3 East 93; *Edwards v. Brewer*, 2 M. & W. 375; *Miles v. Gorton*, 2 C. & M. 504; *Jenkyns v. Usborne*, 7 M. & G. 678; 8 Scott 505.

See also, as to the effect of payment by note, bill, or check, PAYMENT, vol. 18, p. 167, *et seq.*, where the cases are very fully collated and discussed.

But where the seller accepts an order, note, or accepted bill of a third party in payment for the goods, without the indorsement or guaranty of the purchaser, he has no right of stoppage. *Eaton v. Cook*, 32 Vt. 58; *Cowasjee v. Thompson*, 5 Moore's P. C. 165. This is on the principle that if a man has a bill payable to him, or

bearer, and delivers it over for money received, without indorsement, it is a plain sale of the bill, and he who sells it does not become a new security. *Bank of England v. Newman*, 1 Ld. Raym. 442; 12 Mod. 241; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; 6 Am. Dec. 383. "If a vendor of goods receive from the purchaser the note of a third person, at the time of the sale (such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser as to the solvency of the maker), it is deemed to have been accepted by the vendor in payment and satisfaction unless the contrary be expressly proved." *Breed v. Cook*, 15 Johns. (N. Y.) 241.

1. *Newhall v. Vargas*, 13 Me. 103; 29 Am. Dec. 489; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Lewis v. Mason*, 36 U. C. Q. B. 590; *Feise v. Wray*, 3 East 93; *Patten v. Thompson*, 5 M. & S. 350; *Edwards v. Brewer*, 2 M. & W. 375; *Miles v. Gorton*, 2 C. & M. 504; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76; *Story on Sales*, § 327. But see *Arnold v. Delano*, 4 Cush. (Mass.) 33; 50 Am. Dec. 754, where it is said "that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties."

2. *Hays v. Mouille*, 14 Pa. St. 54; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Edwards v. Brewer*, 2 M. & W. 375; *Story on Sales*, § 327.

3. *Tiedeman on Sales*, §§ 129, 122. *Shaw, C. J.*, in *Arnold v. Delano*, 4 Cush. (Mass.) 39; 1 Am. Dec. 754, seems to think that the seller might retain possession by virtue of his right of lien, and says that "The law, in holding that a vendor who has thus given credit for goods waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment the vendee becomes bankrupt or insol-

*a. WHEN TRANSIT BEGINS.*—Whenever the goods have passed out of the control of the seller, for the purpose of transportation to the buyer, the transit may be said to have begun.<sup>1</sup>

*b. WHEN TRANSIT ENDS*—(1) *In General.*—The transit continues until the goods come into the actual or constructive possession of the buyer, or of some person acting for him.<sup>2</sup>

vent, and the vendor still retains the custody of the goods, or any part of them, his lien is restored, and he may hold the goods as security for the price." And in this he is supported by *Thompson v. Baltimore, etc.*, R. Co., 28 Md. 406.

In *Story on Sales*, § 319, it is said: "It will be perceived that these two rights of lien and stoppage *in transitu*, although they are very similar, are not identical. The right of lien can only be exercised upon goods which are in the actual or constructive possession of the vendor, and in respect to which no delivery has taken place; but the right of stoppage *in transitu* is properly exercised only upon the goods which are in passage, and are in the hands of some intermediate person between the vendor and vendee in process and for the purpose of delivery. In the one case there is an incipient delivery, or at least a resignation of possession, and in the other there is not. The criterion, therefore, whether the vendor retains the right of stoppage, is not to be found in the question whether he has lost possession, but whether the vendee has acquired possession. When possession is surrendered by the vendor his lien is gone, but his right of stoppage remains until the vendee has acquired possession. In a word, the right in the one case is to retain possession, the right in the other is to regain possession."

*Stoppage After Transit Ended.*—Where the transit has ended, if the seller attempts to stop the goods, he is a wrongdoer, and will be liable for any damage resulting, and can obtain no lien upon the goods for any expenses incurred by himself. In *Guilford v. Smith*, 30 Vt. 74, the seller of goods, after they had reached their destination and were in the possession of a warehouseman, took them from him, paying the freight and giving a bond for indemnity to secure the payment of the import duties. It was held that he acquired no lien on the property for the expenditures, or the indemnity incurred by his bond.

1. *Benj. on Sales* (6th Am. ed.), § 839.

And this though they be only in the hands of a middleman as a packer; *Atkins v. Colby*, 20 N. H. 155; *Ellis v. Hunt*, 3 T. R. 467; or a warehouseman or forwarding agent; *Atkins v. Colby*, 20 N. H. 155; *Nicholls v. Le Teuvre*, 2 Bing. N. Cas. 81; 29 E. C. L. 262; as well as in the actual possession of a carrier. If in the possession of a carrier for the purpose of transportation it is immaterial that the goods are still in his warehouse and not yet loaded into the car or vessel; they are nevertheless in transit. *Berndtson v. Strang*, L. R., 4 Eq. 481; *Hodgson v. Loy*, 7 T. R. 440; *Ex parte Rosevear China Clay Co.* 11 Ch. Div. 560; *Northey v. Field*, 2 Esp. 613; *Holst v. Pownall*, 1 Esp. 240; *Tiedeman on Sales*, § 129.

2. There will be found an apparent conflict in the cases, some holding that there must be an actual delivery to the vendee or his agent in order to prevent the vendor's right of stoppage from attaching. *Calahan v. Babcock*, 21 Ohio St. 281; 8 Am. Rep. 63; *Symms v. Schotten*, 35 Kan. 310; *U. S. Engine Co. v. Oliver*, 16 Neb. 614; *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394; *Walsh v. Blakelee*, 6 Mont. 194; *Reynolds v. Boston, etc.*, R. Co., 43 N. H. 580; *Mohr v. Boston, etc., R. Co.*, 106 Mass. 70; *Stubbs v. Lund*, 7 Mass. 453; 5 Am. Dec. 63; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Arnold v. Delano*, 4 Cush. (Mass.) 33; 1 Am. Dec. 754; *Grout v. Hill*, 4 Gray (Mass.) 361; while others hold that the delivery may be constructive as well as actual. *Insee v. Lane*, 57 N. H. 454; *Hall v. Dimond*, 63 N. H. 565; *Greve v. Dunham*, 60 Iowa 108; *O'Neil v. Garrett*, 6 Iowa 484; *McFetridge v. Piper*, 40 Iowa 627; *Rucker v. Donovan*, 13 Kan. 255; 19 Am. Rep. 84; *Fraschieris v. Henriques*, 6 Abb. Pr. N. S. (N. Y.) 254; *Buckleby v. Furniss*, 15 Wend. (N. Y.) 145; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 63; *Nottram v. Heyer*, 5 Den. (N. Y.) 629; *Hoover v. Tibbits*, 13 Wis. 79; *Jones v. Earl*, 37 Cal. 632; 99 Am. Dec. 338; *Blackman v. Pierce*, 23 Cal. 509; *Moore v. Lott*, 13 Nev. 383; *Chandler v. Fulton*, 10 Tex. 12; 60 Am. Dec. 188;

(2) *Delivery at Destination* — (a) *When Destination Is Reached*. — When the goods have arrived at the place for which they were intended under the directions given by the seller, and require new orders from the buyer to put them again in motion, they have reached their destination, and delivery there ends the transit.<sup>1</sup>

*Half v. Allyn*, 60 Tex. 278; *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 768; *Hayes v. Mouille*, 14 Pa. St. 51; *Cabbeen v. Campbell*, 30 Pa. St. 259; *The Natchez*, 31 Fed. Rep. 615. But upon an examination and comparison of these cases it will be seen that this apparent conflict may be readily reconciled, each class having in mind a different constructive delivery. Those decisions which hold constructive delivery insufficient have in mind the delivery to the carrier at the beginning of the transit, which is such a constructive delivery to the buyer as will place the goods at his risk and cause the seller to lose his right of lien, but not his right of stoppage. Those decisions which hold constructive delivery sufficient to defeat the right of stoppage have in mind the delivery by the carrier to the buyer (*Kendal v. Marshall*, 11 Q. B. Div. 364); which may be done constructively, as where the carrier enters into an agreement with the buyer to hold the goods as his agent or warehouseman, or, as where the buyer's agent demanded and marked the goods at the inn where they arrived at their destination, it was considered a constructive delivery defeating the right of stoppage. *Inslee v. Lane*, 57 N. H. 459; *Ellis v. Hunt*, 3 T. R. 466. The first class of cases consider that in a case of this kind the buyer has actual possession by his authorized agent, and that it is an actual and not a constructive delivery. See *Alsberg v. Latta*, 30 Iowa 442; *Warner v. Johnson*, 65 Iowa 128. The distinction will be the more readily seen from an examination of the case of *Buckley v. Furniss*, 15 Wend. (N. Y.) 145, where it was said that the goods must come into the actual possession of the purchaser, or be placed under circumstances equivalent to actual possession. *Bronson, J.*, in delivering the opinion of the court, saying: "It may be conceded that the title to the goods passed to the vendee when they were forwarded pursuant to his order; that the delivery to the carrier was for the most purposes a delivery to the purchaser, and the loss of the property, had it been sunk or destroyed, would

have fallen on him. Still, it was only a constructive, not an actual delivery to the vendee; and such interest as he had in them was subject to be defeated, in case of his insolvency, by the exercise of the vendor's right to stop the goods before they came into the actual possession of the purchaser."

*Parke, B.*, in *Whitehead v. Anderson*, 9 M. & W. 534, says that "A case of constructive possession is where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new and further order to be given to him." And see *Abott on Shipping*, 624, 625. See also *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188.

1. *Bethell v. Clark*, 19 Q. B. Div. 553; 20 Q. B. Div. 615. And see *Wait v. Scott*, 6 Grant (Ont.) 154, and *Treadwell v. Aydlett*, 9 Heisk. (Tenn.) 388; *Biggs v. Barry*, 2 Curtis (U. S.) 259.

In *Dixon v. Baldwin*, 5 East 185, the goods were sold on credit by a cotton-spinner at Manchester to B. & Son, merchants of London, but they were directed to be sent to M. & Co., of Hull, for the purpose of being shipped to the correspondents of B. & Son at Hamburg, and by these correspondents sent to the persons for whom they were intended. They were reclaimed by the sellers while in the hands of Metcalf & Co. waiting orders from B. & Son, who had failed. The court held that the transit was at an end, Lord Ellenborough, C. J., remarking that, "The goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such order they would continue stationary."

In *Becker v. Hallgarten*, 86 N. Y. 167, the buyers, living in Berlin, ordered their seller, also of Berlin, to ship the goods to their agent at Bremen, subject

to their disposal, which was done; the seller informing the Bremen agent that the goods were sent "at the request of and for account of" the buyer, and requesting him to "carry out the further instructions of said parties concerning the same." It was held that the goods had reached the place for which they were intended by the seller and had come under the actual control of the buyers. In this case the buyers had also transferred the goods to a third party to secure a loan of money, and the court said that, had the detention at Bremen been originally intended only to give the buyers an opportunity to determine by which of the several routes, or at what time, as in *Harris v. Pratt*, 17 N. Y. 249, the goods would go on, the circumstance of the transfer to a third party who took actual possession and control of the goods would have defeated the right.

But where a firm, carrying on business in New York and in Nottingham, Eng., under different firm names, one partner residing in each place, purchased, in the name of the Nottingham firm, goods which they informed the manufacturer were for the New York market and which they directed to be forwarded for shipment to a shipping-agent at Liverpool, there to await further instructions, it was held that delivery to the shipping agent appointed by the vendee was not a termination of the transit, the court, per Denio, J., saying: "We regard what was done by the firm of Nottingham, in giving directions to the shipping agents, to have been in aid of the general purpose of sending the goods to New York. The partner at Nottingham, though in law one of the purchasers, acted in regard to these goods as an agent of the house at New York in facilitating the transportation to that city. During the short time the goods remained in the hands of these agents, before directions came from Nottingham, they could not be said to be 'awaiting new orders from the purchaser to put them again in motion, and to communicate to them another substantive destination,' in the sense in which that language was used by Lord Ellenborough in *Dixon v. Baldwin*, 5 East 185. New York was the destination contemplated from the beginning. It was the one named to the vendor, and there was no thought of diverting the goods from that point at any time, or by any person. They were awaiting

a new impulse only in the sense in which that may be predicated of freight *in transitu*, which is permanently at rest while arrangements are making to send it forward on the journey on which it was originally embarked." *Harris v. Pratt*, 17 N. Y. 249.

But in *Ex parte Miles*, 15 Q. B. Div. 39, a commission agent in London was employed by merchants at Kingston, Jamaica, to buy goods for them in England. The commission agent ordered the goods of the manufacturers "for this mark," there being in the margin of the letter which gave the order a mark consisting of two letters with "Kingston, Jamaica," added. The manufacturers knew from previous dealings that this mark had been used by the Jamaica firm. The goods were to be paid for by six months' bills drawn by the manufacturers on the commission agent and accepted by him. The commission agent afterwards wrote the manufacturers, telling them to pack the goods and mark them with the mark previously mentioned, and to forward them to specified shipping agents at Southampton, for shipment by a particular ship, "advising them with particulars for clearance." The manufacturers sent the invoice of the goods to the commission agent, telling him that they had that day forwarded the goods by railway to the shipping agents "with the usual particulars for clearance." The same day the manufacturers wrote to the shipping agents, sending them the particulars of the goods, and adding, "which please forward as directed." The particulars described the goods as marked with the letters originally given by the commission agent, and the words "Kingston, Jamaica," and numbered with specified numbers; but the columns for "consignee" and "destination" were left in blank. The cost of the carriage to Southampton was paid by the manufacturers. The commission agent sent the shipping agents particulars of the goods, giving the name of the Jamaica firm as consignees, and stating the destination of the goods to be Kingston, Jamaica. The goods were shipped on board the vessel, the bills of lading describing the commission agent as consignor, and the Jamaica firm as consignees. After the ship had sailed, but before her arrival at Jamaica, the commission agent stopped payment, and the manufacturers, who had not been paid for the goods, gave notice to the

(b) **Mere Arrival at Destination Not Sufficient.**—The mere arrival of the goods at their destination, however, and unloading and placing them in the warehouse of the railroad company, does not of itself terminate the transit nor put an end to the right of stoppage. As long as they remain in the possession of the carrier, as such, the right continues. There may be cases where the carrier becomes the agent of the vendee and holds the goods as a warehouseman for him, but such agency will not be implied from his original employment, and until some agreement or understanding to that effect is affirmatively shown, he will be presumed to retain them in his original capacity of carrier.<sup>1</sup>

shipowners to stop them *in transitu*. It was held that, as between the commission agent and the manufacturers, the commission agent was a purchaser and the transit was at end when the goods arrived at Southampton, and that the notice to stop was given too late. In this case the learned judge said: "What is meant by sending goods to their destination?" It seems to me that it means sending them to a particular place, to a particular person who is to receive them there, and not sending them to a particular place without saying to whom."

1. *Symms v. Schotten*, 35 Kan. 310; *Calahan v. Babcock*, 21 Ohio St. 293; 8 Am. Rep. 63; *Hays v. Mouille*, 14 Pa. St. 51; *Bender v. Bowman*, 2 Pearson (Pa.) 517; *Greve v. Dunham*, 60 Iowa 108; *Clapp v. Peck*, 55 Iowa 270; *O'Neil v. Garrett*, 6 Iowa 480; *McFetridge v. Piper*, 40 Iowa 628; *Alsberg v. Latta*, 30 Iowa 442; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580; *Inslee v. Lane*, 57 N. H. 454; *Atkins v. Colby*, 20 N. H. 155; *Guilford v. Smith*, 30 Vt. 65; *Half v. Allyn*, 60 Tex. 278; *Chandler v. Fulton*, 10 Tex. 1; 60 Am. Dec. 188; *Seymour v. Newton*, 105 Mass. 275; *Naylor v. Dennie*, 8 Pick. (Mass.) 198; *Powell v. McKechnie*, 3 Dakota 319; *Parker v. McIver*, 1 Desaus. Eq. (S. Car.) 281; *Macon, etc., R. Co. v. Meador*, 65 Ga. 705; *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Harris v. Hart*, 6 Duer (N. Y.) 606; *Coventry v. Gladstone*, L. R., 6 Eq. 44; *Kendal v. Marshall*, 11 Q. B. Div. 366; *McLean v. Breithaupt*, 12 Ont. App. 383; *Foster v. Frampton*, 6 B. & C. 107; 13 E. C. L. 111; *Bolton v. Lancashire, etc., R. Co.*, L. R., 1 C. P. 431; *Whitehead v. Anderson*, 9 M. & W. 535; *Bartram v. Farebrother*, 1 M. & P. 526; *Jackson v. Nichol*, 5 Bing. N. Cas. 508; 35 E. C. L. 202; *Kemp v. Falk*, L. R., 7 App. Cas. 584; *Ex parte*

*Barrow*, 6 Ch. Div. 783; *Ex parte Cooper*, 11 Ch. Div. 68; *Blackburn on Sales*, p. 370.

In *Clapp v. Peck*, 55 Iowa 270, the purchaser claimed that an arrangement had been made by him with the railroad agent by which the goods were to be stored and kept for him. The agent testified that no such arrangement had been made, but that the goods were stored simply because they were not taken away by the purchaser. Decision was rendered in favor of the seller, and upon an appeal the court declined to disturb the judgment, the evidence being conflicting.

And where, on the arrival of a vessel containing a load of lumber, the consignee went on board and told the captain that he had come to take possession and went down into the cabin, into which the ends of the timbers projected, and saw and touched them with his fingers, and the captain made no reply at the time, but afterwards told him, at the same interview, that he would deliver the cargo when satisfied about his freight charges, it was held that the captain had not contracted to hold as agent of the consignee and the transit was not at an end. *Whitehead v. Anderson*, 9 M. & W. 518. And in this case Parke, B., said: "It appears to us very doubtful whether an act of marking or taking samples or the like, without any removal from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession unless accompanied by such circumstances as to denote that the carrier was intended to keep, and consented to keep, the goods in the nature of an agent for custody." And see *Foster v. Frampton*, 6 B. & C. 107; 13 E. C. L. 111.

Four or five weeks after the arrival of goods at their destination, the consignee, who owed arrearages of charges

(c) **Consignee Must Consent to Receive.**—The consignee must consent to receive the goods as well as the carrier to deliver them, for the carrier can no more constitute himself the consignee's agent to hold, without his consent, than can the consignee make the carrier his agent without the carrier's consent.<sup>1</sup>

upon other goods, verbally pledged the goods to the railroad company as security therefor. The goods at that time were in the company's warehouse, and under a stipulation of the bill of lading the company had a lien thereon for the arrearages. There was no change of possession, nor was there any new consideration for the agreement. *Held*, that no delivery had taken place which would defeat the seller's right of stoppage. *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390; 37 Am. & Eng. R. Cas. 704. And where, by statute, actual receipt of the goods was necessary to put an end to the right of stoppage, it was held that, although goods had reached their destination and, by agreement between the railroad company and the consignee, had been set apart in the company's depot to be sold for the payment of arrearages of freight due the carrier, no delivery was effected by this agreement, and the right of stoppage still continued. *Macon, etc., R. Co. v. Meador*, 65 Ga. 705.

In *McLean v. Breithaupt*, 12 Ont. App. 383, goods were shipped to the buyer on a shipping bill containing the following conditions: "In all cases . . . the delivery of the goods will be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse, . . . when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk, . . . storage to be charged on all freight remaining in the depot over forty-eight hours." On the arrival of the goods at their destination the buyer requested that they be kept for him by the company until he could find time to remove them, and that no storage be charged, but the railroad agent did not promise. This was held to be no delivery, and the seller allowed to exercise the right of stoppage.

1. In *McLean v. Breithaupt*, 12 Ont. App. 388. *Burton, J.*, said: "The carrier cannot of his own will convert himself into a warehouseman for the purchaser

so as to terminate the *transitus*." Nor, *a fortiori*, can the carrier appoint someone to receive and hold the goods as agent of the consignee upon the latter's failure or refusal to accept them. He can, it is true, place them in the hands of a warehouseman or wharfinger for safekeeping, but there is no delivery unless it is to one having a general or special authority from the consignee. *James v. Griffin*, 2 M. & W. 623, is a strong case in point. Here the purchaser, knowing himself to be insolvent, determined not to receive a cargo of lead which he had not paid for, but on its arrival at the wharf where he had been in the habit of leaving the lead with the wharfingers as his agents, it became necessary to unload it in order to set the vessel free. He, therefore, told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive it, and they probably deemed themselves his agents to hold possession. After this the goods were stopped, and it was held that the buyer's intention not to receive being proved, the wharfingers could not receive as his agents without his assent, and therefore the transit was not ended. And in *Bolton v. Lancashire, etc., R. Co.*, L. R., 1 C. P. 431, *Willes, J.*, said: "The arrival, which is to divest the vendor's right of stoppage *in transitu*, must be such that the buyer has taken actual or constructive possession of the goods, and that cannot be as long as he repudiates them." See also, *Alsberg v. Latta*, 30 Iowa 442; *Greve v. Dunham*, 60 Iowa 108; *Grout v. Hill*, 4 Gray (Mass.) 361; *Lane v. Jackson*, 5 Mass. 162; *Scholfeld v. Bell*, 14 Mass. 40; *Naylor v. Dennie*, 8 Pick. (Mass.) 198; 19 Am. Dec. 319; *Inslee v. Lane*, 57 N. H. 454; *Ex parte Barrow* 6 Ch. Div. 783; *Benjamin on Sales*, §§ 849, 851.

In *Kloes v. Wurmser*, 34 Mo. App. 453, the insolvent buyer wrote to the vendor rescinding the sale while the goods were yet in transit, which was consented to by the seller, and it was held that title was re-vested in the seller even as against an innocent purchaser without notice from the buyer.



(a) **Delivery to Agent of Consignee.**—When delivery is made to an agent of the consignee, the question is whether the goods in his hands require new orders to put them again in motion and give them another substantive destination. If, without such new orders, they must continue stationary, then the delivery is complete, and the seller's right of stoppage lost; but if the agent is one merely to receive and expedite the goods on the way to their original destination, his possession is considered the same as that of a carrier, and the right of stoppage continues.<sup>1</sup>

Delivery to the sheriff or to the mortgagees of the buyer, who are in possession of his store, is not such a delivery as will defeat the right of stoppage, and this notwithstanding a clause in the mortgage conveying after-acquired property. *Kingman v. Denison*, 34 Mich. 608; *Harris v. Tenney* (Tex.), 20 S. W. Rep. 82. But the bankruptcy of the buyer, not being in law a rescission of the contract, and the assignees being vested with all his rights, the delivery of the goods into the buyer's warehouse after his bankruptcy, or an actual possession of them taken by his trustee, will put an end to the transit. *Ellis v. Hunt*, 3 T. R. 467; *Tooke v. Hollingworth*, 5 T. R. 226; *Scott v. Pettit*, 3 B. & P. 469; *Inglis v. Usherwood*, 1 East 515.

In *Lane v. Robinson*, 18 B. Mon. (Ky.) 623, the carrier, a teamster, on his arrival at the place of destination, found that the consignee of the goods had absconded and appointed no one to receive them; so he told one Redman that he had better pay for the hauling and keep the goods for the consignee, which Redman did. The court decided that this was a delivery, putting an end to the transit, and therefore to the right of stoppage *in transitu*. The decision was based upon the ground that the delivery to Redman was a delivery to keep for the consignee, as his agent, the court seeming to lose sight of the fact that no one can become agent save by authority of the principal, and while the consignee might have afterwards ratified Redman's agency in receiving the goods, yet it must have been before the seller gave notice of his intention to claim the right of stoppage. See *White v. Mitchell*, 38 Mich. 390; *O'Neil v. Garrett*, 6 Iowa 480; *Hoover v. Tibbits*, 13 Wis. 79; *Ex parte Barrow*, 6 Ch. Div. 783.

1. *Cabeen v. Campbell*, 30 Pa. St. 259; *Markwald v. Creditors*, 7 Cal. 213; *Harris v. Pratt*, 17 N. Y. 263; *Hol-*

*brook v. Vose*, 6 Bosw. (N. Y.) 76; *Lyons v. Hoffnung*, L. R., 15 App. Cas. 391; *Dixon v. Baldwin*, 5 East 175; *Valpy v. Gibson*, 4 C. B. 837; 56 E. C. L. 837; *Pottinges v. Hecksher*, 2 Grant (Ont.) 309; 2 Kent's Comm. 545. Hence it is immaterial that the carrier has been appointed by the buyer himself. It does not make him such an agent of the vendee as will defeat the vendor's right of stoppage. *Hays v. Mouille*, 14 Pa. St. 51; 2 Kent's Comm. 545; *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. (7th Am. ed.) 818; *Holst v. Pownall*, 1 Esp. 240; *Jackson v. Nichol*, 5 Bing. N. Cas. 508; 35 E. C. L. 202. But it has been held that if the seller takes bills of lading stating that the goods are shipped on account of the buyer, the delivery is complete, and the seller cannot afterwards stop the goods in transit. *Meletopulo v. Ranking*, 6 Jur. 1095.

It is immaterial whether the orders to the agent were given before or after the order to the sellers. The case depends upon what was the transit, and when the goods have arrived at the end of the journey upon which they had been sent by the seller's orders, and have been received by the buyer's agent in his behalf, the right of stoppage is gone. *Kendal v. Marshall*, 11 Q. B. Div. 365. In this case the purchaser ordered the goods sent to M. & Co., owners of a line of vessels, whom he ordered to forward them to Rouen; and, on its being argued that M. & Co. were only carrying agents, Brett, L. J., said: "The truth is, they were to act as agents for the vendee and keep the goods until the ship should be ready to sail; but I do not think it a material matter that they were to keep the goods. The point is that M. & Co. received their instructions from the vendee and not from the vendor."

And where a manufacturer's agent bought wool for his factory, to be paid for by the paper of the manufacturing company on delivery at the factory,

which wool was delivered to the agent upon an order from the seller to the storekeeper having possession of the same, and by him forwarded to his factory, it was held, on the failure of the manufacturing company before the arrival of the wool, that it might be stopped in transit; that the transit was not terminated either by the order of the seller upon the storekeeper, or the acts of the agent in taking possession. The court said that the delivery was not to the agent as owner, nor as agent of the owners, to dispose of in any other way than to transship to the buyer's place of business. He was the agent of the buyers to make the purchase of the wool to be transmitted to the factory, and that was the extent of his agency. He stood, therefore, rather in the position of a mere forwarding agent than in that of an agent to receive the goods for the buyer's use. *Aguirre v. Parmelee*, 22 Conn. 473.

In *Leeds v. Wright*, 3 B. & P. 320, the goods were purchased of the plaintiff at Manchester by one Moisseron, in the name of Le Grand & Co., of Paris, for whom he was general agent in London. The seller, by Moisseron's directions, sent them to the house of the defendant, a packer in London, where some of them were unpacked and sent away and the remainder repacked. Moisseron had authority to send the goods to Paris, Holland or Germany, or any other market as he should think most beneficial. While the balance of the goods were at the packer's, Le Grand & Co. failed, upon which the plaintiff demanded the goods. It was held that the transit had ended. Lord Alvanley said: "These goods were not sent to the defendant, the packer, to be delivered by him to the house of Le Grand & Co., at Paris, but they were sent to Moisseron, the agent of that house in London, and were there to await his disposal, he being invested with authority to send them to such market as he should think most advisable. Indeed, Moisseron might, if he had so pleased, have made London the place of their ultimate destination and have disposed of the goods there."

In *Guilford v. Smith*, 30 Vt. 49, P. & Co., at Burlington, purchased flour of G. H. & Co., of Toronto, which they ordered shipped to F. & H., their agents at Ogdensburg, who were in the habit of receiving their flour and forwarding it as directed by them. In the bills of lading the flour was consigned to F. &

H., "to be forwarded to P. & Co. Burlington." On the arrival of the flour at Ogdensburg, it was stored in a bonded warehouse connected with the railroad, awaiting the payment of charges and duties, the warehouseman agreeing to hold it subject to the orders of F. & H. On G. H. & Co.'s attempt to stop the flour in transit, it was held that the transit was ended by its arrival at Ogdensburg, and the exercise of control over it by F. & H., the court saying, that even had Burlington been the ulterior destination, the fact that the flour had reached a point on its transit where it would await a fresh direction to be given to it by P. & Co., or their agents, the transit nevertheless would be at an end.

**Delivery of Logs to a Booming Company.**—A contract for logs provided that the seller should drive them to the main stream to be taken in charge by a booming company when its drive went down, and if too late should follow and overtake the drive. The seller engaged another person, who was taking a large quantity of other logs to meet the drive, to take these logs with them, but he missed the drive, and as he could not separate the logs and had engaged to take the other logs farther, he took these also, the seller apparently acquiescing. When he reached his destination the main drive had not been overtaken, and as he was going no farther, the buyer, without objection from the seller, engaged the booming company to go back and collect the logs and run them to a designated place, and this was held to have amounted to a delivery which cut off any lien the seller might have had on the logs, and his right to stop them in transit. *Muskegon Booming Co. v. Underhill*, 43 Mich. 629.

**Delivery at a Specified Place.**—But where the contract of purchase provides that the goods shall be delivered at a specified place, the *transitus* is ended when they are delivered there, although it is not the place of ultimate destination, and the goods are re-shipped from there to the vendee. Thus, in *Brooke Iron Co. v. O'Brien*, 135 Mass. 446, iron was purchased by a firm in Boston from the Brooke Iron Co. in Pennsylvania, to be delivered at Elizabethport, N. J., and, on its arrival at Elizabethport, was received by the vendee's agent and forwarded to him at Boston. On the vendor attempting to stop the iron at Boston it

(e) **Effect of Carrier Refusing to Deliver.**—The rights of the buyer cannot be affected by the wrongful refusal of the carrier to deliver the goods, and when the destination is reached, if the carrier, upon tender of his charges, wrongfully refuses to make delivery, the transit will be considered ended and the right of stoppage cease to exist.<sup>1</sup>

was held that the transit ended on the delivery to the vendee's agent at Elizabethport, the court, per Holmes, J., saying: "The contract between the seller and the buyers expressly provided that the goods should be delivered at Elizabethport; the identification of the buyers as of Boston does not affect the place of delivery or cut down the plain words 'deliverable at Elizabethport.'" And see *Dodson v. Wentworth*, 4 M. & G. 1080; 43 E. C. L. 555; *Ex parte Rosevear China Clay Co.*, 11 Ch. Div. 569, per Brett, L. J., and *Ex parte Watson*, 5 Ch. Div. 35.

**Delivery "Free on Board."**—But an agreement to deliver "free on board," at a certain place, has no such effect. That expression only means that the purchaser will not have to pay drayage from the place of business of the vendor to the carriage, but that the vendor will bear that expense and deliver the goods "free on board" the vessel or car. *Ex parte Rosevear China Clay Co.*, 11 Ch. Div. 565.

1. Where the goods have reached their destination and the party having the right to their possession has demanded them of the carrier, he has no right to refuse, and if he does, the transit will be considered at an end at the time the consignee demands the goods and tenders the freight, for the wrongful refusal of a carrier to make delivery cannot affect the rights of the consignee. *Bird v. Brown*, 4 Ex. 786; 19 L. J. Ex. 154; *Walley v. Montgomery*, 3 East 585; *Bohtlingk v. Inglis*, 3 East 381; *Reynolds v. Boston*, etc., R. Co., 43 N. H. 591.

In *Blackburn on Sale* 375, written before the decision of *Bird v. Brown*, 4 Ex. 786, the learned author says: "And possibly an unequivocal demand of possession made upon the middleman and refused by him, may have the same effect upon the *transitus* that an actual taking of possession against the assent of the middleman would have had. That is, it would terminate the *transitus* if the refusal were so tortious as to render the middleman liable in trover, just as the actual taking of

possession would terminate the *transitus* if it was justifiable against the middleman."

In *Anderson v. Fish*, 16 Ont. (Q. B. Div.) 476, affirmed in 17 Ont. App. 28, on the arrival of goods at their destination, the carrier's agent sent an "advice note" to the buyer, who refused to receive them. Shortly afterwards the buyer made an assignment, for the benefit of his creditors, to the plaintiff, who demanded the goods and offered to pay the freight, but produced no "advice note." The agent did not refuse to make delivery, but stated that, by the rules of the company, when goods were claimed by an assignee for the benefit of creditors, his duty was to telegraph the company's solicitor for instructions. He did so telegraph, but before a reply was received, and on the same day, he was notified by the sellers not to deliver the goods, as they claimed the right of stoppage. It was held that the delay of the agent until he received instructions from the solicitor was not wrongful, and that the transit was not at an end when the sellers intervened and stopped the goods, *Street, J.*, in delivering the opinion of the court, saying: "I think that under the circumstances, the goods being claimed by a third person, who produced no advice or shipping note, the railway company's agent was entitled to a reasonable time to obtain instructions from the company's solicitor; that this was acquiesced in at the time by the plaintiff, and that trover could not have been maintained against the company by the plaintiff until a reasonable time had elapsed. There was no attempt on the part of the railway company to set up against the plaintiff any right in themselves or any third person."

But see *Allen v. Mercier*, 1 Allen (Pa.) 103, a case determined in the fifth judicial district of *Pennsylvania*. Here goods were shipped by packet from Philadelphia to the buyer in *Delaware*, and on the arrival of the packet at the landing were demanded by the buyer and delivery refused unless a balance

(f) **Delivery of Part.**—A delivery of part, or even of the bulk of the goods, is not, *prima facie*, a delivery of the whole, and those relying upon the partial delivery are bound to show that it took place under such circumstances as to make it a constructive delivery of the whole.<sup>1</sup>

(g) **Payment of Freight Charges.**—A constructive delivery will not be implied from the payment of the freight charges alone. The carrier can only become the agent or warehouseman of the consignee by virtue of some contract or course of dealing between the parties.<sup>2</sup>

(h) **Delivery to Warehouseman or Wharfinger.**—A delivery to a warehouseman or wharfinger at the place of ultimate destination of the goods, who does not receive them as the mere agent of the buyer, but in the ordinary course of his business as a middleman, is not such a constructive delivery to the buyer as will put an end

due for former freights was paid, which the buyer not doing, the goods were brought again to Philadelphia. The buyer becoming insolvent, the carrier attached the goods for his balance as the property of the buyer, and afterwards the seller tendered the amount of freight due upon them and demanded them of the captain, and upon his refusal to deliver, brought replevin, and it was held that he was not deprived of his right to stop the goods *in transitu*, the court basing its decision mainly upon the ground that the carrier could not be allowed to take advantage of his tortious act in refusing to deliver to the buyer, the question of the rights of the buyer not being considered.

1. *Buckley v. Furniss*, 17 Wend. (N. Y.) 504; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261; *Cabeen v. Campbell*, 30 Pa. St. 258; *White v. Welsh*, 38 Pa. St. 396; *Ex parte Cooper*, 11 Ch. Div. 73; *Ex parte Falk*, 14 Ch. Div. 455; *Kemp v. Falk*, L. R., 7 App. Cas. 579; *Dixon v. Yates*, 5 B. & Ad. 313; 27 E. C. L. 86; *Tanner v. Scovell*, 14 M. & W. 28.

In *Ex parte Cooper*, 11 Ch. Div. 73, part of the freight charges had been paid and part of the goods delivered, but the court held that, while the carrier would be compelled to deliver up to the extent of the freight which had been paid, unless ordered to the contrary, yet it could not be supposed that he intended to abandon his lien for the unpaid freight, and therefore a delivery of part did not operate as a constructive delivery of the whole.

In *Slubey v. Heyward*, 2 H. Bl. 504,

and *Hammond v. Anderson*, 1 N. R. 69, sometimes cited in support of the contrary doctrine, there had been an actual delivery in each case by the carrier consenting to hold the goods for the consignees, and the decisions did not turn upon the question of a partial delivery being constructive delivery of the whole. And in *Hall v. Dimond*, 63 N. H. 565, which, at first glance, also seems to decide that the delivery of the whole will be implied from the delivery of a part, the decision was based, not upon the ground of the partial delivery, but upon the ground that, by the previous dealing between the parties, the railroad agent had agreed to become warehouseman for the buyer and to hold the goods as his agent. And see further *Betts v. Gibbins*, 2 A. & E. 73; *Hammond v. Anderson*, 1 B. & P., N. R. 69; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Simmons v. Swift*, 5 B. & C. 857; *Miles v. Gorton*, 2 Cr. & M. 504; *Jones v. Jones*, 8 M. & W. 431; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Ex parte Gibbes*, 1 Ch. Div. 101.

2. In *Reynolds v. Boston, etc., R.Co.*, 43 N. H. 590, the court held that paying the freight charges merely, without an express agreement with the carrier to hold the goods as agent and warehouseman for the consignee, was not such a constructive delivery as would defeat the seller's right of stoppage *in transitu*, *Bell, C. J.*, delivering the opinion of the court, saying: "It was long held that the right of stoppage *in transitu* could be terminated only by an actual delivery of the goods to the consignee or his agent. The later cases furnish some exceptions to this rule, as

where the consignee calls for the goods, and the carrier agrees or consents that he will hold them for him, thus making himself his agent to keep the goods, *Richardson v. Goss*, 3 B. & P. 127; *Scott v. Pettit*, 3 B. & P. 469; *Molloy v. Hay*, 3 M. & R. 396; *Rowe v. Pickford*, 1 Moore 526; *Allen v. Gripper*, 2 C. & J. 218; or where the consignee has been in the habit of using the warehouse of the carrier or wharfinger as his own, *Tucker v. Humphrey*, 4 Bing. 521; 15 E. C. L. 63; *Foster v. Frampton*, 6 B. & C. 109; 13 E. C. L. 111; or where the consignee claims the goods and the carrier wrongfully refuses to deliver them, so that he makes himself liable for the goods in trover, *Walley v. Montgomery*, 3 East 585. But where the goods remain in the actual possession of the carrier without fraud on his part, *Crawshay v. Eades*, 1 B. & C. 181; 8 E. C. L. 78; *Tucker v. Humphrey*, 4 Bing. 516; 15 E. C. L. 63; *Holst v. Pownall*, 1 Esp. 240; *Lackington v. Atherton*, 8 Scott, N. R. 38; or in the hands of a depository, or in a custom-house till the duties are paid, *Mottram v. Heyer*, 5 Den. (N. Y.) 629; *Newhall v. Vargas*, 13 Me. 109; 29 Am. Dec. 489; *Northey v. Field*, 2 Esp. 613; or until necessary papers are produced, *Donath v. Broomhead*, 7 Pa. St. 301; or while the vessel is lying in quarantine, *Stoveld v. Hughes*, 14 East 308; there is no delivery, either actual or constructive. There is no constructive possession on the part of the vendee, unless the relation in which the carrier stood before, as a mere instrument of conveyance to an appointed place of destination, has been altered by a contract between the vendee and the carrier, that the latter should hold or keep the goods as the agent of the vendee. *Foster v. Frampton*, 6 B. & C. 107; 13 E. C. L. 111; *Whitehead v. Anderson*, 9 M. & W. 508." In this case the consignee paid the freight, but was unable to get possession of the goods because there was other freight in the way of delivery.

And where a consignee who, on the arrival of the vessel containing his goods, paid the freight charges and obtained an order for their delivery, was told, on sending a barge for them with the delivery order, that they could not be got at, but would be delivered as soon as they could be got at, it was held that the mere promise to deliver as soon as the goods could be got at was not a constructive delivery, and that

the character of the carrier, as carrier, was not changed into that of agent of the consignee, and that the goods were still liable to stoppage *in transitu*. *Covenry v. Gladstone*, L. R., 6 Eq. 44.

In *Donath v. Broomhead*, 7 Pa. St. 301, the consignee had paid the freight charges, but owing to the loss of the invoice could not get possession, so the goods were stored in the custom-house, and there remained until his failure, when the seller was allowed to assert his right of stoppage *in transitu* and regain possession. But in this case, *Rogers, J.*, in rendering the decision of the court, said: "It is not necessary to deny that, were there nothing in the case but the payment of freight, a contract or agreement might be implied that the master held the custody of the goods as agent of the vendee; that his character was changed;" but this was only *dicta*.

But when the freight on the goods has been paid by the consignee and the goods receipted for, but left in the depot to be called for, the transit is at an end and they are no longer subject to the seller's right of stoppage. *Langstaff v. Stix*, 64 Miss. 171; 28 Am. & Eng. R. Cas. 85.

**Payment of Freight Charges Not Necessary.**—It is not necessary that the freight charges should be paid before the carrier can agree to hold the goods as agent for the consignee. Mr. Benjamin, in his work on Sales, says: "The carrier's change of character into that of an agent to keep the goods for the buyer is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or freight charges is satisfied. Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods, after arrival at destination, as agent of the buyer, though he may at the same time say, 'I shall not let you take them until my freight is paid.'" *Benjamin on Sales* (4th Am. ed.), § 853; *Hall v. Diamond*, 63 N. H. 569; *Allen v. Gripper*, 2 C. & J. 218.

But the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and in order to rebut this presumption there must be proof of an agreement between the buyer and carrier whereby the latter agrees to retain possession as agent of the buyer, while at the same time retaining his lien for the freight charges. *Ex parte Barrow*, 6 Ch. Div. 783; *L x*

to the right of stoppage *in transitu*,<sup>1</sup> though if the goods are, by the direction of the buyer, forwarded to a particular warehouseman, who in receiving them acts as his agent, the transit is at an end.<sup>2</sup> But where the warehouse is at a place short of the ultimate destination of the goods, even though it be at the end of the transportation line, a delivery to a warehouseman who receives the goods to hold until the buyer can send for them, does not end the transit, and this notwithstanding the warehouseman be selected by the buyer.<sup>3</sup>

(i) **Delivery to Sub-Purchaser.**—Where the goods have been sold by the buyer and delivered by the carrier to the sub-purchaser, it puts an end to the transit as effectually as a delivery to the buyer himself, and thus terminates the seller's right of stoppage.<sup>4</sup>

(j) **Entry of Goods at Custom-House.**—When the goods are entered at the custom-house and regularly bonded and warehoused under the present warehousing system, the transit is at an end, and the right

*parte* Cooper, 11 Ch. Div. 68; *Ex parte* Falk, 14 Ch. Div. 446.

1. O'Neil v. Garrett, 6 Iowa 484; White v. Mitchell, 38 Mich. 390; Atkins v. Colby, 20 N. H. 156; Edwards v. Brewer, 3 M. & W. 375; Bartram v. Farebrother, 1 M. & P. 526; Jackson v. Nichol, 5 Bing. N. Cas. 508; 35 E. C. L. 202; and if the warehouseman refuses to obey a delivery order, the transit continues. Lockington v. Ather-ton, 8 Scott, N. R. 38.

2. Hoover v. Tibbits, 13 Wis. 79; Atkins v. Colby, 20 N. H. 156; Walsh v. Blakely, 6 Mont. 194; Dixon v. Baldwin, 5 East 184; Hammond v. Anderson, 2 Camp. 243; Lucas v. Dorian, 7 Taunt. 279; 2 E. C. L. 278.

Unless his warehouse is at a place short of their original destination and he receives them only to forward to the purchaser at the first opportunity, in which case the seller's right of stoppage continues until the goods have reached the possession of the buyer. Blackman v. Pierce, 23 Cal. 508; Ins-lee v. Lane, 57 N. H. 459; Atkins v. Colby, 20 N. H. 154; *In re* Foot, 11 Blatchf. (U. S.) 530; Mills v. Ball, 2 B. & P. 457; Ellis v. Hunt, 3 T. R. 466.

Where, by the previous dealings between the parties, the carrier had been in the habit of depositing the goods of the buyer with a certain warehouseman, who was in the habit of receiving and holding them at the buyer's risk, without charging warehouse rent, until taken away by him or delivered to other persons by his orders, the warehouseman was considered the agent of the buyer, and the

transit ended on the delivery of the goods to him. Dodson v. Wentworth, 4 M. & G. 1080; 43 E. C. L. 555. And see Richardson v. Goss, 3 B. & P. 119; Wentworth v. Outhwaite, 10 M. & W. 436; Rowe v. Pickford, 8 Taunt. 83; 4 E. C. L. 27.

The warehouseman has a lien on the goods for his charges prior to the seller's right of stoppage or any other claim, but where he states to the seller's agent at the time demand is made upon him for the goods that he has no charges, he waives his lien. Blackman v. Pierce, 23 Cal. 509.

3. In Covell v. Hitchcock, 23 Wend. (N. Y.) 610, the court decided that the right of stoppage continues while the goods remain in a public warehouse, if at a place short of their original destination, although there was no public carrier between the place where the goods were warehoused and the place of final destination, and the purchaser had to send after them with his own team.

And in Blackman v. Pierce, 23 Cal. 508, the buyer had selected his warehouseman and had the goods shipped in his care, and, when notified of their arrival, wrote that he would send a team after them, and yet the court decided that there had been no delivery and the *transitus* was not at an end, as the goods had not reached the place of ultimate destination as intended when purchased. To the same effect, see Buckley v. Furniss, 15 Wend. (N. Y.) 137; Chandler v. Fulton, 10 Tex. 2; 60 Am. Dec. 188.

4. U. S. Engine Co. v. Oliver, 16

of stoppage *in transitu* ceases; but a mere formal entry, not followed up by proper bonding or payment of the duties, does not terminate the transit, and the right continues.<sup>1</sup>

(k) **Delivery to Local Carrier.**—Goods are still in transit while in the hands of a dray line for local delivery at the place of destination.<sup>2</sup>

(3) **Delivery at Point Short of Original Destination.**—(a) **Delivery to Buyer.**—The buyer may anticipate the natural end of the transit by intercepting and taking possession of the goods, and if the carrier turns them over to him before the destination is reached, the delivery is complete and the right of stoppage is at an end.<sup>3</sup>

Neb. 612; Klein v. Fischer, 30 Mo. App. 568.

1. Frasier v. Henriques, 6 Abb. Pr. N. S. (N. Y.) 261; Cartwright v. Wilmerding, 24 N. Y. 521; Harris v. Pratt, 17 N. Y. 249; Mottram v. Heyer, 5 Den. (N. Y.) 629; Holbrook v. Vose, 6 Bosw. (N. Y.) 78; Guilford v. Smith, 30 Vt. 72; Parker v. Byrnes, 1 Low. (U. S.) 539; Haig v. Wallace, 2 Huds. & B. 671; Orr v. Murdock, 2 Ir. C. L. R. 9; Croker v. Lawder, 9 Ir. L. R. 21; *In re Bearns*, 18 Bankr. Reg. 500; Strachan v. Knox, cited in Brown on Sales, 536; Wiley v. Smith, 1 Ont. App. 179; *affirmed* 2 Duval (Super. Ct. of Can.) 1; in which Howell v. Alport, 12 U. C. C. P. 375, was said not to be good law; Graham v. Smith, 27 U. C. C. P. 1; Burr v. Wilson, 13 U. C. C. B. 478. And see Lewis v. Mason, 36 U. C. C. B. 590, and Wilds v. Smith, 2 Ont. App. 8, *modifying and reversing* the same case in 41 U. C. C. B. 136.

Where goods have reached their destination and left the hands of the carrier, and the buyer has sold them to one who gives bond for the payment of the customs duties, and deposits them in a bonded warehouse in his own name, the seller's right of stoppage is gone. Sheppard v. Newhall (Cir. Ct. App.), 54 Fed. Rep. 306.

The entry must be complete, and where the goods are removed to a government warehouse under general orders, in default of an entry, the right of stoppage *in transitu* is not terminated. Frasier v. Henriques, 6 Abb. Pr. N. S. (N. Y.) 261. Thus in Donath v. Broomhead, 6 Pa. St. 201, the goods were removed to the custom-house directly from the vessel by the officers, and were not entered at the custom-house by the consignee on account of loss of the invoice; and clearly the buyer, though he had paid the freight, had not entitled himself to actual possession, or to have constructive possession.

And in Northey v. Field, 2 Esp. 613, the goods remained on board the vessel until after the buyers became bankrupt, and the duties not having been paid within the twenty days allowed by the excise law, during which time they were to remain on board, they were taken from the ship to the King's warehouse in consequence of the non-payment of the duties; and in both cases it was held that there had been no delivery, and that the seller could exercise his right of stoppage.

2. White v. Mitchell, 38 Mich. 390; Harris v. Tenney (Tex.), 20 S. W. Rep. 82. The right of stoppage is not lost by the delivery of the goods by the carrier to a local transfer company for delivery to the buyer, if they were received by the transfer company for conveyance only, and not for safe custody or disposal on the part of the buyer. Scott v. William B. Grimes Dry Goods Co., 48 Mo. App. 521. In this case the goods were received by the transfer company under a previous general order from the buyer, and the transit was held not at an end, and the right of stoppage held to exist.

3. Wood v. Yeatman, 15 B. Mon. (Ky.) 280; Secomb v. Nutt, 14 B. Mon. (Ky.) 264; Jordan v. James, 5 Ohio 102; Walsh v. Blakely, 6 Mont. 194; Mohr v. Boston, etc., R. Co., 106 Mass. 72; Poole v. Houston, etc., R. Co., 58 Tex. 134; 9 Am. & Eng. R. Cas. 197; Harris v. Pratt, 17 N. Y. 264; Stevens v. Wheeler, 27 Barb. (N. Y.) 658; 2 Kent's Com. 547; Story on Sales, § 342a; Tiedeman on Sales, § 131; Benj. on Sales, § 854; Mills v. Ball, 2 B. & P. 461; Oppenheim v. Russell, 3 B. & P. 54; Whitehead v. Anderson, 9 M. & W. 518; London, etc., R. Co. v. Bartlett, 7 H. & N. 400; Wright v. Lawes, 4 Esp. 82; Mix v. Oliver, cited in Abbott on Shipping 424.

The contract for delivery is made between the carrier and the consignee,

The intermediate delivery may be constructive as well as actual,<sup>1</sup> but a mere demand by the buyer before the destination is reached, without any delivery, has been held not to deprive the seller of his right of stoppage.<sup>2</sup>

the consignor being the agent of the consignee to make it, and it entitles the consignee to take delivery either at the place indicated at the time of the departure of the goods or any other place at which he afterwards prefers to receive them. *Cork Distilleries Co. v. Great Southern R. Co.*, L. R., 7 H. L. 269; and *Bramwell, B.*, in *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400; 31 L. J. Exch. 92, said: "The goods are intended to reach the consignee, and provided he receives them it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor, *unless* the consignee directs them to be delivered at a different place."

Where goods were sent from Manchester to be shipped at Liverpool for Valparaiso, and, after having been put on board the ship, were relanded by order of the buyer and returned to the warehouse of the seller to be repacked, it was held that the purchaser had exercised such an act of ownership over them as would put an end to the seller's right of stoppage. *Valpy v. Gibson*, 4 C. B. 837; 56 E. C. L. 837.

**Forcible Interception of Goods by Buyer.**—Whether, if the carrier should refuse to deliver the goods at an intermediate point and the buyer should take forcible possession of them, the transit would be considered ended, has never been definitely decided, but Lord Blackburn is of the opinion that at least where the carrier has a right to refuse to make an intermediate delivery, the buyer cannot improve his position by tortiously taking actual possession against his will. In *Whitehead v. Anderson*, 9 M. & W. 518, Parke, B., says: "If the vendee take them out of the possession of the carrier into his own, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end, though in case of the absence of the carrier's consent it may be a wrong to him for which he will have a right of action;" and Lord Blackburn in his work on *Sales*, p. 375, says, in commenting on this case, that, "Notwithstanding the expressions of the

Exchequer in *Whitehead v. Anderson*, it is submitted that it is doubtful whether, when the carrier has a right to refuse to allow the vendee to take even constructive possession, the vendee can improve his position by tortiously taking actual possession against the will of the carrier. The law, in general, discountenances violence, and it would seem not consistent with its general policy to give a man a benefit in consequence of his forcible or fraudulent wrong against third parties." This opinion seems to be borne out by the decision in *Bird v. Brown*, 4 Ex. 786; 19 L. J. Ex. 154, which is just the converse of Lord Blackburn's proposition, for in that case it was decided that the wrongful refusal of the carrier to make delivery to the buyer when the goods had arrived at their destination did not affect the latter's rights, and that the transit was ended and the right of stoppage gone. See *supra*, this title, *Effect of Carrier's Refusing to Deliver*.

**1. Constructive Intermediate Delivery.**—It would seem that the buyer need not take actual possession of the goods, but that if he enters into an agreement with the carrier to hold them as his agent in a new capacity, the transit is ended. In *Foster v. Frampton*, 6 B. & C. 107; 13 E. C. L. 111, Bayley, J., uses this language: "If the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession, the *transitus* is at an end;" and Parke, B., in *Whitehead v. Anderson*, 9 M. & W. 518, says: "The vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless, in the meantime, they come into the actual or constructive possession of the vendee." And see *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 662; *Jordon v. James*, 5 Ohio 104; *Blackburn on Sales* 374; *Story on Sales*, § 342a.

**2. Jackson v. Nichol.** 5 Bing. N. Cas. 508; 35 E. C. L. 202. *Tindall, C. J.*, in delivering the opinion of the court in this case, said: "It was urged on the



(b) **Delivery to Buyer's Agent.**—The goods may be intercepted by the buyer's agent under instructions to ship to some point other than that of original destination, or to hold subject to further orders; but if the agent takes possession under instructions to ship to the buyer at the place of original destination, the seller's right of stoppage is not defeated.<sup>1</sup>

part of the defendants, on the authority of the *dictum* of Lawrence, J., in *Bohtlingk v. Inglis* (3 East. 394), that the tortious act of a third person should not prejudice the rights of the parties; and consequently that the demand made by the buyer, and the unlawful refusal to deliver, was tantamount to a delivery. But it is to be recollected . . . that here the goods had not actually reached the terminus of their delivery when the demand of the vendee took place; and although it might be conceded to be the better opinion that if the vendee actually receives the possession of his goods on their passage to him, and before the voyage has completely terminated, that the delivery is complete and the right of stoppage gone, yet no authority has been cited for the position; and the principle seems the other way, that a mere demand by the vendee, without any delivery, before the voyage has completely terminated, deprives the consignor of his right of stoppage."

1. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264; *Cabeen v. Campbell*, 30 Pa. St. 254; *Hays v. Mouille*, 14 Pa. St. 51; *Markwald v. Creditors*, 7 Cal. 213; *Guilford v. Smith*, 30 Vt. 65; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Harris v. Hart*, 6 Duer (N. Y.) 606; *followed in Harris v. Pratt*, 17 N. Y. 264; *Kendal v. Marshall*, 11 Q. B. Div. 364. And see *supra*, this title, *Delivery to Agent of Consignee*, for the principle governing delivery to an agent is in both cases the same.

Mr. Tiedeman, in his work on Sales, § 131, says: "The delivery at the intermediate point is required to be a *bona fide* delivery, in order to terminate the transit and destroy the vendor's right of stoppage. And delivery at an intermediate point, with the intention of having the goods reshipped to the original place of destination, is evidently done for the purpose of defeating the vendor's rights, and, therefore, not a *bona fide* delivery."

And where the consignees of goods made a fraudulent assignment of the bill of lading to their attorney, at the

same time giving him a written order for delivery on the station agent at a place short of the original destination, and the attorney intercepted the shipment and obtained possession of the same, and, after effacing from the boxes the name of the original consignees, inserted that of a bogus firm, and reshipped them by the same line to the place of original destination, it was held not to terminate the transit. *Poole v. Houston, etc., R.-Co.*, 58 Tex. 134; 9 Am. & Eng. R. Cas. 197.

In *Half v. Allyn*, 60 Tex. 278, the buyer lived at B, some eighteen miles from C, the railroad station, and had the goods shipped to him at B, care of the railroad agent at C. On the arrival of the goods at C, they were taken out by F and stored in the back room of his store, and on the day after were attached by the creditors of the purchaser. On the seller claiming the right of stoppage *in transitu*, it was held that if F took possession of the goods as agent of the buyer for the purpose of forwarding them to their original destination, the transit was not ended, and the right of stoppage attached.

Where goods were shipped to a purchaser by a canal-boat, but on the canal-boat being stopped by the ice, were landed by the master and placed in a warehouse, it was held that an order from the buyer to the warehouseman to sell for a specified price did not end the transit as to such as remained unsold, the order being conditional only, and the general purpose being to forward to the purchaser. *In re Foot*, 11 Blatchf. (U. S.) 530.

And where an agent of the buyer intercepted a shipment of goods and sold a portion, but being unable to dispose of the balance, forwarded them to their original destination, it was held that the sale of part did not affect the right of the seller to stop such as were not sold. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 264. In this case the court said that where an agent intercepts a transit and holds the goods for further orders, and afterwards, under new directions from the

(4) *Delivery on Board Buyer's Vessel.*—When goods are delivered on board a vessel owned or chartered by the buyer, the question is whether he contemplates a fuller and more complete possession. If not, the transit is terminated by the delivery to the vessel; if he does, they are still in transit, and the right of stoppage continues.<sup>1</sup>

buyer, forwards them to the place of original destination, it is a new transit just as certainly as would be a change of destination; and *Walsh v. Blakely*, 6 Mont. 194, would seem to support this view. In that case one Potter ordered goods of a merchant in St. Joseph, Mo., to be shipped to him at Poney, Mont., but before the arrival of the goods, went to a firm in Bozeman, where they were to arrive by rail, and made arrangements with them to pay the freight charges and take the goods to hold for him until he should order them sent to him. On the vendor's attempting to stop the goods in the agent's hands, it was held that the transit was ended, as the goods were held subject to further orders from the purchaser.

1. *Stubbs v. Lund*, 7 Mass. 457; 5 Am. Dec. 63; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; 23 Am. Dec. 607; *Newhall v. Vargas*, 13 Me. 105; 29 Am. Dec. 489; *Isley v. Stubbs*, 9 Mass. 65; 6 Am. Dec. 29; *Cross v. O'Donnell*, 44 N. Y. 666; 4 Am. Rep. 721. But see *Bolin v. Huffnagle*, 1 Rawle (Pa.) 9, and *Pequeno v. Taylor*, 38 Barb. (N. Y.) 375.

In *Stubbs v. Lund*, 7 Mass. 457; 5 Am. Dec. 63, the court, by Parsons, C. J., said: "In our opinion, the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment (3 East 381); but if the goods are not to be imported by the consignee but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading,

which express the terms of the shipment (7 D. & E. 442)."

But the *English* cases make a distinction between a vessel owned by the buyer and one chartered by him, holding that a delivery on board a vessel owned by the buyer ends the transit, whether a more complete possession is contemplated or not. *Ex parte Rosevear China Clay Co.*, 11 Ch. Div. 571; *Van Casteel v. Booker*, 2 Exch. 691; *Schotsmans v. Lancashire, etc.*, R. Co., L. R., 2 Ch. 332; *Blakey v. Dinsdale*, Cowp. 664; *Ogle v. Atkinson*, 5 Taunt. 759; and in *Schotsmans v. Lancashire, etc.*, R. Co., L. R., 2 Ch. 336, it was held immaterial whether the goods were shipped on a vessel sent out expressly to receive them or on one of a regular line owned by the buyer and shipped without any previous arrangement for that purpose. But where the seller is ignorant of the fact that the vessel in which he ships his goods belongs to the buyer, a question might arise whether the delivery could properly be held complete. Lord Chelmsford, L. C., in touching upon this point in the above case, said: "It would seem to be scarcely just to a person who has delivered goods to be carried to a consignee, under the belief that he could exercise the ordinary right of an unpaid vendor over them, to deprive him of that right because he had ignorantly placed the goods on board the consignee's own vessel, and therefore must be taken to have made an absolute delivery of them."

Where the vessel is chartered by the buyer, the *English* cases make a distinction not recognized in the *United States*, resulting from their doctrine that delivery on board the buyer's own ship ends the transit, and hold that where the charterer becomes owner of the vessel for the voyage, that is, where the ship has been demised to him, and he has employed the captain, so that the captain is his servant, then delivery on board such chartered ship is delivery to the buyer; but where the owner of the vessel has his own captain and men on board, so that the captain is the

**3. Buyer Must be Insolvent.**—The third requisite to the exercise of the right of stoppage *in transitu* is the insolvency of the buyer, unknown to the seller at the time of the sale, or arising afterwards;<sup>1</sup> and if, through excess of caution, he stops the goods while the buyer is yet solvent, he does so at his peril.<sup>2</sup> By the

servant of the owner, and the effect of the charter is only to secure to the charterer the exclusive use and employment of the vessel, then a delivery of goods on board is not a delivery to the buyer, but to an agent for carriage. Blackburn on Sale 352; Benj. on Sales, § 843; Abbott on Shipping, part 4, ch. 1; Inglis v. Usherwood, 1 East 515; Bohtlingk v. Inglis, 3 East 381; Fowler v. McTaggart, cited 7 T.R. 442, and 10 East 522; Brindley v. Cilwin Slate Co., 55 L. J. Q. B. 67; Berndtson v. Strang, L. R., 3 Ch. App. 588; *Ex parte* Rosevear China Clay Co., 11 Ch. Div. 571; Noble v. Adams, 7 Taunt. 59; 2 E. C. L. 59. And see, for a further discussion of the subject, Sandeman v. Scurr, L. R., 2 Q. B. 86; 36 L. J. Q. B. 58; Omoa Coal & Iron Co. v. Huntley, 2 C. P. Div. 464. As to what amounts to a demise of a ship, see Meiklereid v. West, 1 Q. B. Div. 428.

A *New York* case has held that delivery on board a vessel chartered by the buyer places the goods entirely in his dominion, and ends the transit as much as if placed in the buyer's warehouse. But in this case the goods were to be sent to a foreign port, and no fuller possession was contemplated by the purchaser. Pequeno v. Taylor, 38 Barb. (N. Y.) 388.

If the seller desires to protect himself, he may restrain the effect of such delivery and preserve his right of stoppage by taking bills of lading making the goods deliverable to his order or assigns. Schotsmans v. Lancashire, etc., R. Co., L. R., 2 Ch. 336; Turner v. Liverpool Docks, 20 L. J. Exch. 393; Brown v. North, 8 Exch. 1; Jenkyns v. Brown, 14 Q. B. 496; Walley v. Montgomery, 3 East 589; but in such a case the right of stoppage continues only until the bill of lading, indorsed by the seller, comes to the possession of the buyer. Van Casteel v. Booker, 18 L. J. Exch. 9.

1. Blum v. Marks, 21 La. Ann. 268; 99 Am. Dec. 725; Schwabacher v. Kane, 13 Mo. App. 126; Stevens v. Wheeler, 27 Barb. (N. Y.) 663; Bender v. Bowman, 2 Pearson (Pa.) 517; Farrell v. Richmond, etc., R. Co., 102 N.

Car. 390; 37 Am. & Eng. R. Cas. 704; Loeb v. Peters, 63 Ala. 243; 35 Am. Rep. 17; Gustine v. Phillips, 38 Mich. 675; Fenkhausen v. Fellows, 20 Nev. 312; White v. Mitchell, 38 Mich. 390; Kingman v. Denison, 84 Mich. 612; More v. Lott, 13 Nev. 380; Reynolds v. Boston, etc., R. Co., 43 N. H. 580. The *Constantia*, 6 C. Rob. 326. And if, at the time of the sale, the seller knew the vendee to be insolvent, the right does not attach. Buckley v. Furniss, 15 Wend. (N. Y.) 137; O'Brien v. Norris, 16 Md. 122; 77 Am. Dec. 284.

It was held in Rogers v. Thomas, 20 Conn. 53, that the insolvency must intervene between the time of the sale and the exercise of the right of stoppage. But this doctrine cannot be sustained either on principle or authority. Benedict v. Schaettle, 12 Ohio St. 525; Buckley v. Furniss, 15 Wend. (N. Y.) 137.

2. "If from misinformation or excess of caution, the seller has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods with an indemnification for the expenses that have been incurred." Per Lord Stowell in *The Constantia*, 6 Rob. Adm. 327; Benedict v. Schaettle, 12 Ohio St. 518; More v. Lott, 13 Nev. 383; Walsh v. Blakely, 6 Mont. 194.

Though no evidence of insolvency should precede the stoppage, still if the fact of insolvency existed, it will avail to protect the seller, and the buyer cannot complain. Benedict v. Schaettle, 12 Ohio St. 520; Blum v. Marks, 21 La. Ann. 268; 99 Am. Dec. 725; *The Constantia*, 6 Rob. Adm. 327. In Naylor v. Dennie, 8 Pick. (Mass.) 204; 19 Am. Dec. 319, Parker, C. J., said: "It is objected also to the exercise of this right by the plaintiffs, that the consignee did not become insolvent until after the arrival of the goods; by which is supposed to be meant that his insolvency was not known or declared. But we do not see how this can affect the question. We do not find that the right of stoppage *in transitu* depends upon a de-

term insolvency, as here used, is meant a general inability on the part of the buyer to pay his debts in the ordinary course of business.<sup>1</sup>

**IV. HOW RIGHT EXERCISED—1. Giving Notice.**—The usual mode of exercising the right of stoppage *in transitu* is by a simple notice to the carrier, or party in possession of the goods, in which the

clared insolvency or open bankruptcy before the arrival of the goods. It is enough that the affairs of the consignee are so involved that he is unable to pay for the goods, if he was to pay on delivery, or that he has become actually insolvent before he shall have taken possession."

1. It is not necessary that he should have been adjudged a bankrupt or insolvent debtor. *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 13; *Lee v. Kilburn*, 3 Gray (Mass.) 600; *Thompson v. Thompson*, 4 Cush. (Mass.) 134; *Herrick v. Borst*, 4 Hill (N. Y.) 650; *Benedict v. Schaettle*, 12 Ohio St. 515; *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 616; 6 Am. & Eng. R. Cas. 371; *Gibson v. Carruthers*, 8 M. & W. 329; *Mills v. Ball*, 2 B. & P. 457; *Bayley v. Shofield*, 1 M. & S. 338; *Shone v. Lucas*, 3 D. & R. 218; *Edwards v. Brewer*, 2 M. & W. 375; *James v. Griffin*, 2 M. & W. 622; *Parker v. Gossage*, 2 C. M. & R. 617; *Biddlecombe v. Bond*, 4 A. & E. 322, 696; and see *Billson v. Crofts*, 15 Eq. 314. In *Hays v. Mouille*, 14 Pa. St. 48, it is said: "It is not necessary, to prove insolvency, that the vendee should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exists, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more." And see *Naylor v. Denie*, 8 Pick. (Mass.) 205; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

In *Rogers v. Thomas*, 20 Conn. 53, it was held that, in order to authorize the stoppage, there must be some open notorious act on the part of the buyer calculated to affect his credit. But it is unsustained by authority, and we believe the better rule to be as stated above.

**Evidence of Insolvency.**—Stopping payment is sufficient evidence of insolvency. *Inslee v. Lane*, 57 N. H. 458; *O'Brien v. Norris*, 16 Md. 122; 77 Am. Dec. 284; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Vertue v. Jewell*, 4 Camp. 31; *Newsom v. Thornton*, 6

East 17; *Dixon v. Yates*, 5 B. & Ad. 313; *Bird v. Brown*, 4 Ex. 736; and also the admissions of the buyer. *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261; and it is said that failure to pay one just and admitted debt will probably be sufficient. *Benj. on Sales*, § 837; *Smith's Merch. Law* 550. At any rate a well-founded information of an embarrassment or failure on the part of the buyer to meet the demands of his creditors, is sufficient to warrant the seller stopping the goods sold. *More v. Lott*, 13 Nev. 383; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261. But the mere issue of an attachment against the buyer is not. *Gustine v. Phillips*, 38 Mich. 674. And see a discussion by Willes, J., as to the meaning of "insolvency," in *The Queen v. The Saddlers' Co.*, 10 H. L. C. 425.

In *Walsh v. Blakely*, 6 Mont. 194, W., the seller, testified that he "did have information as to P.'s (the buyer's) solvency, and to the effect that he was solvent; but learned of his insolvency through C., who was authorized to collect the bill from said P.," and the court held that this testimony did not authorize or justify a finding of the court below, "that plaintiff learned of the insolvency of P., and this fact of insolvency appeared and was proved," *Wade, C. J.*, saying: "How did the fact of insolvency appear? By the merest hearsay. C. had told W. that P. was insolvent, and W. simply testified to what C. had told him. When W. obtained this information it does not appear. If C. had information of this kind so essential to the respondent's right to retake the goods, why was he not called to testify as to what he knew and as to what information he gave to W.? There is no explanation. Why, if P. was insolvent at the time W. seized the goods, was not this fact proven? If the insolvency had been a fact, or if W. had any such information upon which he had the right to act, such facts might have been readily established. The insolvency of the buyer must be based upon well-founded information. There is no

**How Right Exercised. STOPPAGE IN TRANSITU. To Whom Notice Given.**

seller states his claim and notifies him not to deliver them to the consignee, or requests him to hold them subject to his orders.<sup>1</sup> No particular form of notice is necessary,<sup>2</sup> nor need an express demand be made for the goods, it being sufficient if the carrier is clearly informed that it is the desire and intention of the seller to retake them;<sup>3</sup> but the notice must give a sufficient description of the goods to enable the carrier to identify them.<sup>4</sup>

**2. To Whom Notice Given.**—The notice must be given to the person in possession of the goods, or, if to his employer, then at

proof that C.'s information to W. had the least foundation in fact, and, for all that appears, P. was solvent at the time the goods were seized by W." Where a member of a firm (the sellers) testified that they believed the buyer to be solvent when they sold him the goods, and did not learn of his insolvency until the goods were attached, and one of their traveling agents testified that he made the sale, and that both he and the sellers knew the buyer was insolvent when the goods were sold, but trusted to his honor and not to his solvency, believing that he would pay as he had always done, it was held that the evidence warranted a finding that the sellers knew of the consignee's insolvency at the time of shipping the goods. *Fenkhausen v. Fellows*, 20 Nev. 312.

**By Whom Defense of Solvency Must be Made.**—The objection that the purchaser was not insolvent at the time of the stoppage can only be taken by the purchaser and not by the carrier, except that he may show as a matter of defense that the debt could have been made by due diligence. *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 616; 6 Am. & Eng. R. Cas. 371.

1. *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Newhall v. Vargas*, 13 Me. 93; 29 Am. Dec. 489; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *Bohtlingk v. Inglis*, 3 East 381; *Syeds v. Hay*, 4 T. R. 260; *Snee v. Prescott*, 1 Atk. 250; *Litt v. Cowley*, 7 Taunt. 169; 2 E. C. L. 168; *Whitehead v. Anderson*, 9 M. & W. 518. In *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580, the agent of the seller gave a verbal notice to the carrier to hold the goods until he could hear from his principal; and in *Seymour v. Newton*, 105 Mass. 272, the agent of the seller informed the railroad agent that the buyer had allowed a draft for the pur-

chase price of the goods to go to protest, and notified him not to let him have them, and requested the agent to let him know when they arrived.

The notice need contain no statement of the nature or basis of the claim, but if the consignor unreasonably refuses subsequently to furnish the carrier with any evidence of the validity of his claim, such refusal may be considered as a waiver of his right. *Allen v. Maine Cent. R. Co.*, 79 Me. 327; 30 Am. & Eng. R. Cas. 122.

It has been held that a direction by the seller to hold the proceeds of the goods subject to his order, did not express an intention to retake possession of the goods, and was not an effectual stoppage. *Phelps v. Comber*, 29 Ch. Div. 813.

It is not necessary that the seller take actual possession of the goods. *Atkins v. Colby*, 20 N. H. 156; *Mills v. Ball*, 2 B. & P. 457; and the filing by the sellers of a claim, in an attachment case, to the fund in court, being the proceeds of goods sold under the court's order, is a sufficient exercise of the right of stoppage. *O'Brien v. Norris*, 16 Md. 130; 77 Am. Dec. 284; as is also entry of the goods by the seller at the custom-house. *Walker v. Woodbridge*, cited in *Cook's Bankrupt Law* 494.

2. *Rucker v. Donovan*, 13 Kan. 255; 19 Am. Rep. 84; *Mottram v. Heyer*, 5 Den. (N. Y.) 629.

3. *Jones v. Earl*, 37 Cal. 630; 99 Am. Dec. 338; *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 616; 6 Am. & Eng. R. Cas. 371; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580.

4. *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 263. In this case the plaintiffs telegraphed the defendants at Hamilton: "Do not deliver earthenware from our English house to W. B. Palmer & Co. Hold to our order." Palmer & Co. had then about 400 pieces of goods in defendants ware-

such time and under such circumstances that he may, by using reasonable diligence, send the necessary orders to the servant to prevent the delivery.<sup>1</sup>

**3. Effect of Carrier's Refusal to Redeliver.**—If upon demand by the seller a carrier declines to redeliver the goods, or delivers them to the buyer, he will be liable to the seller,<sup>2</sup> for whom various remedies exist; thus, trover lies,<sup>3</sup> as does also trespass on the case,<sup>4</sup> or replevin.<sup>5</sup>

**V. LOSS OF RIGHT—1. How Right Is Lost.**—The right of stop-

house at Hamilton, and the plaintiffs' names were not on any of the papers in defendants' possession, nor were the packages so marked that they could be identified, and the notice was held insufficient.

1. *Mottram v. Heyer*, 5 Den. (N.Y.) 629; *Newhall v. Vargas*, 13 Me. 109; 29 Am. Dec. 489; *Kemp v. Falk*, L. R., 7 App. Cas. 585; *Mills v. Ball*, 2 B. & P. 457; *Litt v. Cowley*, 7 Taunt. 169; *Whitehead v. Anderson*, 9 M. & W. 518; *The Tigress*, 32 L. J. Adm. 97. But see *Bell v. Moss*, 5 Whart. (Pa.) 206.

Hence, a demand of the property from the buyer made before its actual delivery to him, and while it is still in the custody of the custom-house officers, is not sufficient. *Mottram v. Heyer*, 5 Den. (N. Y.) 629.

In *Poole v. Houston*, etc., R. Co., 58 Tex. 138; 9 Am. & Eng. R. Cas. 197, notice was given to the station agent having charge of the freights of the railroad at the place of ultimate destination of the goods, and in the absence of evidence showing that the railroad had a general freight agent at the point in question, such notice was held sufficient, and that the railroad company, by delivering the goods to the consignee at an intermediate point, became liable. But this was by a divided court.

2. *Bloomington v. Memphis*, etc., R. Co., 6 Lea (Tenn.) 616; 6 Am. & Eng. R. Cas. 371; *Jones v. Earl*, 37 Cal. 632; 99 Am. Dec. 338; *Allen v. Maine Cent. R. Co.*, 79 Me. 327; 30 Am. & Eng. R. Cas. 122; *Howatt v. Davis*, 5 Munf. (Va.) 34; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *The Tigress*, 32 L. J. Adm. 97.

The bringing suit upon the debt, when due, and recovery of judgment, does not estop the seller from suing the carrier for wrongful delivery. *Bloomington v. Memphis*, etc., R. Co., 6 Lea (Tenn.) 616; 6 Am. & Eng. R. Cas. 371.

Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment. *Mac Veagh v. Atchison*, etc., R. Co., 3 N. Mex. 205; 18 Am. & Eng. R. Cas. 651; *Baltimore*, etc., R. Co. v. *Davis* (Pa.), 12 Atl. Rep. 335; 32 Am. & Eng. R. Cas. 563; *French v. Star Union Transportation Co.*, 134 Mass. 288.

3. *Inslee v. Lane*, 57 N. H. 454; *Morison v. Gray*, 2 Bing. 260; 9 E. C. L. 405; *Bohtlingk v. Inglis*, 3 East 381. In *Litt v. Cowley*, 7 Taunt. 169; 2 E. C. L. 168; 2 Marsh. 457, *Gibbs, C. J.*, delivering the opinion of the court, said: "As soon as the notice is given, the property returns to the vendor, and he is entitled to maintain trover, not only against the carriers, but against the assignees of the bankrupt, or any other person." But in *Childs v. Northern R. Co.*, 25 U. C. Q. B. 165, it was held that trover cannot be maintained against a carrier who wrongfully refuses to hold goods after notice from the vendor, *Draper, C. J.*, saying: "But this right of the vendor to withhold the goods from his vendee, who, by paying, would have an immediate right to the possession as being already the owner by sale and delivery to the carrier, is a very different thing from the right of property and of possession which is asserted in the action of trover, which, in my humble judgment, will not lie upon the facts in evidence. We must not be understood as giving any support to the notion that the defendants were right in delivering these goods to the vendee. If he, when tendering the freight, had demanded the goods and threatened a suit, we have no doubt the defendants might have got an interpleader issue."

4. *Calahan v. Babcock*, 21 Ohio St. 281; 8 Am. Rep. 63; *Pottinger v. Hecksher*, 2 Grant Cas. (Pa.) 309.

5. *Benedict v. Schaettle*, 12 Ohio St. 515.

page *in transitu* is lost by the buyer obtaining delivery of the goods,<sup>1</sup> or by his indorsement of the bill of lading to a *bona fide* purchaser for value and without notice;<sup>2</sup> but if the indorsement

1. *Supra*, this title, *Under What Circumstances Right May be Exercised*.

2. See BILL OF LADING, vol. 2, p. 244; *Becker v. Hallgarten*, 86 N.Y. 167; *Dows v. Perrin*, 16 N. Y. 325; *Stevens v. Wheeler*, 27 Barb. (N. Y.) 661; *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Stubbs v. Lund*, 7 Mass. 457; 5 Am. Dec. 63; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; 23 Am. Dec. 607; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Schumacher v. Eby*, 24 Pa. St. 521; *Loeb v. Peters*, 63 Ala. 248; 35 Am. Rep. 17; *Winslow v. Norton*, 29 Me. 421; 1 Am. Dec. 601; *Lee v. Kimball*, 45 Me. 172; *Newhall v. Central Pac. R. Co.*, 51 Cal. 345; 21 Am. Rep. 713; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Missouri Pac. R. Co. v. Hiedenheimer*, 82 Tex. 195; *Walter v. Ross*, 2 Wash. (U. S.) 283; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 445; *Lickbarrow v. Mason*, 2 T. R. 63; 1 Smith's Lead Cas. 388; *Kemp v. Canavan*, 15 Ir. C. L. 216; *Walley v. Montgomery*, 3 East 585; *Boyd v. Mosely*, 2 Swan 661; *Cuming v. Brown*, 9 East 506; *Haille v. Smith*, 1 B. & P. 570; *Leask v. Scott*, 2 Q. B. Div. 376; *Evans v. Marlett*, 1 Ld. Raym. 271; *Newsom v. Thornton*, 6 East 22; *Clementson v. Grand Trunk R. Co.*, 42 U. S. C. Q. B. 273. And see *Blossom v. Champion*, 28 Barb. (N. Y.) 217; 37 Barb. (N. Y.) 554.

This is upon the principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to do or occasion the injury must suffer the loss. *Dows v. Greene*, 32 Barb. (N. Y.) 490; *affirmed* in 24 N. Y. 638.

There must be a purchaser for value, without fraud, to defeat the right, for it will not be lost by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. *Rosenthal v. Dessau*, 11 Hun (N. Y.) 49; and where the sub-purchaser accepts the transfer of the bill of lading, knowing his transferor to be insolvent, it is strong evidence tending to show that he did not purchase in good faith, and is admissible for that purpose in a contest with the original vendor. *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17; *Rosenthal v. Dessau*, 11 Hun (N. Y.) 49.

**Purchaser "Without Notice."**—By purchaser "without notice" is not meant one without notice that the goods have not been paid for, because a man may be perfectly honest in dealing for goods which he knows have not been paid for, but it is meant one without notice of such circumstances as render the bill of lading not fairly and honestly assignable. *Cuming v. Brown*, 9 East 506; *Salomons v. Nissen*, 2 T. R. 681; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188.

**Assignment of Bill of Lading.**—But the mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, but not delivered to him, does not put an end to the transit or destroy the right of the original seller to stop the goods. *Ex parte Golding Davis & Co.*, 13 Ch. Div. 628. Here the goods had been loaded on the vessel and a bill of lading taken in the name of the sub-purchaser as consignor, but before it had been mailed to him or the vessel had left her dock the original buyer stopped payment, and upon the original seller giving notice he was allowed to stop the goods. And see *Spalding v. Ruding*, 6 Beav. 376; *Ex parte Falk*, 14 Ch. Div. 446.

Under the Code of Georgia nothing defeats the right of stoppage but actual possession of the goods by the buyer, or a *bona fide* assignment of the bill of lading; and where the freight and wharfage bills had been paid and receipted, and delivered, together with an order on the carrier for the goods, to a *bona fide* purchaser for value to whom the bill of lading was exhibited but not assigned, it was held that the right of stoppage was not defeated, although the goods were upon the wharf and had been partially delivered in pursuance of the order, and the portion remaining undelivered was allowed to be stopped. *Ocean S. S. Co. v. Ehrlich* (Ga. 1892), 14 S. E. Rep. 707. And see *Bergeman v. Indianapolis, etc., R. Co.*, 104 Mo. 77.

**Transfer of Unindorsed Bill of Lading.**—In *Sheppard v. Newhall* (Cir. Ct. App. 1893), 54 Fed. Rep. 306, an ocean bill of lading was drawn to "E. H. or assigns." The drawee was a railroad

agent at New York, who attended to the transshipment of goods, and he shipped them to San Francisco, and transmitted the bill of lading to the buyer without indorsement, who indorsed the bills and delivered them as security for advances. Before the arrival of the goods the buyer became insolvent, and the shipper gave notice of stoppage *in transitu*, and it was held, *reversing* Sheppard *v.* Newhall (U. S. Cir. Ct.), 47 Fed. Rep. 468. and *distinguishing* St. Paul Roller Mill Co. *v.* Great Western Despatch Co., 27 Fed. Rep. 434. that the shipper's right to retake possession of the goods was unaffected by the buyer's indorsement and transfer of the bill of lading, as, "E. H.," having failed to indorse them, no title to the goods passed. In St. Paul Roller Mill Co. *v.* Great Western Despatch Co., 27 Fed. Rep. 434. it was held that a bill of lading, running to the order of the shipper, being delivered unindorsed to the buyer by the shipper's agent, with intent to pass the title, transfers the title to the property as absolutely as a bill of sale, and Ross, Dist. J., in delivering the opinion of the court in Sheppard *v.* Newhall, 54 Fed. Rep. 306, said: "There are many cases which hold that the delivery of a negotiable or quasi negotiable instrument, like a bill of lading drawn to order, will vest title without indorsement, as against the person who made delivery without such indorsement; for he is justly held estopped from setting up his own mistake, omission or fraud to defeat the effect of his own action. The case of St. Paul Roller Mill Co. *v.* Great Western Despatch Co., 27 Fed. Rep. 434, referred to in the opinion of the court below, was a case of that character. There the bill of lading was drawn to the order of the shipper, which drew its draft at 15 days' sight, against the flour mentioned in the bill of lading, upon one W., of Boston, and forwarded the draft, with the bill of lading attached, unindorsed, to the Tremont National Bank of Boston, for acceptance and collection. Upon W.'s acceptance of the draft, the bank delivered to him the bill of lading, without indorsement, and he afterwards indorsed and transferred it to the National Bank of Redemption for an antecedent debt due from him to that bank. Afterwards, and before the flour arrived in Boston, the shipper, being informed of the insolvency of W., notified the carrier not

to deliver the flour to him or his assigns; but upon its arrival it was delivered to W.'s assignee, and the shipper thereupon sued the carrier for its conversion. It was urged for the plaintiff that the bill of lading, running to the order of the shipper, and delivered to W., without indorsement, carried on its face notice that he held it subject to equities between prior parties; but the court said that it was of no importance that it was delivered unindorsed; that it was the intention of the shipper that its agent (the Tremont Bank) should deliver the bill of lading on acceptance of the draft. It would have been manifestly unjust to have permitted the shipper to take advantage of his own failure to indorse the bill of lading which he delivered, with the intention of carrying the right to the property covered by it. But that is by no means the present case. Here the bill of lading was not drawn to the order of the shipper, the plaintiff in error, but, in effect, to the order of E. H., by whom it was delivered without indorsement, and the omission of which the plaintiff seeks to avail itself, in protection of his lien for the unpaid purchase price of the goods, is not his own omission, but that of H."

**Transfer of Duplicate Bill of Lading.—**

It has been held that the transfer of a duplicate bill of lading for value does not necessarily carry with it the title to the goods. Thus, D. sold goods to T. and sent him a duplicate bill of lading, the original being attached to a sixty-days' draft drawn on him and sent through a bank for acceptance. On receipt of the duplicate T. indorsed it to C., to whom he sold the goods and received payment, and when the original bill of lading and draft were presented, refused to accept the draft, which was returned to D. T. failed, and D. ordered the goods stopped, and it was held that C. had notice before he paid for the goods, which should have put him upon inquiry as to what disposition had been made of the original bill of lading, and therefore did not acquire a legal title that would defeat the right of the consignor to stop them. *Castanola v. Missouri Pac. R. Co.*, 24 Fed. Rep. 267; 21 Am. & Eng. R. Cas. 75. But this case was disapproved in *Mo. Pac. R. Co. v. Heidenheimer*, 82 Tex. 195. in which case the seller had retained the bill of lading marked "original" and forwarded the "duplicate" to the buyer,



is merely as a pledge or security for advances, the seller's right is only destroyed to the extent of the amount advanced.<sup>1</sup> The

who transferred it for value, and the right of stoppage was held to be lost, the "duplicate" bill of lading being considered as, in effect, an original.

**1. Indorsement of Bill of Lading by Way of Pledge to Secure Advancements.**

—The right of stoppage is not discharged absolutely by an indorsement of the bill of lading by way of security or pledge, but it remains, in equity at all events, as it was before, subject to a charge in favor of the indorsee, which must be paid off, and which being paid off the person entitled to and exercising the right stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement. *Kemp v. Falk*, L. R., 7 App. Cas. 576; *In re Westzinthus*, 5 B. & Ad. 817; 27 E. C. L. 201; *Spalding v. Ruding*, 6 Beav. 370; 12 L. J. N. S. Ch. 503; *Burdick v. Sewell*, 10 App. Cas. 74; 13 Q. B. Div. 159; 10 Q. B. Div. 363; *Coven-try v. Gladstone*, L. R., 6 Eq. 44; *Ex parte Golding Davis*, L. R., 13 Ch. Div. 628; *Chandler v. Fulton*, 10 Tex. 2; 6 Am. Dec. 188; *Mo. Pac. R. Co. v. Heidenheimer*, 82 Tex. 195. This right of the unpaid seller covers the whole surplus in the pledgee's hands, and cannot be defeated beyond the advance by reason of there being other unpaid debts due the pledgee; *Spalding v. Ruding*, 6 Beav. 376; and in such cases the seller has also the further equitable right against the pledgee of insisting upon the marshaling of assets. Thus, in the case of *In re Westzinthus*, 5 B. & Ad. 817; 27 E. C. L. 201, the pledgee had previously advanced money on other goods (the property of the buyer) deposited with him, the value of which was sufficient to satisfy all his claims, including the last advance for the security of which the bill of lading had been assigned, and it was held that the seller had a clear equity to oblige the pledgee to have recourse against the buyer's own goods deposited with him to pay his debt in ease of the surety, and was entitled to have the proceeds of his goods turned over to him. And see *Spalding v. Ruding*, 6 Beav. 376; *Kemp v. Falk*, 7 App. Cas. 575.

If the bill of lading is transferred back on the repayment of the advances, the rights of the original con-

signor or seller return to him, and he is remitted to all his remedies under the original contract. *Short v. Simpson*, L. R., 1 C. P. 248; 35 L. J. C. P. 147.

**Consideration—Antecedent Indebtedness.**—There is some difference of opinion as to whether a prior indebtedness is such a consideration for the transfer of a bill of lading as will protect the pledgee against the claim of the consignor, but the *United States* courts, and the courts of *England, Canada* and some of the states, hold such a consideration valuable; *St. Paul Roller Mill Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434; *Leask v. Scott*, 2 Q. B. Div. 376; *Clementson v. Grand Trunk Ry. Co.*, 42 U. C. Q. B. 273; *Davis v. Russell*, 52 Cal. 611; *Peters v. Elliott*, 78 Ill. 321; while other states hold that without a new consideration it does not constitute the assignee a purchaser for value, and would permit the seller to stop the goods. *Loeb v. Peters*, 63 Ala. 243; *Barnard v. Campbell*, 58 N. Y. 73.

And see *Lesassier v. The Southwestern*, 2 Woods (U. S.) 35, where *Bradley. C. J.*, says: "The transfer of a bill of lading as a mere collateral to previous obligations without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage *in transitu*." In *Lee v. Kimball*, 45 Me. 172, it was held that where the consignee sells the goods before their arrival and assigns the bill of lading to the buyer, the right of the consign- or to stop the goods *in transitu* is thereby divested, notwithstanding the consideration of the sale was the payment of an antecedent debt, but the court seemed to be of the opinion that had the bill of lading been assigned as a collateral security for an antecedent debt, the consignor's right of stoppage would not have been divested.

The reason given by the states which follow the rule as laid down in *Alabama* appears to be that since nothing is surrendered by the transferee upon the receipt of the bill of lading merely as collateral security for an antecedent indebtedness, he is not deprived of any right or advantage enjoyed at the time of the transfer. He subjects himself

seller, however, may secure himself against the transfer of the bill of lading by retaining the title to the goods in himself until they are paid for.<sup>1</sup>

**2. When Right Is Not Lost.**—An assignment by the buyer for the benefit of his creditors does not defeat the right of stoppage *in transitu*,<sup>2</sup> nor can a creditor of the buyer defeat the right by attaching the goods before delivery;<sup>3</sup> nor does the seller lose his right by mere delay to exercise it, provided the possession be re-

to no additional inconvenience, and takes upon himself no additional burdens, and, therefore, there is no reason why the goods of the consignor should be taken to pay the debts of another. The fallacy of this reasoning is exposed in the opinion of Judge Redfield in *Atkinson v. Brooks*, 26 Vermont 569, in the course of which he says: "He certainly does forego the pursuit of his own debt, and thus certainly puts himself, for the time, in a different, and in law, a worse situation. And this must be regarded as *prima facie* a foregoing of some advantage by the indorsee, and also an accommodation to the indorser, who may fairly be presumed to prefer this mode of meeting his debt. The transaction, therefore, possesses both the cardinal ingredients which constitute the textbook definition of a valuable consideration—it is a detriment to the promisee, and an advantage to the promisor—and it is no satisfactory answer to the case to say the party who takes such bill or note, which proves unproductive, is in the same condition he was before. This is by no means certain. He has, for the time, foregone the collection of his debt, and in such matters time is the essence of the transaction. And the debtor thereby gains time—it may be more or less—but of necessity, some time is thereby gained; and in such matters this is always accounted an advantage, and is often of the most vital consequence to the debtor."

1. *Pattison v. Culton*, 33 Ind. 240; 5 Am. Rep. 199; *Seymour v. Newton*, 105 Mass. 272.

2. An assignee for the benefit of creditors stands in the same position as his assignor, and, therefore, is not entitled to protection as a *bona fide* purchaser. *Harris v. Hart*, 6 Duer (N. Y.) 606; *Buckley v. Furniss*, 17 Wend. (N. Y.) 504; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Tufts*

*v. Sylvester*, 79 Me. 213; *Bell v. Moss*, 5 Whart. (Pa.) 205; *Arnold v. Delano*, 4 Cush. (Mass.) 33.

But see *Millard v. Webster*, 54 Conn. 415. Here the buyer, finding that he was insolvent, ordered a carrier to return the goods, which were then in his warehouse awaiting delivery, to the seller; but while they were being loaded into a car for that purpose, they were taken possession of by the sheriff under insolvency proceedings, as the property of the buyer. The seller wrote to the carrier, ordering the goods returned, but the letter was never received. It was held that there was no effectual exercise of the right of stoppage, and that the notice to the carrier, to be effectual, must have been given before the sheriff took possession after the assignment.

3. *Naylor v. Dennie*, 8 Pick. (Mass.) 198; 19 Am. Dec. 319; *Seymour v. Newton*, 105 Mass. 272; *Durgy Cement, etc., Co. v. O'Brien*, 123 Mass. 12; *Cabeen v. Campbell*, 30 Pa. St. 258; *Eastern Lumber Co. v. Gill*, 9 Pa. Co. Ct. Rep. 630; *Hays v. Mouille*, 14 Pa. St. 48; *Newhall v. Vargas*, 15 Me. 314; 33 Am. Dec. 617; *Sherman v. Rugee*, 55 Wis. 346; *Estey v. Truxel*, 25 Mo. App. 238; *Kitchen v. Spear*, 30 Vt. 545; *Clark v. Lynch*, 4 Daly (N. Y.) 83; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; 17 Wend. (N. Y.) 504; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Symms v. Schotten*, 35 Kan. 310; *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84; *Schuster v. Carson*, 28 Neb. 612; *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394; *Calahan v. Babcock*, 21 Ohio St. 281; *Benedict v. Schaeffle*, 12 Ohio St. 515; *Aguirre v. Parmelee*, 22 Conn. 473; *Woodruff v. Noyes*, 15 Conn. 335; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Hause v. Judson*, 4 Dana (Ky.) 13; 29 Am. Dec. 377; *O'Neil v. Garrett*, 6 Iowa 480; *Cox v. Burns*, 1 Iowa 64; *Greve v. Dunham*, 60 Iowa 108; *Mason v. Wilson*, 43 Ark. 172; *Mississippi Mills v.*

sumed before the transit is at an end.<sup>1</sup> Though the right may

Bank, 9 Lea (Tenn.) 314; Blackman v. Pierce, 23 Cal. 509; Atkins v. Colby, 20 N. H. 154; Inslee v. Lane, 57 N. H. 454; Morris v. Shryock, 50 Miss. 590; Dickman v. Williams, 50 Miss. 500; More v. Lott, 13 Nev. 376; Chandler v. Fulton, 10 Tex. 2; 60 Am. Dec. 188; O'Brien v. Norris, 16 Md. 122; 77 Am. Dec. 284; Blum v. Marks, 21 La. Ann. 268; 99 Am. Dec. 725; Smith v. Goss, 1 Camp. 282; McLean v. Breithaupt, 12 Ont. App. 383.

And as delivery cannot be made without the assent of the consignee, it follows that where he absconds or refuses to receive the goods, his creditor cannot constitute himself his agent to accept the same, pay the freight charges, and then levy an attachment on them. Greve v. Dunham, 60 Iowa 108. And see Heinz v. Railroad Transfer Co., 82 Mo. 233. But compare Baltimore, etc., R. Co. v. Davis (Pa.), 32 Am. & Eng. R. Cas. 563. If the attaching creditor has paid the freight, the seller must repay the same before he will be entitled to retake the goods. Rucker v. Donovan, 13 Kan. 251; 19 Am. Rep. 84; Greve v. Dunham, 60 Iowa 108. See also Langstaff v. Stix, 64 Miss. 171; 28 Am. & Eng. R. Cas. 85.

It is immaterial to the enforcement of the right of stoppage that the goods sought to be stopped shall be found, and the seller may exercise the right though the goods have been attached by a creditor of the buyer and taken possession of by a third person, who claimed to have purchased them, on his giving a bond to produce them if the issue is decided against him. Dreyfus v. Mayer, 69 Miss. 282.

A sale of goods attached by order of court will not defeat the right. The effect of such sale is merely to convert the goods into money, which remains in the hands of the sheriff pending the determination of the attachment, and subject to any claims that might have been asserted against the goods themselves. O'Brien v. Norris, 16 Md. 122; 77 Am. Dec. 284.

It is immaterial that the attachment was levied by the carrier for arrearages of freight due by the consignee. Farrell v. Richmond, etc., R. Co., 102 N. Car. 390; 37 Am. & Eng. R. Cas. 704.

It was held in Sproule v. McNulty, 7 Mo. 62, that where A consigned goods to B to be sold and the proceeds

applied to the payment of a debt due from A to B, an attachment *in transitu*, as the property of A, was good against B.

**Duty of Carrier in Case of Attachment.**—It is not the duty of a common carrier to remove goods committed to him, in order to prevent their being subjected to an attachment levy. If property in the hands of a common carrier is seized under legal process, and the owner has timely knowledge thereof, the carrier has a right to presume that such owner will take the proper steps in the premises without formal notice from him. In such a case the negligence and *laches* of the owner, if it does not occasion the loss, so far contributes towards it that he must bear the burden of it, and he cannot be heard to attribute the fault to another. MacVeagh v. Atchison, etc., R. Co., 3 N. Mex. 205; 18 Am. & Eng. R. Cas. 651; Baltimore, etc., R. Co. v. Davis (Pa.), 12 Atl. Rep. 335; 32 Am. & Eng. R. Cas. 563. Nor is it the carrier's duty, upon receiving notice to stop the goods, to give such notice to the attaching officer and request him not to deliver to the buyer, and he is not, therefore, liable to the seller for neglect to give such notice. French v. Star Union Transportation Co., 134 Mass. 288.

**Attachment by Seller.**—If the seller levies an attachment on the goods while they are in transit he waives his right of stoppage. Woodruff v. Noyes, 15 Conn. 335. But where the attachment was made under an erroneous impression that the right of stoppage was gone, it seems there would be no waiver of the right, especially if the attachment is withdrawn as soon as the error is discovered and the right of stoppage is exercised before the goods arrive at their destination. Fox v. Willis, 60 Tex. 373.

**Parties to a Suit Against Attaching Creditor.**—A buyer has no interest in a suit brought by the seller against an attaching creditor for the recovery of the property under the seller's right of stoppage *in transitu*, and is not, therefore, a necessary party. Harris v. Tenney (Tex. 1892), 20 S. W. Rep. 82.

1. Buckley v. Furniss, 15 Wend. (N. Y.) 137. Bronson, J., in delivering the opinion of the court in this case, said: "It was urged, on the argument, that

be lost by waiver, such is not the result where the attorney of the seller, under the impression that the transit was ended, began suit for the price of the goods, but on finding that delivery had not been made, promptly asserted the right and did not press the suit.<sup>1</sup>

**VI. EFFECT—1. On Rights of Parties.**—The stoppage of goods *in transitu* does not rescind the sale, but only places the parties in the same position, as nearly as may be, in which they would have been had the seller not parted with the possession.<sup>2</sup>

nearly forty days had elapsed between the sale and the stoppage of the goods. But I am not aware that it has ever been held that the mere lapse of time was a circumstance of any importance in determining the right of the vendor to resume possession of the goods, provided the right be exercised before the *transitus* is at an end. As between the vendor and vendee, no reason is perceived why this consideration should be permitted to affect the question. Mere delay on the part of the seller would neither deprive him of his right nor confer a superior equity upon the purchaser."

1. *Calahan v. Babcock*, 21 Ohio St. 294. Though the right of stoppage *in transitu* on the part of the consignee is adverse to that of the consignee, and cannot be exercised under a title derived from him (*Lane v. Jackson*, 5 Mass. 162), yet the consignor's right of stoppage is not defeated by his obtaining from the consignee a writing, in which the consignee declares that he revokes the order for the consignment and declines to receive the goods, and requests the master of the ship, or any other person having the goods in his custody, to deliver them to the consignor. *Naylor v. Dennie*, 8 Pick. (Mass.) 198; 19 Am. Dec. 319.

2. *Rowley v. Bigelow*, 12 Pick. (Mass.) 313; 23 Am. Dec. 607; *Stanton v. Eager*, 16 Pick. (Mass.) 475; *Rogers v. Thomas*, 20 Conn. 58; *Rucker v. Donovan*, 13 Kan. 251; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188; *Penn. R. Co. v. American Oil Works*, 126 Pa. St. 485; *Newhall v. Vargas*, 15 Me. 314; 33 Am. Dec. 617; *Cross v. O'Donnell*, 44 N. Y. 665; *Babcock v. Bunnell*, 80 N. Y. 251; *Jordan v. James*, 5 Ohio 98; *Phelps v. Comber*, 29 Ch. Div. 821, per Cotton, L. J.; *Hodgson v. Loy*, 7 T. R. 445; *Lickbarrow v. Mason*, 6 East 27; *Clay v. Harrison*, 10 B. & C. 99; 21 E. C. L. 31; *Dixon v. Yates*, 5 B. & Ad. 339; 27 E. C. L.

86; *James v. Griffin*, 2 M. & W. 632; *Edwards v. Brewer*, 2 M. & W. 379; *Bloxam v. Sanders*, 4 B. & C. 948; 10 E. C. L. 477; *Sweet v. Pym*, 1 East 4; *Stephens v. Wilkinson*, 2 B. & Ad. 323; 22 E. C. L. 86; *Ex parte Gwynne*, 12 Ves. 379; *Wait v. Scott*, 6 Grant (Ont.) 154; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Martindale v. Smith*, 1 Q. B. 389.

The seller takes possession of the goods, not as his own, but as the purchaser's, on which he has a lien for his unpaid purchase money; and hence the buyer cannot recover a partial payment made on the goods, and if he refuses to pay the balance, the seller may, after reasonable notice, sell them, and after applying the proceeds to the payment of his bill, recover any balance remaining still unpaid; *Newhall v. Vargas*, 15 Me. 314; 33 Am. Dec. 617; *Jordon v. James*, 5 Ohio 99; *Kymer v. Suwercroft*, 1 Camp. 109; *Lickbarrow v. Mason*, 6 East 27; *Langford v. Tyler*, 6 Mod. 162; or, if they bring more than the purchase price, the balance belongs to the buyer. *People v. Haynes*, 14 Wend. (N. Y.) 565; 28 Am. Dec. 530.

In *Patten's Appeal*, 45 Pa. St. 151, the purchaser of a quantity of sugar, having made an assignment, the sellers stopped it *in transitu* to secure payment of certain notes given for the purchase price, and when the notes fell due and were not paid, sold the sugar and applied the proceeds to their payment. The vendors of the sugar claimed that, in the settlement of the estate, a dividend should be allowed them on the full amount of the notes, amounting to \$23,239.65 less \$20,845.53, net, received from the sale of the sugar; but on the other hand, it was argued that the retention of the sugar and stoppage *in transitu* was a rescission of the contract, and that having sold some of the notes the sellers were not entitled to a dividend until the full amount received from the sale

**2. On Rights of Carrier.**—The lien of the carrier for his transportation charges is paramount to the seller's right of stoppage *in transitu*, and he may insist upon retaining possession until his charges are paid;<sup>1</sup> and where a carrier stops goods and holds them in obedience to orders from the consignor, the contract of carriage terminates and his liability henceforth is that of a warehouseman.<sup>2</sup>

of the sugar was brought into a common fund with the rest of the assigned estate, and that, under all the circumstances, they were only entitled to a dividend on the balance due and not on the full amount of the notes; and it was held that the contract of sale was not rescinded, and that the vendors were entitled to *pro rata* distribution out of the assigned estate and to a dividend upon the whole amount of their claim at the date of the assignment.

**Vendor Not Entitled to Insurance Money.**—As the property in the goods continues in the buyer, it follows that the seller has no claim to money paid under an insurance policy for damage incurred by them during the transit. In *Berndtson v. Strang*, L. R., 3 Ch. 591, Cairns, L. C., in considering this point, said: "It appears to me that this is a claim wholly untenable, and, I might say, altogether unexampled in my experience. The right to stop *in transitu* is a right to stop the goods in whatever state they arrive. If they arrive injured and damaged in bulk or quality the right to stop *in transitu* is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim some moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property."

1. *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84; *Potts v. New York, etc., R. Co.*, 131 Mass. 455; 3 Am. & Eng. R. Cas. 424; 41 Am. Rep. 247; *Benj. on Sales*, § 836.

But this only applies to the carriage of the specific articles in question, and not to any lien for a general balance which the carrier may claim. *Potts v. New York, etc., R. Co.*, 131 Mass. 457; 3 Am. & Eng. R. Cas. 424; 41 Am. Rep. 247; *Penn. R. Co. v. American Oil Works*, 126 Pa. St. 485; *Oppenheim v. Russell*, 3 B. & P. 42; *Jackson v. Nichol*, 5 Bing. N. Cas. 518; 35 E. C. L. 202.

The carrier may stipulate in the bill of lading that he "shall have a lien upon the goods shipped for all arrear-

ages of freight and charges due by the said owners or consignees on other goods," but it will not affect the seller's right of stoppage, such a stipulation being subordinate thereto. *Farrell v. Richmond & Danville R. Co.*, 102 N. Car. 390; 37 Am. & Eng. R. Cas. 704.

Where the seller of goods replevied them from a constable who had taken them under an order of attachment, as the property of the buyer while on their transit, it was held not necessary that the charge or lien of the carriers for freight be paid before the writ of replevin was issued, but that it was sufficient if it was paid before the goods were taken from their possession. *Hays v. Mouille*, 14 Pa. St. 48.

An officer holding process against the buyer may lawfully advance the charges to the carrier on taking possession of the goods, and having so advanced them, is substituted to all his rights of possession as security therefor. *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84.

In *The Mercantile, etc., Bank v. Gladstone*, L. R., 3 Exch. 233, it was held that the seller's right of stoppage was paramount to the carrier's lien for freight under the following circumstances: The goods were ordered by F. & Co. of Liverpool from the defendants in Calcutta, and were shipped on board F. & Co.'s own vessel, the master signing the bills of lading, "freight for the said goods free on the owner's account." The bill of lading was such as the master had authority from the owners to sign, but before it was signed in Calcutta the owners in Liverpool had transferred the vessel with "all the profits and all the losses, as the case might be," though the transfer was unknown to the consignors or to the captain when the bills of lading were signed. It was held that the consignor's right of stoppage, "free of freight," could not be affected by the sale in *England* which was unknown to him.

2. And he does not become party to a new contract of carriage by the subsequent order of the owner to ship the

**STOPPING PLACE.**—See STATIONS; USUAL.**STORE.**—(See also SHOP, vol. 22, p. 778; WAREHOUSEMAN).—

1. v. To keep goods and merchandise for safe custody, to be delivered in the same condition substantially as when received. The term only applies when the safe keeping is the principal object of the deposit.<sup>1</sup>

2. n. A store is any place where goods are sold either by wholesale or retail.<sup>2</sup> It is used in this country as nearly synonymous with "shop."<sup>3</sup>

goods to another person and place, and if he fails to forward them in pursuance of such order the right of action against him is as a warehouseman for failing to forward, and not as a common carrier. *MacVeagh v. Atchison, etc., R. Co.*, 3 N. Mex. 205; 18 Am. & Eng. R. Cas. 651.

1. *New York Equitable Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 628; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 127; *Hynds v. Schenectady Co. Mut. Ins. Co.*, 16 Barb. (N. Y.) 119. See also WAREHOUSEMAN.

2. Webster's Dict. followed in *Martin v. Portland*, 81 Me. 293; *Com. v. Whalen*, 131 Mass. 419.

3. *Barth v. State*, 18 Conn. 439. And in that case the court, by Storrs, J., said: "By a reference to the lexicographers of this country and *England*, it appears that the word shop is used in the same sense in both; but that the word store as applied to a building is used in a more extensive sense in this country than in that. There it is never applied to a place where goods are sold, but only to one where they are merely deposited, but here it is used to denote both." See also *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 425; *Com. v. Annis*, 15 Gray (Mass.) 197; *Com. v. Riggs*, 14 Gray (Mass.) 376; 77 Am. Dec. 333. But compare *Sparrenberger v. State*, 53 Ala. 481; 25 Am. Rep. 643.

"In the United States, shops for the sale of goods of any kind, by wholesale or retail, are often called stores; that is, we use the word store for storehouse; the word which properly means the quantity of a thing accumulated or deposited, as a designation of the place of deposit. 'Shop' is defined by Richardson to be a 'place for the purpose of containing merchandise for sale, protected from the weather.' Webster defines it as 'a building in which goods, wares, drugs, etc., are sold by retail;' also as 'a building in

which mechanics work.' In conversation we speak of a store as a place where goods are exposed for sale, thus giving it the same meaning as shop. Still, we recognize a difference between the meanings of these two words. Thus, we do not call the place where any mechanic art is carried on a store, but we give it the name of shop, as a tailor's shop, a blacksmith shop, a shoemaker's shop. We usually understand by the word store, a place where goods are exhibited for sale, but we do not always mean a store when we use the word shop." *State v. Canney*, 19 N. H. 137. See also *Boston Loan Co. v. Boston*, 137 Mass. 336.

**A Store is not Necessarily a Building.**—In *Com. v. M'Monagle*, 1 Mass. 517 (see also *Folkes v. State*, 63 Miss. 83), it was held that an indictment for breaking a "store" cannot be supported under a statute making it a felony to break up any dwelling-house, shop, mill, etc., or other "building" whatsoever, with criminal intent, unless it be averred in the indictment that the store is a building. But in that case Sewell, J., doubted whether it was necessary to aver it "because the word has in this state a settled, known meaning and is not used otherwise than as and for the name of a building." And it has been held several times that a "shop" must necessarily be a structure of some sort. See SHOP, vol. 22, p. 778.

**An Ice house**, in which a dealer in ice had stored his stock, was held not to be a "store" within a *Massachusetts* tax statute. The court, by Colburn, J., said: "We are of opinion that the natural import and common use in this country of the word 'store,' when applied to a building, is to designate a place where traffic is carried on in goods, wares, or merchandise, and not to designate a storehouse." *Hittinger v. Westford*, 135 Mass. 259.

**Desk-room is not a "Store."**—A

**STORE ORDER ACTS.**—The term Store Order Acts (or Truck Acts, as this legislation is called in *Great Britain*), is applied to statutes having for their object the prevention of the payment of workmen by orders redeemable by the master in goods or truck. These statutes provide for the payment of wages in lawful money only.<sup>1</sup>

In the states of the Union where these statutes have been enacted they are of comparatively recent date. They have been enacted in *West Virginia, Illinois, Missouri, Pennsylvania,* and

*Maine* statute provided that all personal property employed in trade should be taxed in the town in which it was so employed, provided the owner had his store or shop in such town. It was held that a stockbroker who merely had desk-room in a city did not occupy a store or shop within the statute. *Martin v. Portland*, 81 Me. 293.

**Bakery a Store.**—An insurance policy stated that the building insured was used as a store and residence; it was held that a bakery was a "store." *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 425.

A Saloon and Restaurant was held a "store" in *Com. v. Whalen*, 131 Mass. 419; and see *BURGLARY*, vol. 2, p. 677, where that case is set out at some length.

**Storehouse** — (See *HOUSE*, vol. 9, p. 780).—A room occupied as a news depot in which papers, pamphlets, and the like are kept for sale, and communicating by a door-way with another room used as an outer hall or entrance to the building, is a storehouse within the meaning of the *Ohio* Burglary Act. *Bauer v. State*, 25 Ohio St. 70. See also *BURGLARY*, vol. 2, p. 677.

The terms "storehouse" and "warehouse," as used in *Kentucky* Gen. Sts., ch. 29, art. 6, § 4, mean any house not an office or a shop, or any room in a steam or other boat, in which goods, wares and merchandise, are usually deposited for safe keeping or for sale. *Ray v. Com.*, 12 Bush (Ky.) 397.

**Ship Stores.**—See *PROVISIONS*, vol. 19, p. 299; *SHIPS AND SHIPPING*, vol. 22, p. 710. And see *U. S. v. Twenty-Four Coils of Cordage*, 1 Baldw. (U. S.) 502, for a restricted use of the term in an old United States Revenue law.

**Store Fixtures.**—What included under the term in a policy of insurance. See *INSURANCE*, vol. 11, p. 290.

1. **English Statutes and Decisions.**—In *England*, statutes have been passed

at various times aiming at the abolition of the "Truck System" of giving orders payable in goods or truck in lieu of cash wages. In 1837 the "Truck act" of 1 & 2 Wm. IV, ch. 37, was enacted. This act consolidated previous acts on the subject, and prohibited manufacturers of iron and certain other things, and miners of coal, salt, etc., from paying the wages of their laborers in anything other than the lawful money of the realm. The application of that act was extended by 50 & 51 Vict., ch. 46. The purpose of this legislation was to prevent fraud and to prohibit employers from compelling their employés to accept goods of inferior quality at a high price. *Sweet's L. Dict.*; *Black's L. Dict.* See also *McCullogh, Commercial Dict., Truck System*.

There are a few English cases involving the construction of these acts. It was held in *Riley v. Warden*, 2 Exch. 59, that the statute 1 and 2 Wm. IV, ch. 37, applied only to persons contracting as laborers—that is, to those contracting to use their personal services and to receive payment for such services in wages.

*Sharman v. Sanders*, 13 C. B. 166; *Chawner v. Cummings*, 8 Q. B. 311; *Bowers v. Lovekin*, 3 El. & Bl. 584; *Ingram v. Barnes*, 7 El. & Bl. 115; *Sleeman v. Barrett*, 2 H. & C. 934; *Morehouse v. Lee*, 4 F. & F. 455; *Pillar v. Llybni Coal & Iron Co.*, 4 L. R., C. P. 752, involve questions of who are artificers within the act.

It was held in *Floyd v. Weaver*, 16 Jur. 289; 21 L. J. Q. B. 151, that the act applied only to agreements for personal services, and not to agreements for the performance of a certain quantity of work which the contractor could not perform except by making use of the labor of others.

It was held in *Archer v. James*, 2 B. & S. 61, that deductions or stoppages made from the wages of an artificer in

*Indiana*, and perhaps in other states. In certain instances they have been declared unconstitutional, but it would seem that the statutes thus adjudged unconstitutional were declared to be soon the ground that they applied to miners and manufacturers, and, therefore, attempted to discriminate between classes of employers, instead of being general in their application to all employers. It would seem that legislation general in its nature, and not objectionable as class legislation, was within the legitimate exercise of the police power, as defined in the various cases where its limits have undergone judicial discussion.<sup>1</sup>

the hosiery trade in respect of frame rent, machine rent, standing of frames or machines, winding the material, fines for illegal attendance, gas for lighting the factory, and fire in waiting-room amounting to a little over three shillings a week, fixed charges, were not illegal.

It was held in *Wilson v. Cookson*, 13 C. B. N. S. 496, that to constitute an offense within the statute it was not necessary that the payment of wages in goods instead of money should be the result of any contract or understanding between the employer and the workman—that the mere payment was enough; and that the offense was not purged by a subsequent payment in money, whether made voluntarily or compulsorily under an order of justices.

In *Smith v. Walton*, 3 C. P. D. 109, it appeared that an artificer in a trade within the Truck act had damaged a piece of cloth through negligent workmanship, and that his employer had delivered the damaged cloth to him instead of such wages earned as were equivalent to the value which, according to the assessment of the employer, the cloth would have had if undamaged. It was held that the employer had paid wages otherwise than in current coin, and was, therefore, liable to the penalty fixed by the act.

In *Pillar v. Llynbi Coal & Iron Co.*, 4 L. R. C. P. 752, it appeared that an employer had stopped part of the wages of an artificer as a contribution to funds established by the employer to provide medicine and medical attendance for the artificers employed, and schools for their children, but without any written agreement with the artificer. It was held that the latter was entitled to recover the deduction specified by the act. See also *Cutts v. Ward*, 2 Q. B. 357.

1. *West Virginia* act 1891, ch. 76, is as follows in its application to the sub-

ject under discussion, and affords an example of this legislation: "It shall be unlawful for any corporation, company, firm, or person engaged in any trade or business, either directly or indirectly, to issue, sell, give, or deliver, to any person employed by such corporation, company, firm, or person, in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check, or other evidence of indebtedness, payable or redeemable otherwise than in lawful money; and, if any such scrip, token, draft, check, or other evidence of indebtedness, be so issued, sold, given, or delivered to such laborer, it shall be construed, taken and held in all courts and places to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm or person issuing, selling, giving or delivering the same to the person named therein, or to the holder thereof." The foregoing provision was declared to be constitutional in *Peel Splint Coal Co. v. State* (W. Va. 1892), 15 S. E. Rep. 1000. From the opinion in this case two of the judges dissented, however.

An earlier *West Virginia* act was adjudged unconstitutional in *State v. Goodwill*, 33 W. Va. 179, on the ground that it applied in terms to mine-owners and manufacturers, and thus constituted class legislation.

*Illinois*.—Sections 1 and 2 of *Illinois* act, May 28, 1891, declared it unlawful for any person, company, corporation, or association engaged in mining or manufacturing, to be engaged or interested in keeping a truck store, or controlling any store or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to employes. This legislation was declared unconstitutional in *Fraser v. People* (Ill. 1892), 31 N. E. Rep. 395.

*Missouri*.—In *State v. Loomis*, 22 S. W. Rep. 350; 48 Alb. L. J. 46, a case



**STORM.**—See note 1.

decided in the spring of 1893, the *Missouri* statute was held unconstitutional as class legislation. This case was before a division of the court in 1892, and the decision was the other way. *State v. Loomis* (Mo.), 20 S. W. Rep. 332. The *Missouri* statute attacked in this case applied in its terms to corporations, persons or firms, engaged in "manufacturing or mining," being in this respect similar to the *Illinois* statute referred to above.

*Pennsylvania.*—In *Godcharles v. Wigeman*, 113 Pa. St. 431; 6 Atl. Rep. 354, the Supreme Court of *Pennsylvania* adjudged §§ 1, 2, 3 and 4 of the act of June 29, 1881, providing that the wages of laborers in and about iron mills, etc., should be paid at regular intervals and in lawful money of the *United States*, to be unconstitutional. Mr. Justice Gordon, in delivering the opinion of the court, said: "The first, second, third and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employé; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the *United States*."

The *West Virginia* court, in *Peel Splint Coal Co. v. State* (W. Va. 1892), 15 S. E. Rep. 1000, in commenting upon *Godcharles v. Wigeman*, 113 Pa. St. 431, said: "The decision rested upon a peculiar provision of their constitution, as follows: 'The general assembly shall not pass any local or special law . . . regulating labor, trade, mining or manufacturing, . . . granting to any corporation, association or individual any special or exclusive privilege or immunity.' Section 7, art. 3, Const. Pa. In our state we have no such constitutional provision; if we had, the defendant and other mining companies could not have been clothed with the 'special and exclusive privilege' of watering stock, holding 10,000 acres of land, and laying out towns and cities. After the above decision was rendered, the legislature of *Pennsylvania* effected

its remedial legislation by prohibiting altogether mining or manufacturing companies from carrying on 'company stores,' or 'general supply stores,' where any goods or merchandise are sold, other than those mined or manufactured by themselves. Laws Pa. 1891, p. 256."

In *Indiana*, an act of the legislature requiring the owners of mines to pay for mining coal every two weeks in lawful money of the *United States*, and forbidding the execution of contracts waiving the right to payment in money, was held to be constitutional. In *Hancock v. Yaden*, 121 Ind. 366; 16 Am. St. Rep. 396, Judge Elliott, delivering the opinion of the court, said: "It cannot be denied, without repudiating all authority, that the legislature does possess some power over the right to contract, and if it does, then nothing can be clearer than that this power extends far enough to uphold a statute providing that payment of wages shall be made in money where there is no agreement to the contrary made after the services have been rendered. . . . The provision of the statute to which our decision is directed operates upon all members of the classes it enumerates. It neither confers special privileges nor makes unjust discrimination. All who are members of the classes named are entitled to its benefits or subjected to its burdens. It is open to every citizen to become a member of any of the classes designated, and the privileges conferred belong on equal terms to all."

In *Maryland*, in *Shaffer v. Union Min. Co.*, 55 Md. 74, the court, without otherwise discussing questions of constitutionality, said: "It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employés otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money."

1. A policy of insurance insured against loss by "fire or storm;" a freshet, occasioned by the melting of the snow and prevailing south winds and rain, carried away the property.

**STORY.**—See note 1.

**STOWAGE.**—See SHIPS AND SHIPPING, vol. 22, p. 710.

**STRADDLE.**—See GAMBLING CONTRACTS, vol. 8, p. 1004.

**STRANDING.**—(See also MARINE INSURANCE, vol. 14, p. 376).  
—A stranding is when a ship takes ground, not in the ordinary course of navigation, but by accident or the force of the wind or sea, and remains stationary for some time. The vessel must ground from an accident happening out of the ordinary and usual course of navigation.<sup>2</sup>

The loss was held not to be covered by the policy. *Stover v. Insurance Co.*, 3 Phila. (Pa.) 38.

1. In a statement, filed in order to obtain a mechanic's lien, the building intended to be covered by the lien was described as being of three stories. The court, by Knowlton, J., said: "The description of the house was not inaccurate nor misleading. If the lower part of it was properly called a basement, it was, according to the definitions of lexicographers and the common understanding of the word, a story of the building." *Cleverly v. Moseley*, 148 Mass. 284.

2. *Wells v. Hopwood*, 3 B. & Ad. 20; 23 E. C. L. 18; 3 Kent's Com. 323; *Lake v. Columbus Ins. Co.*, 13 Ohio 66; 42 Am. Dec. 188.

It may be said, in general terms, that in order to constitute a stranding the ship must be in the course of prosecuting her voyage when the loss occurs; there must be a settling down on the obstructing object, and the vessel must take the ground by reason of extraordinary casualty, and not from one of the ordinary incidents of a voyage. *Arn. Ins.*, §§ 297, 318; *Bouv. L. Dict.*

"Stranding is understood to be the striking of a vessel upon a rock, bank, reef, or the like." *Strong v. Sun Mut. Ins. Co.*, 31 N. Y. 106; 88 Am. Dec. 242.

To constitute a stranding the vessel must be stationary for some time. Thus, if the ship merely touches or strikes and gets off again, howsoever much she may be injured, she is not stranded. *McDougle v. Royal Exch. Assurance Co.*, 1 Stark. 130; 4 M. & S. 503; *Harmon v. Vaux*, 3 Camp. 429; *Lake v. Columbus Ins. Co.*, 13 Ohio 48; 42 Am. Dec. 188.

In the following cases the vessel was held to have stranded: A resting for

fifteen or twenty minutes has been held to be a stranding, whether it be upon a bank or rock. *Baker v. Towry*, 1 Stark. 436. Where a ship was improperly fastened to a pier in a basin so that she took ground and when the tide left her she fell over and was bilged, this was held to be a stranding. *Carruthers v. Sydebotham*, 4 M. & S. 77. See also *Bishop v. Pentland*, 7 B. & C. 219; 14 E. C. L. 33. Where the water was drawn off from an inland navigable water for purposes of repair, and a vessel settled accidentally upon some spiles which were not known to be there, it was held that the vessel had stranded. *Rayner v. Godmond*, 5 B. & A. 225. A ship under stress of weather made a tidal harbor, but it being low water she grounded there. *Held*, a stranding. *Corcoran v. Gurney*, 1 E. & B. 456; 72 E. C. L. 455. See also *De Mattos v. Saunders*, L. R., 7 C. P. 570; *Letchford v. Oldham*, 5 Q. B. Div. 538; *Wells v. Hopwood*, 3 B. & Ad. 20; 23 E. C. L. 18.

**Not a Stranding.**—Where a vessel takes ground in the ordinary and usual course of navigation and management in a tidal river or harbor upon the ebbing of the tide, or from a natural deficiency of water, so that she may float again upon the flow of the tide or increase of the water, this is not a stranding. *Magnus v. Buttemer*, 11 C. B. 876; 73 E. C. L. 875; *Hearn v. Edmunds*, 1 B. & B. 388. Compare *Corcoran v. Gurney*, 1 E. & B. 456; 72 E. C. L. 455. A vessel took the ground in a tidal harbor where it was intended she should do so at the time she was moored, and was injured by striking against some hard substance. This was considered not to be a stranding. *Kingsford v. Marshall*, 8 Bing. 458; 21 E. C. L. 344. See also *Potter v. Suffolk Ins. Co.*, 2 Sumn.

**STRANGER**—(*Compare* PRIVACY, vol. 19, p. 156).—One who is not a party or privy to an act or contract.<sup>1</sup>

**STRATEGY**.—See note 2.

**STRAW BAIL**—(See also BAIL, vol. 2, p. 1; SPECIAL BAIL, vol. 22, p. 892).—Common bail. One or more fictitious sureties formally entered in the proper office of the court, in contradistinction from special bail who are real and substantial bondsmen.<sup>3</sup>

Worthless bail, as being given by an irresponsible person.<sup>4</sup>

**STRAY**—(See also ESTRAY, vol. 7, p. 34; IMPOUNDING, vol. 10, p. 186).—"Stray," in its common-law sense, denotes a wandering beast whose owner is unknown.<sup>5</sup>

**STREAM**—(See also SURFACE WATERS; WATERS AND WATER-COURSES).—A stream is a river, brook, or rivulet.<sup>6</sup>

(U. S.) 197. Where the loss was occasioned by the vessel striking upon a rock and bilging without remaining stationary, held, not a stranding. *Lake v. Columbus Ins. Co.*, 13 Ohio 48; 42 Am. Dec. 18.

**Voluntary Stranding**.—See GENERAL AVERAGE, vol. 8, p. 1300.

1. Burrill's L. Dict.

"In its general legal signification, 'stranger' is opposed to the word 'privy.'" *O'Donnell v. McIntyre*, 118 N. Y. 156.

A stranger to a cause is one who has no direct interest in the subject-matter of the suit, and who has no right to make defense, control proceedings, examine and cross-examine witnesses, or appeal from the judgment. *Robbins v. Chicago*, 4 Wall. (U. S.) 657. See also PARTIES TO ACTION, vol. 17, p. 470.

2. A jury found that the vendor used "strategy" in bringing about a contract for the sale of land. It was held that, in connection with other findings, the term "strategy" must be interpreted to mean that "the contract was brought about by acts and perhaps representations not in themselves unlawful, but such as are common to persons entering into contract relations, each endeavoring to make the best terms for himself in the transaction, and not as if it was intended to convey a meaning incompatible with fair dealing and approximating to that conveyed in the word 'stratagem,' which implies artifice, trickery, deception, and, perhaps, even positive fraud." *Fortune v. Watkins*, 94 N. Car. 304.

3. Anderson's L. Dict.; Bouv. L. Dict.

4. Webster's Dict.; Century Dict.

5. *Robert v. Barnes*, 27 Wis. 422. See also *Walters v. Glatz*, 29 Iowa 437.

A stray beast is one which has left an inclosure and wandered at large without its owner and beyond his control. *Sturges v. Raymond*, 27 Conn. 474.

Hogs left in a stock yard by some person unknown, are not strays. *Mill Creek Tp. v. Brighton Stock Yards Co.*, 27 Ohio St. 433.

6. *French v. Carhart*, 1 N. Y. 107.

Stream implies a continuous current in one direction. *Murdock v. Stickney*, 8 Cush. (Mass.) 117.

A watercourse is a stream of water usually flowing in a particular direction with well defined channels and banks, although the channel may sometimes be dry. *Simmons v. Winters* (Oregon, 1891), 27 Pac. Rep. 7.

"Stream" Distinguished from "Pond" or "Lake."—A small natural body of water bounded by mountains and low swamps, fed by two sluggish streams and shaped like a bowl or spoon and having no thread or current, is a "pond" or "lake" and not a "stream" or "river." *Gouverneur v. National Ice Co.*, 57 Hun (N. Y.) 474. See also LAKES AND PONDS, vol. 12, p. 611.

For streams as boundaries, see BOUNDARIES, vol. 2, p. 504.

**Natural Stream**.—See NATURAL, vol. 16, p. 220.

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**I. DEFINITION.**—The designation “street railway” is applied to a railway passenger carrier whose road lies along and upon the streets of a city, town, or village. But this definition cannot be applied invariably, since it is not uncommon for street railways to be operated upon suburban roads. The motive power may be supplied by either horses, locomotives, electricity, or cable.<sup>1</sup> A

1. The definition given in Elliott on Roads and Streets, p. 557, is: “A street railway is a railway laid down upon roads and streets for the purpose of carrying passengers.” It is there further said: “The term ‘street railway’ is neither as definite nor as extensive as is desirable, but seems to be the best and most appropriate at command. It will not do to designate a street railway as a ‘horse railway,’ as is often done, for the power by which the cars are drawn along the tracks is frequently mechanical; nor will it do to designate a street railway as a ‘tramway,’ for . . . a ‘tramway’ possesses essential features that street railways do not. (See Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. Rep. 324.) The term ‘street’ is too restrictive, for street railways may be operated upon suburban roads. But with all its shortcomings and imperfections the term ‘street railways’ seems best to express the meaning we desire to convey.” The designation “street railways” is to be confined to passenger carriers exclusively. *Carli v. Stillwater St. R., etc., Co.*,

28 Minn. 373; 3 Am. & Eng. R. Cas. 226; 41 Am. Rep. 290.

**Classed with Owners of Omnibuses and Similar Vehicles.**—In *Allerton v. Chicago*, 9 Biss. (U. S.) 552, it appeared that a municipal corporation had by its charter authority to license hackmen, omnibus drivers, “and others pursuing like occupations.” It was held that under this the municipality had the right to impose a tax upon the owners of street cars. So in the case of *Frankford, etc., R. Co. v. Philadelphia*, 58 Pa. St. 124; 98 Am. Dec. 242, where the city was authorized to license omnibuses and “vehicles in the nature thereof,” it was held that the authority included the licensing of street railways. *Johnson v. Philadelphia*, 60 Pa. St. 445. *Compare Mayor, etc., of N. Y. v. Second Ave. R. Co.*, 32 N. Y. 261; *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295 (street railway not a “public highway”).

**Not a Carriage.**—The word “carriage” used in a bill of lading, has been considered not to include a street railway car. *Cream City R. Co. v. Chicago*,

street railway differs widely in its essential characteristics from an ordinary railroad, but in the construction of statutes the question has sometimes arisen as to whether the term "railroad" includes street railways. Whether it does so or not is to be determined in each case from the intent and purpose of the statute.<sup>1</sup>

etc., R. Co., 63 Wis. 93; 21 Am. & Eng. R. Cas. 70; 53 Am. Rep. 267. See *CARRIAGE*, vol. 2, p. 735, where the case is set out at length.

So also a statute fixing bridge tolls for every "carriage, wagon, or other wheeled vehicle," has been held not to apply to street cars. *Monongahela Bridge Co. v. Pittsburgh*, etc., R. Co., 114 Pa. St. 478; 28 Am. & Eng. R. Cas. 30. Nor does a statute fixing the liability of drivers of "stage coaches . . ." and every other carriage or vehicle used for the transportation of passengers or goods" apply to street cars. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418.

**Street "Car."**—A franchise was granted on condition of the payment of an "annual license fee for each car now allowed by law." At that time license fees were required by an old ordinance for each "accommodation coach" or "stage coach." It was held that the word "car" in the resolution, and the word "coach" in the ordinance, both referred to a conveyance for public use, and that the city was entitled to the same license fee from each. *Mayor, etc. of N. Y. v. Third Ave. R. Co.*, 117 N. Y. 404; 40 Am. & Eng. R. Cas. 278.

**1. Distinguished from Railroads.**—The distinction between street railways and the ordinary railroads in the matter of using streets in which to lay their tracks is adverted to in various parts of this article. See generally *RAILROADS*, vol. 19, p. 778.

The *Alabama* Code contains a provision that all trains shall stop within 100 feet of where two "railroads" cross each other. Under this it is held that it was clearly the intention of the legislature to include within the term "railroad" a dummy line operated between Birmingham and Ensley City. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 200. The same view is held in *Tennessee*. *Katzenberger v. Lawo*, 90 Tenn. 235.

A statute in *Pennsylvania* authorizing the consolidation of "railroads," was held to include street railways. *Hestonville, etc., R. Co. v. Philadelphia*, 89 Pa. St. 210; and an act mak-

ing the real estate of "any railroad company" subject to certain taxes, was held to include a street railway. *Citizen's Pass. R. Co. v. Pittsburgh*, 104 Pa. St. 522; 17 Am. & Eng. R. Cas. 438. But in other cases, art. 17, § 4 of the *Pennsylvania* Const., providing that "no railroad, canal or other corporation . . . shall consolidate . . . with, or lease, or purchase the works or franchise of, or in any way control any other railroad, canal, or corporation owning a parallel or competing line," was held not to apply to street railway companies. *Gyger v. Philadelphia, etc., R. Co.*, 136 Pa. St. 96; *Shipley v. Continental R. Co.*, 13 Phila. (Pa.) 128. See also *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1. But the *New York* act of 1875, ch. 108, authorizing the consolidation of railroads, has been held to include street railways, and this notwithstanding a previous act which expressly excluded street railways from the operation of the consolidation statute. *In re Washington St., etc., R. Co.*, 115 N. Y. 442; 40 Am. & Eng. R. Cas. 588.

The words "any railroad corporation" in the *Iowa* Right-of-way act, are considered to apply as well to railways operated by animal power as to those operated by steam. *Clinton v. Clinton, etc., Horse R. Co.*, 37 Iowa 61.

So also the *New York* act of 1850, relating to the liability of railroad companies for injuries to passengers while on the platform, etc., does not apply to street railroad companies. *Lax v. Forty-second St., etc., R. Co.*, 46 N. Y. Super. Ct. 448. *Contra* as to a similar statute in *Kentucky*. *Johnson v. Louisville City R. Co.*, 10 Bush (Ky.) 231.

In *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; 43 Am. & Eng. R. Cas. 215, it is laid down that the difference between street railways and railroads for general traffic consists in their use and not in their motive power; and that a railroad, the rails of which are laid so as to conform to the grade of the street, and which is otherwise so constructed that the public is not excluded from the use of any part of the street as a public highway, which

**II. LEGAL STATUS.**—Like an ordinary railroad, a street railway is of a *quasi* public nature, and its use is a public use.<sup>1</sup> Like all

runs at a moderate rate of speed, which carries no freight but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at every street crossing to receive and discharge passengers, is a street railway, no matter whether the cars are propelled by animal or mechanical power.

It was held in *Re New York District R. Co.*, 107 N. Y. 42; 32 Am. & Eng. R. Cas. 202, that the *New York General Railroad act* of 1850 does not apply to street railways; also that a railroad confined within the limits of the city and proposed to be built under the surface of the streets thereof is a street railway within the meaning of the provision of the state constitution that no law shall authorize the construction of a street railroad except upon the condition of the consent of the owners of one-half in value of the abutting property. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1; *People v. Newton*, 112 N. Y. 396; 38 Am. & Eng. R. Cas. 391.

In *Central Nat. Bank v. Worcester Horse R. Co.*, 13 Allen (Mass.) 105, there was a statute providing that any corporations created by the state "except railroad and banking corporations" might institute proceedings in insolvency. It was held that the exception embraced street railway corporations. The court, by Gray, J., after reviewing the chief characteristics of railroad corporations, said: "A 'horse railroad company,' or, as it is more frequently and more appropriately called in recent statutes, a 'street railway corporation,' has all these attributes, and is none the less a 'railroad corporation,' less public in its character, or more fit to have its franchise and property transferred to assignees under proceedings in insolvency, because it more generally uses horses instead of steam power to draw its cars, and lays its rails over land already devoted to the public use for a street or highway, and is therefore made by statute peculiarly subject in the location and use of its tracks to the regulations of municipal authorities."

*New York Laws* 1869, ch. 917, authorizing the consolidation "of certain

railroad companies" expressly excluded street railroads. Laws of 1875, ch. 108, provided for the consolidation "of railroad companies organized under the general laws of this state." Laws of 1883, ch. 387 amended Laws of 1875, so as to omit the word general in referring to the laws of the state. It was held that the acts of 1875 and 1883 authorized the consolidation of street railroad companies. *In re Washington St., etc.*, R. Co., 52 Hun (N. Y.) 311, affirmed 115 N. Y. 442; 40 Am. & Eng. R. Cas. 588.

In *Thompson-Houston Electric Co. v. Simon*, 20 Oregon 60; 47 Am. & Eng. R. Cas. 51, it was held that the provision of the statute concerning the condemnation of land for a right of way for railroads did not apply to street railways. The court quoted from the opinion of Robertson, J., in *Louisville, etc., R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 178, where it is said: "A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight; a street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only and within the limits of the city. In its technical sense, therefore, a street railway is not a railroad."

**Under Mechanics' Lien Laws.**—In *Front St. Cable R. Co. v. Johnson* (Wash.), 47 Am. & Eng. R. Cas. 287, it is held that a statute giving a laborer's lien upon a "railroad," or "any other structure," does not apply to street railways. The court, by Stiles, J., quotes from the opinion of the court in *Louisville, etc., R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175: "A 'railroad' and a 'street railroad' or 'way,' are in both their technical and popular import as distinct and different things as a road and a street, or as a 'bridge' and a 'railroad bridge.' . . . A street railway is not, either in the popular or legislative sense, a railroad." The *Kentucky* case is cited with approval in 2 *Rorer on Railroads*, p. 1422; *Elliot on Roads and Streets*, p. 558. A contrary view, however, was taken in *St. Louis Bolt, etc., Co. v. Donahoe*, 3 Mo. App. 559. See *Fleming v. St. Paul City R. Co.*, 47 Minn. 124; 47 Am. & Eng. R. Cas. 290.

1. Therefore the right of eminent do-

other private property, however, it is subject to the state's right of eminent domain, and may be condemned for the use of another railway, or for any other public purpose.<sup>1</sup>

The franchise to own and operate a street railway may belong to an individual as well as to a corporation,<sup>2</sup> though as a matter of fact nearly all street railways are owned by corporations.

Street railways are always common carriers of passengers, but they are not carriers of goods except under special circumstances.<sup>3</sup>

**III. THE CORPORATION—ITS CREATION, ORGANIZATION, ETC.**—Street railway corporations are, as a general rule, organized under the same general laws, and by the same methods of procedure as ordinary railroad corporations.<sup>4</sup> In many states constitutional provisions exist which forbid the creation or formation of any corporation except under general laws.<sup>5</sup>

main may be exercised in order to secure for it a right of way. *Union Depot R. Co. v. Southern R. Co.*, 105 Mo. 562; *St. Louis R. Co. v. Southern R. Co.*, 105 Mo. 577; 46 Am. & Eng. R. Cas. 1; *Texas, etc., R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80; 22 Am. & Eng. R. Cas. 160; 53 Am. Rep. 739; *In re Petition of Kerr*, 52 Barb. (N. Y.) 119. EMINENT DOMAIN, vol. 6, p. 555; RAILROADS, vol. 19, p. 780. Compare *Thompson-Houston Electric Co. v. Simon*, 20 Oregon 60; 47 Am. & Eng. R. Cas. 51. See also *State v. Atlantic City*, 34 N. J. L. 99.

Where a railroad track is laid down in a street, by authority of the city council, to connect a private manufacturing establishment with other railroad tracks, it becomes a public highway, and the city council has a right to devote a portion of the street to that use; the remedy of a person sustaining injuries thereby is at law, and chancery cannot control the manner in which the right shall be exercised. *Parlin v. Mills*, 11 Ill. App. 396.

1. *Metropolitan City R. Co. v. Chicago, etc., R. Co.*, 87 Ill. 317. In such a case it is not the franchise which is condemned, but the company's qualified right of property in the street. See also *infra*, this title, *Use of Tracks of Another Company*.

2. *Henderson v. Ogden City R. Co. (Utah)*, 46 Am. & Eng. R. Cas. 95; *New York, etc., R. Co. v. Forty-second St. R. Co.*, 50 Barb. (N. Y.) 309. See also *Budd v. Multnomah St. R. Co.*, 15 Oregon 404; 40 Am. & Eng. R. Cas. 551; 3 Am. St. Rep. 169. RAILROADS, vol. 19, p. 783.

3. *Thompson-Houston Electric Co.*

*v. Simon*, 20 Oregon 60; 47 Am. & Eng. R. Cas. 51.

In an action to recover damages of a street-railway company for the loss of merchandise delivered to one of its conductors for transportation on the platform of a car, for which money was paid by the owner to the conductor, the testimony of two other persons that they had paid money at other times to the defendant's conductors for the like transportation of merchandise with the knowledge of the superintendent of the road, is competent evidence to show, and, in the absence of anything to control or contradict it, sufficient evidence to warrant a jury in finding, that the defendants have assumed the business of common carriers of merchandise on their cars. *Levi v. Lynn, etc., R. Co.*, 11 Allen (Mass.) 300; 87 Am. Dec. 713.

4. See RAILROADS, vol. 19, p. 785; CORPORATIONS, vol. 4, p. 185.

The *New York* Rapid-transit act (Laws *New York*, 1875, ch. 606) gives to the commissioners, therein directed to be appointed by the mayor, exclusive authority to make the articles of incorporation, and deliver the certificate of incorporation to the directors. And *New York* Laws of 1870, ch. 135, authorizing the directors of any corporation organized under the general act to file an amended certificate of incorporation cannot apply to such companies. *In re New York Cable R. Co.*, 109 N. Y. 32, *aff'd* 45 Hun (N. Y.) 53; *New York* Laws, 1891, chap. 4, provides for the sale of rapid-transit franchises at public auction. See *infra*, this title, *Elevated Railroads*.

5. *Grand Cent. R. Co. v. Gulf, etc., R. Co.*, 63 Tex. 529; 26 Am. & Eng. R.



The right to exist as a corporation is one which may be granted only by the legislature; power to grant such a right is an attribute of sovereignty which may not be delegated.<sup>1</sup> Any irregularities in the formation of the corporation may be and are cured by subsequent legislative recognition.<sup>2</sup>

**IV. THE CHARTER AS A CONTRACT.**—The charter of a street railway corporation granting the franchise to construct and operate the railroad, and other franchises necessarily incidental, is, like charters of other corporations, a contract, the obligation of which may not be impaired by subsequent legislation;<sup>3</sup> and this rule

Cas. 142; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673. The *California* Const., art. 4, § 31, prohibiting the formation of a corporation, except under general laws, cannot be construed to prohibit an organized corporation from receiving by assignment from its lawful owners, a franchise to construct and operate a street railway. *People v. Stanford*, 77 Cal. 360.

And the grant of additional powers to a corporation already existing, as, for example, authority to construct its road on such streets as the city council should prescribe, does not violate such a constitutional provision. *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; 10 Am. & Eng. R. Cas. 270.

1. *Fanning v. Osborne*, 102 N. Y. 441; 25 Am. & Eng. R. Cas. 252.

Where a corporation, by virtue of a legislative grant, has authority to construct and operate its road in certain streets, an ordinance giving it authority to extend its tracks to other streets is not an attempt to confer corporate powers, and, therefore, does not contravene a constitutional provision against ordinances conferring corporate powers. *Sims v. Street R. Co.*, 37 Ohio St. 556; 4 Am. & Eng. R. Cas. 132. See *infra*, this title, *Authority of Municipality to Grant; Authority of Legislature*.

2. See RAILROADS, vol. 19, p. 789.

Article 3, section 159 of the *Maryland* Code provides that the certificate of incorporation shall specify the termini of the road and the counties or cities through which it shall pass. Where the certificate of a street-railway company specifies that the entire road is to be located in a certain city, and the termini are to be therein, and the legislature afterwards recognizes the company as a valid existing corporation by authorizing its consolidation with another company, the effect of such legislation is to dispense with a more spe-

cific mention of the termini. *Koch v. North Ave. R. Co. (Md.)*, 50 Am. & Eng. R. Cas. 401. See also in this connection, *St. Louis R. Co. v. Northwestern St. Louis R. Co.*, 2 Mo. App. 69; *In re New York Cable R. Co.*, 109 N. Y. 32, *aff'd*, 45 Hun (N. Y.) 153.

3. *Springfield R. Co. v. Springfield*, 58 Mo. 674; *Asheville St. R. Co. v. Asheville (N. Car.)*, 14 S. E. Rep. 316; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Hays v. Com.*, 82 Pa. St. 517; *Wyandot v. Corrigan*, 35 Kan. 21. See also CORPORATIONS, vol. 4, p. 207; FRANCHISES, vol. 8, p. 620.

In *Nash v. Lowry*, 37 Minn. 261, the common council of St. Paul, by an ordinance, granted a street railway franchise, and subsequently the legislature "confirmed and validated" the ordinance. It was held that this ordinance constituted a contract which the council could not thereafter rescind or revoke, and that it was immaterial to the validity of the grant whether the grantees constituted a corporation or only a partnership. See also *West Philadelphia Pass. R. Co. v. Dougherty*, 3 W. N. C. (Pa.) 62.

Where an ordinance of a city, granting a railway company the right to construct and operate a track along a portion of a street, upon certain conditions, has been accepted, so that the ordinance as accepted constitutes a contract, the rights of the contracting parties will be governed by the ordinance, and the city may not impose new and further conditions and burdens upon the company without its consent, such as the construction and operation of an extended line of its road, these not having been required under the original ordinance. *People v. Chicago Western R. Co.*, 118 Ill. 113, *aff'd*, 18 Ill. App. 125. See also *Electric R. Co. v. Grand Rapids*, 84 Mich. 257; 46 Am. & Eng. R. Cas. 26.

may be invoked where a change in the mode of taxation is attempted which would be violative of charter rights.<sup>1</sup> This question arises most frequently in determining the right to require the company to improve or repair the streets occupied by its tracks, and is treated in a subsequent part of this article.<sup>2</sup> The charter may be, however, and usually is, granted with the express condition that it shall be subject to amendment or repeal.<sup>3</sup>

**V. RIGHT TO USE STREETS—1. Generally.**—The right of any com-

Although the existing franchise of a street railway company is not affected by the adoption of a new charter by the city, yet the grant of a franchise for an extension after such adoption will be subject to the restrictions of the new charter. *St. Louis v. Missouri R. Co.*, 13 Mo. App. 524.

A street railroad company incorporated in 1863, with nothing in its charter making the consent of the city a prerequisite to the exercise of its powers in the extension of its road, prior to 1874 had constructed its road in but a few of the streets which its charter authorized it to occupy. In 1887, being about to extend its tracks to unoccupied streets, the city filed a bill for an injunction, on the ground that its consent had not been obtained. It appeared that the constitutional amendment of 1857 provided power in the legislature to alter, revoke, or annul any charter thereafter conferred, and that an article of the new constitution of 1874 provided that no street railway should be constructed within the limits of any city without the consent of the local authorities. It was held that the injunction would not lie; that the amendment of 1857 gave no arbitrary power to repeal charters at will; that even where a moving cause was made to appear, such alteration or revocation must be so made that no injustice should be done to the incorporators; and that the right of the company to lay its tracks in the streets authorized by its charter was not repealed by the constitutional amendment of 1874. *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. St. 1; 36 Am. & Eng. R. Cas. 125.

After a street railway company has availed itself of a city's permission to lay a double track in the streets, the city cannot, by amendment, restrict the company to a single track, no injury being shown to be wrought. *Burlington v. Burlington St. R. Co.*, 49 Iowa 144; 31 Am. Rep. 145.

**Supplement to Charter.**—In Philadelphia, etc., *Pass. R. Co.'s Appeal*, 102 Pa. St. 123; 20 Am. Eng. R. Cas. 1, it is held that a supplement to a charter of a street railway which merely confers upon it a new right, or enlarges an old one, without imposing a new or additional burden upon it, is a mere license or promise by the state and may be revoked at pleasure; it is without consideration to support it and is not binding on a subsequent legislature. In this case, however, the original charter and the supplement were passed at the same session, with only a few days intervening, and the organization of the company took place after the passage of the supplement. There being other questions controlling the decision of the case, the court declined to pass upon the legal effect of the said supplement.

1. *Douglas v. Orange, etc., Horse Car Co.*, 34 N. J. L. 485. See also *Detroit v. Detroit City R. Co.*, 76 Mich. 421; 39 Am. & Eng. R. Cas. 538.

But in *New York v. Twenty-third St. R. Co.*, 113 N. Y. 311; 41 Am. & Eng. R. Cas. 640, *affirming* s. c. 48 Hun (N. Y.) 552, it was held that a statute which requires a street railroad company to pay to the city annually, a percentage of its gross earnings in lieu of a fee for each car used by it as required by its charter, is to be deemed an amendment of the charter in that respect, and is valid under constitutional and statutory provisions reserving the right to alter, suspend, or repeal the charter.

It was held in *New York v. Second Ave. R. Co.*, 32 N. Y. 261, that an ordinance of a city imposing an annual license fee of \$50 for each car of a street car company is void.

2. See *infra*, this title, *Repair of Streets*.

3. *Greenwood v. Union Freight R. Co.*, 105 U. S. 13; 9 Am. & Eng. R. Cas. 526; *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 358; 20 Am. &

pany to use the streets of a city for its track is possessed by virtue of its franchise granted by the legislature, or of a license from the city; this right is, therefore, subject to the limitations of the grant of the franchise or license, and to the inherent right of the city to control and regulate its streets so far as may be necessary to preserve to the public their free use.<sup>1</sup> The city may, therefore, when necessary in making improvements, obstruct or remove the track temporarily, although a serious interruption in the use of the railway may follow. The company, like all others using the highway, must submit to temporary inconveniences for the sake of permanent public advantage.<sup>2</sup>

Where two or more companies each have the right to lay tracks in a street, which can only be occupied by one, the company which first, in good faith, prosecutes the construction of its road there acquires a right of occupancy superior to that of others coming later.<sup>3</sup>

A bridge spanning a stream and connecting streets on either side, constitutes a part of the street, and if a company has authority to operate its road over the bridge, this right is not affected by the destruction of the bridge and the erection of a new one in its stead.<sup>4</sup>

Eng. R. Cas. 542; *New York v. Twenty-third St. R. Co.*, 113 N. Y. 311; 41 Am. & Eng. R. Cas. 640. See also *CORPORATIONS*, vol. 4, p. 207; *FRANCHISES*, vol. 8, p. 620.

Under *Massachusetts Stats.* of 1864, ch. 229, § 15, the selectmen of a town may revoke the location in the town of the track of a street railway company which is chartered to extend beyond the limits of the town. *Medford, etc., R. Co., v. Somerville, etc., R. Co.*, 111 Mass. 232.

1. *Middlesex R. Co. v. Wakefield*, 103 Mass. 262. See *infra*, this title, *Conditions Annexed to Grants*.

2. *Middlesex R. Co. v. Wakefield*, 103 Mass. 262. Compare *West Philadelphia Pass. R. Co. v. Philadelphia*, 10 Phila. (Pa.) 70, holding that the construction of another street railway is not such a "public work" as will justify the tearing up of a railway already laid.

And wherever authority to extend the time is sought on the ground that such an extension is a necessary incident to the original grant, the burden rests on the company to show that the extension is such a necessary incident. *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63.

3. *Conflicting Rights of Occupancy*.—*Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; 43 Am.

& Eng. R. Cas. 234, *quoting* and *approving* *Elliott on Roads and Streets*, p. 570; *Hamilton St. R., etc., Co. v. Hamilton, etc., Co.*, 5 Ohio C. Ct. 319; 50 Am. & Eng. R. Cas. 420, note. But a company authorized to build a cable road only, acquires no right by commencing the construction of a horse or electric road, and if another company in good faith afterward begins the construction of a road authorized by its charter, such latter company is entitled to an injunction against the first one. *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; 43 Am. & Eng. R. Cas. 234.

In *Brooklyn City R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364, it was held that as the construction of the road in the street can give no exclusive right, one company cannot prevent another one from first laying its track in the street in question. If the acts of either amount to a public nuisance or obstruction of the way, it is for the public, and not for the other company, to complain.

4. *Bridge Part of the Street*.—In *Floyd v. Rome St. R. Co.*, 77 Ga. 614, a bridge was constructed by F county within the city limits and placed under the city's control, it agreeing to keep it in repair but not to rebuild. Under its charter and with the consent of both

**2. Authority of Municipality to Grant—*a*. IN GENERAL.**—It is a fundamental principle in this connection that the powers of a municipal corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private persons, or other corporations.<sup>1</sup> This principle has been successfully invoked to have an ordinance declared void which granted to a company the right to construct and operate a street railway for an unlimited period of time, and without reserving any power of revocation.<sup>2</sup> Such an ordinance would be a contract, and would be void as a delegation of powers which are a public trust and, in the absence of express authority, inalienable. It would differ from a mere license which is in its nature revocable and subject to the regulation and control of the municipal government.<sup>3</sup>

city and county the railway company laid its tracks on the bridge. The bridge having been destroyed a new one was placed in its stead by the county. The county then sought to restrain the company from laying its tracks on the new bridge without making compensation. It was held that the injunction would not lie; the statute having made the bridge a part of the street the company's license to lay its track thereon could not be revoked except by legislative act; moreover such use of the bridge did not constitute an additional burden. See in this general connection, *Pittsburgh, etc., R. Co. v. Point Bridge Co.*, 22 Pittsb. L. J. N. S. (Pa.) 367.

1. This is the language of 2 Dillon Mun. Corp. (4th ed.), § 716 (567). See it quoted and approved in *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73 Iowa 513; 32 Am. & Eng. R. Cas. 209. See also *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38; *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127.

2. *Davis v. Mayor, etc.*, of N. Y., 14 N. Y. 506; 67 Am. Dec. 186; *rev'g* 3 Duer (N. Y.) 119; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314, *affirming* 28 Barb. (N. Y.) 228; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201, *affirming* 38 Barb. (N. Y.) 371; *People v. O'Brien*, 111 N. Y. 1; 36 Am. & Eng. R. Cas. 78; *Eichels v. Evansville St. R. Co.*, 78 Ind. 263; 5 Am. & Eng. R. Cas. 274; 41 Am. Rep. 562; 2 Dillon Mun. Corp. (4th ed.), § 716 (567); *Birmingham, etc., R. Co. v. Birmingham R. Co.*, 78 Ala. 465. See also *Stange v. Hill, etc., R. Co.*, 54 Iowa

669; *Stanley v. Davenport*, 54 Iowa 463; 37 Am. Rep. 216; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673 (city of D. had no such authority under territorial government); *State v. Bell*, 34 Ohio St. 194 (held that municipality could not delegate to a board the right to grant such privileges); *Reg. v. Train*, 2 B. & S. 640; 110 E. C. L. 640; *Reg. v. Charlesworth*, 16 Q. B. 1012; *Reg. v. Longton Gas. Co.*, 2 E. & El. 651; *Chicago v. Rumpff*, 45 Ill. 90; *Logan v. Pyne*, 43 Iowa 524.

3. The distinction is to be made in this connection between the grant of a license and that of a franchise. A franchise is a contract; it must emanate from the sovereign power of the state and can never be granted by a municipality unless the power to do so has clearly and specifically been granted to it. This distinction is adverted to clearly and at length in several leading cases, and a grant like that mentioned in the text was held void as being an attempt on the part of the municipality to grant a franchise. *Milhau v. Sharp*, 27 N. Y. 619; 84 Am. Dec. 314, *aff'g* 28 Barb. (N. Y.) 228, and *following* *Davis v. Mayor, etc.*, of N. Y., 14 N. Y. 623; 67 Am. Dec. 186; *Great Cent. R. Co. v. Gulf, etc., R. Co.*, 63 Tex. 529; 26 Am. & Eng. R. Cas. 114 (consent of city is not a grant but a license); *Chicago City R. Co. v. People*, 73 Ill. 546; *Beekman v. Saratoga, etc., R. Co.*, 3 Paige (N. Y.) 75; 22 Am. Rep. 679; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Fanning v. Osborne*, 102 N. Y. 441; 25 Am. & Eng. R. Cas. 252; *FRANCHISES*, vol. 8, p. 585. In the first of these cases the

Whether or not the right to authorize the use of its streets exists in the municipality in particular cases, is a question of the construction of charters and of legislative provisions; but the powers usually conferred upon municipal corporations are generally sufficient to authorize the implication that such right exists.<sup>1</sup> But even where a municipal corporation has such an authority it must be confined to a reasonable exercise thereof, and such au-

court, by Selden, J., speaking of the resolution of the city council, said: "If that resolution should be sustained, no power would remain in the municipality to remove the railway after its construction, if it should prove to be a nuisance, or to reduce the rate of fare, if it should be found to be unreasonably high, or to compel the introduction of any improved method of conveyance, if at any future time such method should be invented, without the consent of the railway company; and the powers of the municipality over the street in many other respects would be abridged. Those powers were given to the municipality as a trust to be held and exercised for the public benefit, from time to time as occasion might require, and they could neither be delegated to others, nor effectually abridged by any act of the municipal authorities. *People v. Kerr*, 27 N. Y. 188." See *Atchison St. R. Co. v. Nave*, 38 Kan. 744; 36 Am. & Eng. R. Cas. 29.

1. In 2 *Dillon Mun. Corp.* (4th ed.), § 724 (575), it is said: "The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads which connect different towns, whose tracks are constructed in the usual manner, and whose trains are propelled by steam. But it is otherwise as respects horse railways; these are for local travel, and the ordinary powers of municipal corporations are often ample enough, in the absence of express or other legislation on the subject indicating a different intent, to authorize them to permit or refuse to permit the use of streets within their limits for such purposes." Quoted with approval in *State v. Corrigan*, etc., St. R. Co., 85 Mo. 275; 29 Am. & Eng. R. Cas. 596; 55 Am. Rep. 366; *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 668; 14 Am. & Eng. R. Cas. 444. See also *Brown v. Duplessis*, 14 La. Ann. 854; *Faust v. Pass. R. Co.*, 3 Phila. (Pa.) 164; *Milhau v. Sharp*, 15 Barb.

(N. Y.) 193; *Milhau v. Sharp*, 17 Barb. (N. Y.) 435; *New York*, etc., R. Co. v. *New York*, 1 Hilt. (N. Y.) 562; *State v. Mayor*, etc., of *Hoboken*, 30 N. J. L. 225; *Texas*, etc., R. Co. v. *Rosedale St. R. Co.*, 64 Tex. 80; 22 Am. & Eng. R. Cas. 160; 53 Am. Rep. 739; *Mayor*, etc., of *Houston v. Houston City St. R. Co.* (Tex.), 50 Am. & Eng. R. Cas. 280 (legislature had given city council exclusive control and regulation of all streets and of everything concerning street railways). A different view is taken in *Eichels v. Evansville St. R. Co.*, 78 Ind. 263; 50 Am. & Eng. R. Cas. 274; 41 Am. Rep. 562. The court by *Elliott, C. J.*, said: "There is no provision in the original charter, nor in any of the various acts amending it, conferring power to grant to either steam or horse railway companies the right to use the streets of the city. The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant to a railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality. Such a power is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation, which confers only the usual powers ordinarily bestowed upon such corporations."

In *Stange v. Hill*, etc., R. Co., 54 Iowa 669, an ordinance granting to a street railway company the right to construct and operate a street railway, using either horse or steam power, was held void, as being beyond the power of the municipality; it had no authority to authorize the use of the street by a steam railway without compensation to the owners of abutting property. *Stanley v. Davenport*, 54 Iowa 463; 37 Am. Rep. 216. Afterwards the legislature attempted to validate the ordinance by granting power to pass it; but it was held that the constitutional provision against special legislation forbade the passage of such a statute. *Stange v. Dubuque*, 62 Iowa 303; 14 Am. & Eng. R. Cas. 107.

thority cannot be extended to authorize a grant to an individual of a right to construct a private railroad across or along a street for his own particular benefit; <sup>1</sup> nor can it authorize grants to so many companies that the street will be virtually closed to public travel.<sup>2</sup>

If a municipal ordinance, specially authorizing a particular street railway company by name to occupy certain streets, is invalid on constitutional grounds, it is absolutely void, and may not be given a general effect so as to inure to the benefit of another company having a prior charter for the streets named.<sup>3</sup>

Where, however, a municipality merely exceeds its powers in granting the use of its streets to a railway company, the legislature may confirm its action and render valid the privilege granted; <sup>4</sup> but if the curative act is in contravention of the constitution, it will, of course, be of no efficacy.<sup>5</sup>

1. *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11; 10 Am. & Eng. R. Cas. 313; *Macon v. Harris*, 75 Ga. 761. See also *In re Split Rock Cable Road Co.*, 128 N. Y. 408; 51 Am. & Eng. R. Cas. 514; *State v. Trenton*, 36 N. J. L. 79. In this case the court, by Van Syckel, J., said: "Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private individual uses, from which the public derive no convenience, benefit, or accommodation, is not a regulation, but a perversion of them from their lawful purposes, and cannot be regarded as an execution of the trust imposed in the city authorities." *Mikesell v. Durkee*, 34 Kan. 509; 36 Kan. 97 (abutting lotowner may enjoin use of such road); *Memphis City R. Co. v. Memphis*, 4 Coldw. (Tenn.) 406; *Carli v. Stillwater St. R., etc., Co.*, 28 Minn. 373; 3 Am. & Eng. R. Cas. 226; 41 Am. Rep. 290.

The city of St. Louis has authority under its charter to regulate the use of its streets; but it was held that this authority extended only to the public use of such streets, and that the city was not authorized to grant permission to a party to build a street railway for his own private use. *Glaessner v. Anheuser-Busch Brewing Co.* 100 Mo. 508.

In *Fanning v. Osborne*, 102 N. Y. 441, where a portion of the street railroad was given up by the corporation for the private use of a private party, which authority was not given under the charter, it was held that this was an attempt by the railroad company to transfer to an individual rights which could

only be exercised for the benefit of the public and was unauthorized and void. Compare *Billard v. Erhart*, 35 Kan. 611; *Clarke v. Blackmar*, 47 N. Y. 150. And in *Chicago Dock, etc., Co. v. Garity*, 115 Ill. 155, it was held that railway tracks leading to private warehouses might be a public use in such a sense as to justify their being laid on the city streets.

2. *Street R. Co. v. West Side St. R. Co.*, 48 Mich. 433; 7 Am. & Eng. R. Cas. 95.

3. *Larimer, etc., St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533.

4. *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611; 29 Am. & Eng. R. Cas. 326; *People v. Los Angeles Electric R. Co.*, 91 Cal. 338; *Nash v. Lowry*, 37 Minn. 261. In this case, the common council of the City of St. Paul, by ordinance, granted a franchise for the construction of a street railway, which was in excess of its authority. Subsequently the ordinance was confirmed and validated by the legislature, and it was held that thereafter the common council could not rescind or revoke the right so granted.

5. The City of Dubuque, acting under a special charter, enacted an ordinance conferring upon a street railway company authority to construct upon certain streets in the city a railway, and to operate the same with either steam or horse power. The city had no power to pass this ordinance (see *Stange v. Hill, etc., R. Co.*, 54 Iowa 669; *Stanley v. Davenport*, 54 Iowa 463). The legislature of the state thereafter passed an act in the following terms, viz.: "The ordinance of the

It has been held that when parks, squares, or grounds are dedicated to the public for the purposes of beauty, adornment, health, or recreation, neither the legislature nor the municipality can authorize their occupation by street railways;<sup>1</sup> but it seems to be otherwise when the property is vested in the municipality without restriction as to its use.<sup>2</sup>

*b. EXCLUSIVE PRIVILEGES.*—In view of the fact that the policy of the law is always to discourage monopolies, authority to grant exclusive privileges to any street railway company as to the occupation of a street does not exist in a municipal corporation, unless the power has been conferred by the legislature in direct and express terms. It can never exist by mere implication or construction.<sup>3</sup> Indeed, the question has more than once arisen as to

city council of the City of Dubuque . . . granting to the Hill & West Dubuque Street Railway Company the right of way for its railroad on certain streets of said city mentioned in said ordinance, be, and the same is hereby, validated and made as effective in law as if said council had full power and authority to pass the same at the time said ordinance was passed." It was held that as the legislature could not by special act have authorized the city to pass the ordinance in question, it followed that it could not, after the passage of the ordinance, legalize it by special act, as it could not accomplish by indirection what it was inhibited from doing directly. *Stange v. Dubuque*, 62 Iowa 303; 14 Am. & Eng. R. Cas. 107.

And in *Ohio*, where there is a general statutory provision requiring the franchise to be granted to the best bidder, it was held that a validating act could have no effect where its operation would enable the municipal officers to avoid the statute. *Knorr v. Miller*, 5 Ohio C. C. 609.

1. *New Orleans, etc., R. Co. v. New Orleans*, 26 La. Ann. 478; *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540. In this latter case a railway company was by act of the legislature authorized to construct and operate a railway in a city "in, over and across and along any and all the avenues, streets, public grounds, squares, and alleys" of the city. Under this grant the company claimed the right to construct and operate its road across a public square which had been duly dedicated to the city. It appeared that city lots had been sold with reference to such square and around it, which had been improved, the value of which was enhanced on account of the square, and

that the city had beautified and adorned the same. The city filed a bill in chancery to prevent the company from appropriating the square for railroad purposes, and it was held that the railway company should be perpetually enjoined from all attempts to lay down the track of its road through or across the public square. And it was said that where a public square is vested in a municipal corporation, the *cestuis que use* acquire a vested estate in the same, and neither the municipality nor the legislature can divert it to railroad or other private use. The power of the legislature is not unlimited, and cannot be exercised to interfere with trust estates and vested rights. If either the legislature or the municipality should attempt such an exercise of power, a court of equity would interfere and enforce the execution of the trust either upon the application of the owners of lots abutting upon the square, or, upon the application of the city, the trustee. See also *Pratt v. Buffalo City R. Co.*, 19 Hun (N. Y.) 30; *In re New York, etc., R. Co.*, 20 Hun (N. Y.) 201; *PARKS AND PUBLIC SQUARES*, vol. 17, p. 418. Compare *Green v. New York Central, etc., R. Co.*, 65 How. Pr. (N. Y.) 154.

2. 2 Dill. Mun. Corp., §§ 650, 651; *PARKS AND PUBLIC SQUARES*, vol. 17, p. 418; *People v. Park, etc., R. Co.*, 76 Cal. 156, where it was held that a road so constructed and operated as not to obstruct the free and comfortable use in the customary manner of the park by the public was not a nuisance. See also *Mathers v. Kerper*, 3 W. L. Bull. 551.

3. See *MUNICIPAL CORPORATIONS*, vol. 15, pp. 1055-6, and numerous cases cited; *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291; *New Orleans City R. Co. v. Crescent City R. Co.*, 12 Fed.

the authority of the legislature to delegate such a power to a municipality. Such a question, however, can only arise in the construction of a constitutional provision against the creation of monopolies by the legislature.<sup>1</sup> By some authorities the right of the city to grant exclusive privileges is regarded as being dependent upon the length of time through which such privilege is to extend, so that if the length of time is not unreasonable the privilege may be granted.<sup>2</sup>

Rep. 308; Canal, etc., St. R. Co. v. Crescent City R. Co., 41 La. Ann. 561; 40 Am. & Eng. R. Cas. 329; Milhau v. Sharp, 17 Barb. (N. Y.) 435; 28 Barb. (N. Y.) 228, affirmed 27 N. Y. 611; 84 Am. Dec. 314; Davis v. Mayor, etc., of N. Y., 14 N. Y. 506; 67 Am. Dec. 186; Henderson v. Ogden City R. Co. (Utah), 46 Am. & Eng. R. Cas. 95; Memphis City R. Co. v. Memphis, 4 Coldw. (Tenn.) 406; People's Pass. R. Co. v. Memphis (Tenn. 1875), 16 S. W. Rep. 973; 10 Wall. (U. S.) 38; Jackson County Horse R. Co. v. Interstate Rapid Transit Co., 24 Fed. Rep. 306; 32 Am. & Eng. R. Cas. 216, n. In this last case the reason is stated by Brewer, J., that "the city may to-day determine that one street railroad will answer all the wants of the public, and so give the privilege of occupying the streets to a single company. Ten years hence its judgment may be that two railroads are needed. . . . When the legislature deems that the public interests require that cities shall be invested with power to grant exclusive privileges, it will say so in unmistakable terms, as it already has in some instances; till then, the courts must deny the possession of such a power."

In Cooley's Const. Lim. (4th ed.) 207\*, it is said: "A corporation having power under its charter to establish and regulate streets cannot under this authority, without explicit legislative consent, permit individuals to lay down a railway in one of its streets, and confer privileges exclusive in their character and designed to be perpetual in duration." Quoting from and approving Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314. See also Stein v. Bienville Water Supply Co., 34 Fed. Rep. 145.

1. The question was raised in Des Moines St. R. Co. v. Des Moines Broad Gauge St. R. Co., 73 Iowa 513; 32 Am. & Eng. R. Cas. 209, in construing art. 4, § 12, of Iowa constitution; but it was decided in favor of the power of the legislature. Also in Indianapolis

City Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369; 43 Am. & Eng. R. Cas. 234, where a clause of the constitution was invoked which forbade the granting of "privileges or immunities which upon the same terms shall not equally belong to all the citizens." See Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19.

The provision of the *Illinois* Const. (1870, art. 4, § 22) against the grant of any special or exclusive privilege, immunity, or franchise, is a limitation upon the power of the general assembly, and cannot be construed as a limitation upon the power of a municipal corporation to designate certain streets and fix the conditions upon which a railway company, organized under a special charter previously granted, may build and operate its road. Chicago City R. Co. v. People, 73 Ill. 541.

2. In Des Moines St. R. Co. v. Des Moines Broad Gauge St. R. Co., 73 Iowa 513; 32 Am. & Eng. R. Cas. 209, the court, by Adams, J., said: "It may be conceded that the future growth and wants of a city cannot be foreseen. The most that can be said is that they may ordinarily be predicted with reasonable approximation for a limited time. From this we are inclined to think it follows that an ordinance providing for an exclusive right in perpetuity, however necessary it might be to contract for the service involved in the exercise of the right, would be unreasonable and might be declared void." (Quoting and approving 2 Dillon Mun. Corp., § 715.) "In the case at bar the time limited was thirty years, which does not seem to be unreasonable, especially in view of the fact that the lines were operated at a loss for fourteen years. Possibly thirty years, or any shorter time, should be deemed too long in any case, if the contract were such that the street railroad company could not be required to meet the public wants as the same should arise." In this case section 464



A company may acquire an exclusive right by contract with private parties over private property, and such a right will be recognized, even though afterwards a highway be laid out over the land occupied.<sup>1</sup>

**3. Authority of Legislature.**—In the absence of particular constitutional provisions, there is no question as to the authority of the legislature to grant to an individual or to a corporation a franchise to construct and operate a street railway within any city, town, or village in the state.<sup>2</sup> Complete control of all highways rests ultimately in the legislature, and its right in this regard is in no wise impaired by the fact that it had previously delegated to a municipality the right to control and regulate streets within its limits.<sup>3</sup> And, since a street railway is not considered to constitute an additional burden upon the street, a legislative act granting a franchise may be valid, though there is no provision made as to compensation to, or obtaining the consent of, owners of abutting property.<sup>4</sup>

of the *Iowa* code, giving the city "power to authorize or forbid the location and laying down of tracks for railways and street railways," was considered to authorize the city to grant a street railway corporation an exclusive privilege in certain streets for thirty years. See also *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 389; 43 Am. & Eng. R. Cas. 234; *New Orleans, etc., Co. v. Louisiana, etc., Co.*, 115 U. S. 650.

1. *Fort Worth St. R. Co. v. Queen City R. Co.*, 71 Tex. 165. In this case a horse railway company, for a valuable consideration, obtained a right to build its road over the line of a railroad company to the depot of such railroad, to the exclusion of other horse railroads. The contract having been recorded, it was held that it was not against public policy, and that equity would recognize it and grant an injunction against the interference of another company with the right secured by the contract.

2. The constitutionality of the Rapid-transit act of *New York*, which authorized the construction of elevated roads in cities, has been sustained. *In re New York El. R. Co.*, 70 N. Y. 327.

The rule of the text is recognized in other cases. See *Hiss v. Baltimore, etc., Pass. R. Co.*, 52 Md. 242; 4 Am. & Eng. R. Cas. 201; 36 Am. Rep. 371; *Eichels v. Evansville St. R. Co.*, 78 Ind. 261; 5 Am. & Eng. R. Cas. 274; 41 Am. Rep. 561; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38; *Paterson, etc., R. Co. v. Mayor, etc.,*

of *Paterson*, 24 N. J. Eq. 158; *Mayor, etc., of Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *State, etc., Land Imp. Co. v. Hoboken*, 35 N. J. L. 208; *Domestic Tel. Co. v. Newark*, 49 N. J. L. 344; *Chicago, etc., R. Co. v. Newton*, 36 Iowa 299; *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660; 14 Am. & Eng. R. Cas. 439; *Harrisburg v. Harrisburg R. Co.*, 1 Pearson (Pa.) 298.

3. *State v. Hilbert*, 72 Wis. 184; 36 Am. & Eng. R. Cas. 118; *Harrisburg City Pass. R. Co. v. Harrisburg (Pa. 1892)*, 24 Atl. Rep. 56; 2 Dillon Mun. Corp. (4th ed.), § 656, 683. See also *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

This rule results as a necessity from the power of the legislature to amend, alter, or repeal the charter of a municipal corporation at pleasure. See MUNICIPAL CORPORATIONS, vol. 15, pp. 971, 976.

There are cases, however, in which the legislature cannot grant the right to use streets, except upon the consent of the city, as where the constitution requires that such consent shall always be secured. *Great Cent., etc., R. Co. v. Gulf, etc., R. Co.*, 63 Tex. 529; 26 Am. & Eng. R. Cas. 114.

4. The consent of abutting owners is not essential in such a case. *Paterson, etc., Horse R. Co. v. Mayor, etc., of Paterson*, 24 N. J. Eq. 158; 2 Dillon Mun. Corp. (4th ed.), § 725 (576); *Hodges v. Baltimore, etc., R. Co.*, 58 Md. 603; 10 Am. & Eng. R. Cas. 270.

In some of the states there exist constitutional provisions that a franchise to construct and operate a street railway may be granted only upon condition that the railway company shall obtain the consent of the city whose streets are to be occupied, or of the owners of abutting property, or of both. In such cases the consent required is absolutely essential. See this subject treated in a subsequent section.<sup>1</sup>

**4. Right of Abutters to Compensation.**—The general doctrine is that the laying of a street railway in the streets of a city or village, and the running of cars thereon for the transportation of passengers, do not constitute an additional burden on the land, but are the uses contemplated when the street was laid out; and, that, therefore, an owner of abutting land can maintain no action for damages to his property resulting as a necessary consequence from the construction and operation of such railway, even though he owns the fee of the street, unless he can show that he has suffered some special and material injury.<sup>2</sup> This doctrine, however,

**1. Right Granted Conditionally.**—People's Pass. R. Co. v. Memphis City R. Co., 10 Wall. (U. S.) 38; Mayor, etc., of Jersey City v. Jersey City, etc., R. Co., 20 N. J. Eq. 360; Paterson, etc., Horse R. Co. v. Mayor, etc., of Paterson, 24 N. J. Eq. 158 (consent of both city and abutting owners required); *infra*, this title, *Conditions Annexed to Grants*.

**Notice to Property Owners.**—The legislature may require that notice of an application for the right to occupy certain streets shall be given to property owners. As to the validity of a particular notice, see Taggart v. Newport St. R. Co., 16 R. I. 668; 43 Am. & Eng. R. Cas. 208.

Under a statute prohibiting municipal corporations from giving consent to construct and operate a horse railroad until ten days' public notice of the time and place of presenting the petition shall have been given, the publication of the report of a committee recommending that leave be granted ten days before the adoption of an ordinance authorizing such construction, is not a compliance with the statute. Metropolitan City R. Co. v. Chicago, 96 Ill. 620; 2 Am. & Eng. R. Cas. 291.

**2. The General Doctrine.**—See STREETS, and the numerous cases there cited; Elliott on Roads & Streets, p. 558; Cooley's Const. Lim. (4th ed.) § 556; 2 Dillon Mun. Corp. (4th ed.), § 722 (573); Lewis on Em. Domain, § 124; Mills on Em. Domain (2d ed.), § 205; Finch v. Riverside, etc., R. Co., 87 Cal. 597; Elliott v. Fair Haven, etc.,

R. Co., 32 Conn. 579; Randall v. Jacksonville St. R. Co., 19 Fla. 409; 17 Am. & Eng. R. Cas. 84; Savannah, etc., R. Co. v. Mayor, etc., 45 Ga. 602; Campbell v. Metropolitan St. R. Co., 82 Ga. 320; 46 Am. & Eng. R. Cas. 90, n.; Eichels v. Evansville St. R. Co., 78 Ind. 261; 5 Am. & Eng. R. Cas. 274; 41 Am. Rep. 561; Covington St. R. Co. v. Covington, etc., C. R. Co., 19 Am. L. Reg. 765; Louisville Mfg. Co. v. Central Pass. R. Co. (Louisville (Ky.) L. and Eq. Ct. 1890); Brown v. Duplessis, 14 La. Ann. 854; Briggs v. Lewiston, etc., Horse R. Co., 79 Me. 363; 32 Am. & Eng. R. Cas. 167 (motor no criterion); Hiss v. Baltimore, etc., R. Co., 52 Md. 242; 4 Am. & Eng. R. Cas. 201; 36 Am. Rep. 371; Hodges v. Baltimore, etc., R. Co., 58 Md. 603; 10 Am. & Eng. R. Cas. 270; Grand Rapids, etc., R. Co. v. Heisel, 38 Mich. 62; 31 Am. Rep. 306; Nichols v. Ann Arbor, etc., St. R. Co., 87 Mich. 361; Atty. Gen'l v. Metropolitan R. Co., 125 Mass. 515; 28 Am. Rep. 264; Newell v. Minneapolis, etc., R. Co., 35 Minn. 112; 24 Am. & Eng. R. Cas. 298; 59 Am. Rep. 303 (even though railway runs 18 miles out of town and is used much like an ordinary railroad); Ransom v. Citizens' R. Co., 104 Mo. 375; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75; Hogencamp v. Paterson Horse R. Co., 17 N. J. Eq. 83; Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. 267; 36 Am. Rep. 542; West Jersey R. Co. v. Cape May, etc., R. Co., 34 N. J. Eq. 164; Van Horne v. Newark Pass. R.

is denied in *New York*, in cases where the owner of abutting property owns also the fee of the street;<sup>1</sup> but where the fee of the

Co., 48 N. J. Eq. 332; 50 Am. & Eng. R. Cas. 235; *McQuaid v. Portland*, etc., R. Co., 18 Oregon 237; *Van Bokelen v. Brooklyn City R. Co.*, 5 Blatchf. (U. S.) 379; Texas, etc., R. Co. v. *Rosedale St. R. Co.*, 64 Tex. 80; 22 Am. & Eng. R. Cas. 160; 53 Am. Rep. 739; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; 9 Am. Rep. 461; *Keasbey on Electric Wires*, p. 106 *et seq.* Compare *Stange v. Dubuque*, 63 Iowa 303; 14 Am. & Eng. R. Cas. 107, holding that where steam motors are to be used compensation must be made to property owners.

In 2 Dillon Mun. Corp. (4th ed.), § 725 (576), it is said: "As to street railroads constructed in the usual manner and operated under municipal regulation so as not to exclude the free passage of ordinary vehicles, the almost general, and in the author's judgment, the sound judicial view is, that they do not create a new burden upon the land, and hence the legislature, no matter whether the fee is in the abutter or in the public, is not bound to, although it may, provide for compensation to the adjoining proprietor."

In his work on Const. Lim. (4th ed.) \*556, Mr. Cooley says: "Perhaps the true distinction in these cases is not to be found in the motive power of the railway, or in the question whether the fee simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving." Quoted and approved in *Eichels v. Evansville St. R. Co.*, 78 Ind. 267; 5 Am. & Eng. R. Cas. 274; 41 Am. Rep. 566.

As to Cable Roads.—See the rule of

the text applied to cable roads, in *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270; *Harrison v. Mt. Auburn Cable R. Co.* (Ohio, 1891), 17 Wkly. L. Bull. 265; *Clement v. Cincinnati*, 16 Wkly. L. Bull. 355. See also *Keasbey on Electric Wires*, pp. 103-4; *People v. Newton*, 112 N. Y. 396; 38 Am. & Eng. R. Cas. 391; 3 L. R. A. 174; *Rafferty v. Central Traction Co.*, 22 Pittsb. L. J. N. S. 15.

1. *Doctrine in New York.*—*Craig v. Rochester City*, etc., R. Co., 39 N. Y. 404; *aff'd* 39 Barb. (N. Y.) 494, was an action for an injunction against the laying of a horse railway track in a street in Rochester. The judgment was rendered for the plaintiff in the lower court, and on appeal the decision was upheld. The court, by Miller, J., after reviewing and distinguishing many cases, said: "The use of a railroad, no matter how it is operated, whether by horse or steam power, necessarily includes to a certain extent an exclusive occupation of a certain portion of the highway for the track of the road, and the running of its cars by the company and a permanent occupation of the soil. It requires that all other parties shall stand aside and make way for its progress. This is clearly inconsistent with the legal object and design of a highway, which is entirely open and free to all for purposes of locomotive travel and transportation. The enjoyment of the easement in a highway never confers an exclusive right upon any one who may have occasion to use it, while the laying down of rails and the employment of cars is to the detriment and exclusion of all others at the time when the cars are running, and is a restraint upon a free, undisturbed, and general public use. It is an assertion of a right to the possession of the highway by the corporation, and an appropriation of it to private occupation, which by lapse of time might ripen into a right and vest a title in the company." In *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146, the same doctrine was upheld and applied to the case of elevated railroads in New York city. See *infra*, this title, *Elevated Railroads; Ordinary Railroads in Streets and Highways*.

In *People v. Kerr*, 27 N. Y. 188, *aff'd*

street is owned by the city, the general rule above stated is applied.<sup>1</sup> And the general doctrine cannot be applied so rigidly as to exclude all right to claim damages; wherever the lot-owner can show that he has suffered some special and material injury in the matter of access to his property, he is entitled to recover compensation.<sup>2</sup> In some instances, statutory provision

37 Barb. (N. Y.) 357, the action was brought by the city to recover compensation, but it was held that the appropriation of the streets by legislative authority for the use of a street railroad was not a taking of private property which would require compensation to the city, though it owned the fee of the streets.

1. In *Kellinger v. Forty-second St.*, etc., R. Co., 50 N. Y. 206, it was held that the owners of property abutting upon a street in the city of New York, laid out under the statute of 1813, had no cause of action for the mere inconvenience of access to their lands occasioned by the lawful use of the street by a horse-railroad company. The case was distinguished from that of *Craig v. Rochester City*, etc., R. Co., 39 N. Y. 404. In the latter case the fee of the street was in the landowner, while in the case in hand the fee as well as the easement was vested in the public.

In *Kane v. New York El. R. Co.*, 125 N. Y. 186; 46 Am. & Eng. R. Cas. 137, the court, by Andrews, J., while upholding the right of an abutting owner to recover damages for the infringement of his easement of light, air, and access by the elevated railroad company, observed: "It is also the law of this state that the use of a city street for an ordinary horse or steam railway, unless it practically closes the street, is a street use which may be permitted, and that abutting owners whose lots are bounded by the side of the street have no legal redress in the absence of negligence in the construction or operation of the railroad, although it interferes with the enjoyment of their premises or seriously impairs their value. *Forbes v. Rome*, etc., R. Co., 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137." See also *Reining v. New York*, etc., R. Co., 128 N. Y. 157; 50 Am. & Eng. R. Cas. 205; *Kellinger v. Forty-second St.*, etc., R. Co., 50 N. Y. 206; *Brooklyn City*, etc., R. Co. v. *Coney Island*, etc., R. Co., 35 Barb. (N. Y.) 364; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; 14 Am. & Eng. R. Cas. 142; 43 Am. Dec. 661; *Ottenot v. New*

*York*, etc., R. Co., 119 N. Y. 603; 43 Am. & Eng. R. Cas. 129; 41 Alb. L. J. 194. As to elevated railroads, see *infra*, this title, *Elevated Railroads*.

2. In *Cincinnati*, etc., R. Co. v. *Cummins*, 14 Ohio St. 550, it was found as a fact, that the proposed construction of the railway track "will be an obstruction to the convenient access to the houses and other improvements" of the lotowners; "and more of an obstruction thereto than it would be if laid in the center of the highway." It was added that, taking into consideration the interests of the company and of the general traveling public as well as those of the lotowners, the location was "as little injurious as it would be in any other part of the highway." The lotowner was allowed to recover damages. The court, by Ranney, J., commenting on the above state of facts, said: "This is the common case when private property is taken for public uses. Reduced into plain English, it simply amounts to this, that the company and the public will gain as much as the lotowners lose."

In case of special injury the remedy is by an action at law for special damage, and not by application for an injunction. *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270; *Stetson v. Chicago*, etc., R. Co., 75 Ill. 74, and cases cited. Compare the remedy granted in the elevated railway cases in *New York* where an injunction and alternative damages are awarded. See *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; *infra*, this title, *Elevated Railroads—New York*.

**Doctrine Confined in its Application.**—The doctrine under discussion, which maintains that a street railway is not an additional burden, is rather to be confined than extended. Thus, it cannot be invoked to authorize a company to lay a horse railway in a street, solely as a freight transfer track between two steam railroads running into the city, without compensation to abutting owners. *Carli v. Stillwater St. R.*, etc., Co., 28 Minn. 373; 3 Am. & Eng. R. Cas.

has been made requiring compensation to be made to abutting lotowners.<sup>1</sup> It has been contended that an electric street railway operated by what is known as the trolley system, with its poles and wires and its peculiar track, constituted a new servitude upon the land in the street; but the contention has not been sustained, and electric railways are considered to be not different from other street railways in this regard. The question whether an additional burden is imposed or not cannot be determined from the motive power employed.<sup>2</sup>

226; 41 Am. Rep. 290. And the rule that the railway is not an additional burden holds only so long as it does not impair the usefulness of the street for travel. If embankments are raised, cuts made, or the grade of the street otherwise changed, it becomes an additional burden and must make compensation to abutting landowners where easements of access over the street to their property are impaired. *Forbes v. Rome*, etc., R. Co., 121 N. Y. 521; 43 Am. & Eng. R. Cas. 137; *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608; *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270; *Louisville, etc., R. Co. v. Finley*, 86 Ky. 294; 36 Am. & Eng. R. Cas. 170, note. Thus in *Elliott on Roads and Streets*, p. 558, it is said: "Where the road is so constructed as materially to impair the rights of the abutter, it seems to us that it should be treated as an additional burden entitling the owner to compensation; but this is true only where the alteration is made in the street solely for the use and accommodation of the railway company."

**1. Statutes Providing for Compensation.**—See *Taylor v. Bay City St. R. Co.*, 80 Mich. 77; 43 Am. & Eng. R. Cas. 335, where a series of statutes and amendments thereto were considered as requiring compensation to property owners. In *Onset St. R. Co. v. Plymouth Co.*, 154 Mass. 395, property owners were allowed to recover damages under *Massachusetts Pub. St.*, ch. 49, § 34, though they did not own the fee of the streets.

In *Vose v. Newport St. R. Co. (R. I.)*, 46 Am. & Eng. R. Cas. 91, the railway company's charter provided that "whenever any estate abutting upon a street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby, the said corporation shall be liable to pay the owner thereof the damages thereby occasioned to said estate." It was held that the owner of abutting property was entitled to re-

cover damages only for injuries resulting from the laying of the rails as distinguished from those resulting from the use of them as laid.

**2. Electric Railways.**—*Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 76; *Koch v. North Ave. R. Co. (Md.)*, 50 Am. & Eng. R. Cas. 401; *District Atty. v. West Chester*, 9 Pa. Co. Ct. Rep. 546; *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419; 47 Am. & Eng. R. Cas. 57, 64, note (injunction denied); *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; 43 Am. & Eng. R. Cas. 215; *Taggart v. Newport St. R. Co.*, 16 R. I. 668; 43 Am. & Eng. R. Cas. 208; *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608; *Ogden City R. Co. v. Ogden*, 7 Utah 207; *Tracy v. Troy, etc., R. Co.*, 54 Hun (N. Y.) 550; *Potter v. Saginaw, etc., St. R. Co.*, 83 Mich. 295; *Mt. Adams, etc., R. Co. v. Winslow*, 3 Ohio C. Ct. 425; *Pelton v. East Cleveland R. Co.*, 22 Wkly. L. Bull. 67.

Where the owner of a corner lot owns the fee to the center of the street, and the electric railway company has its track wholly on the opposite side of the center of the street, he is entitled to no relief other than an order perpetually enjoining the company from thereafter erecting in front of his premises any poles or wires without his consent. *Barber v. Saginaw St. R. Co.*, 83 Mich. 299.

**Electric Railway Wires Distinguished from Telegraph Wires.**—In *Taggart v. Newport St. R. Co.*, 16 R. I. 668; 43 Am. & Eng. R. Cas. 208; 7 L. R. A. 205, the court took pains to distinguish the case in hand from those relating to telegraph and telephone wires. *Durfee, J.*, said: "Assuming telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of the street railway likewise create a new servitude. Telegraph and telephone wires are not used to facilitate the use of the streets where they are erected

In the case of ordinary steam railroads the rule is different. They constitute an additional burden on the land, and may not be constructed or operated in a street unless compensation has been made to the owners of abutting property.<sup>1</sup> It has been attempted to apply this last rule of law to lines operated with dummy engines, but, with a few exceptions, the application has been refused.<sup>2</sup> The distinction between the rule governing ordinary railroads and that applied to street railways is to be found not in the motive power employed, but in the character of the use. A street railway is directly ancillary to the uses of the street; it is a mode of travel closely allied to those in common use on the highway, and, as a matter of fact and common knowledge, is very much less of an obstruction than an ordinary railroad.<sup>3</sup>

**5. Unauthorized Use of Streets.**—The unauthorized use of a public highway by a street railway company in the construction or operation of its road is a nuisance *per se*, being an invasion of the public easement.<sup>4</sup> The company making such unauthorized use

for travel and transportation, or if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets, as such, in that they communicate the power by which the street cars are propelled." Commenting on this case Judge Dillon observes: "The distinction mentioned is so fine as to be almost impalpable, and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement." 2 Dillon Mun. Corp. (4th ed.) § 734c. The same distinction is made in *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; 46 Am. and Eng. R. Cas. 76.

**1. Ordinary Railroads.**—See this subject treated *infra*, this title, *Ordinary Railroads in Streets and Highways*. *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279; 38 Am. & Eng. R. Cas. 462; 2 Dillon Mun. Corp. (4th ed.), § 704a. **2.** *Newell v. Minneapolis, etc., R. Co.*, 35 Minn. 112; 24 Am. & Eng. R. Cas. 298; 59 Am. Rep. 303; *Briggs v. Lewiston, etc., Horse R. Co.*, 79 Me. 363; 32 Am. & Eng. R. Cas. 167; *Williams v. City Electric R. Co.*, 41 Fed. Rep. 556; 43 Am. & Eng. R. Cas. 215. Compare *Stanley v. Davenport*, 54 Iowa 463; 37 Am. Rep. 216; *East End St. R. Co. v. Doyle*, 88 Tenn. 747; 17 Am. St. Rep. 935.

If the railroad company abuses its right and so operates its road that it becomes a nuisance, the adjacent landowners have an appropriate remedy by injunction, or by an action for

damages. *Williams v. City Electric R. Co.*, 41 Fed. Rep. 556; 43 Am. & Eng. R. Cas. 215. See also *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433; 43 Am. & Eng. R. Cas. 219; *East End R. Co. v. Doyle*, 88 Tenn. 747; 17 Am. St. Rep. 933.

**3.** Thus in *Briggs v. Lewiston, etc., Horse R. Co.*, 79 Me. 367; 32 Am. & Eng. R. Cas. 167, the court by Emery, J., said: "We do not think the motor is the criterion; it is rather the use of the street. If the railroad company exclusively occupy the land—shut off the street from it, deprive it of its character of bearing the easement of a street—use it, not for street traffic but for what is known as railway traffic, the company may perhaps be said to make a new and different use of the land. . . . But the defendant company is using the land as a street. Its railroad is a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use." Similar language was used in *Williams v. City Electric R. Co.*, 41 Fed. Rep. 557; 43 Am. & Eng. R. Cas. 217.

**4.** *Van Horne v. Newark, etc., Pass. R. Co.*, 48 N. J. Eq. 332; 50 Am. & Eng. R. Cas. 235; *Larimer, etc. St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533; *Atty. Gen'l v. Lombard, etc., R. Co.*, 10 Phila. (Pa.) 352; *Davis v. New York*, 14 N. Y. 506; *Brooklyn City R. Co. v. Furey*, 4 Abb. Pr. N. S. (N. Y.) 364; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; 2 Am. & Eng.

of the streets may be indicted for maintaining a public nuisance,<sup>1</sup> or it may be enjoined by the public authorities,<sup>2</sup> or by private citizens making out a case of special damage.<sup>3</sup> And it is held to be no objection to the granting of an injunction against the wrongful laying of the track that the municipality would have the right to remove it by force when laid, upon the principle that when a party has a remedy by his own act, involving the use of force, it does not constitute that adequate remedy at law which excludes equitable relief.<sup>4</sup>

R. Cas. 291; Easton, etc., Pass. R. Co. v. Easton, 133 Pa. St. 505; 43 Am. & Eng. R. Cas. 253; 19 Am. St. Rep. 658; Nichols v. Ann Arbor, etc., R. Co., 87 Mich. 361. Compare Hamilton v. New York, etc., R. Co., 9 Paige (N. Y.) 171.

Thus, where the road was constructed in a manner unauthorized by the statute under which the corporation was organized, the grade not conforming to the grade of the street, it was adjudged to be a public nuisance. Denver, etc., R. Co. v. Denver City R. Co., 2 Colo. 673.

The company is to be confined strictly to the streets which it is authorized to occupy, and a road in every street where the company has no authority to place one is a nuisance which may be enjoined. Stamford v. Stamford Horse R. Co., 56 Conn. 381; 36 Am. & Eng. R. Cas. 140; Com. v. Erie, etc., R. Co., 27 Pa. St. 339. Compare Zabriskie v. Jersey City, etc., R. Co., 13 N. J. Eq. 314.

So the use by a street railway company of tracks for private purposes constitutes a nuisance. Fanning v. Osborne, 102 N. Y. 441; 25 Am. & Eng. R. Cas. 252.

1. Com. v. Old Colony, etc., R. Co., 14 Gray (Mass.) 93; Pittsburgh, etc., R. Co. v. Com., 101 Pa. St. 192; 10 Am. & Eng. R. Cas. 321; 2 Dill. Munic. Corp., § 708. See also NUISANCES, vol. 16, p. 961.

2. Coast Line R. Co. v. Cohen, 50 Ga. 451; Stamford v. Stamford Horse R. Co., 56 Conn. 381; 36 Am. & Eng. R. Cas. 140; People v. Third Ave. R. Co., 45 Barb. (N. Y.) 63; McCartney v. Chicago, etc., R. Co., 112 Ill. 611; 29 Am. & Eng. R. Cas., 326; Hunt v. Chicago Horse, etc., R. Co., 121 Ill. 638.

3. Although the unauthorized occupation of public streets by a railway company may be regarded as a nuisance *per se* which will be enjoined, an injunction will not be granted at the

suit of a private citizen or a corporation, unless the plaintiff can make out a case of special damage. Larimer, etc., R. Co. v. Larimer St. R. Co., 137 Pa. St. 533. In such a case the nuisance, being purely a public one, can only be restrained by the public authorities. Coast Line R. Co. v. Cohen, 50 Ga. 451. See also Peterson v. R. Co., 5 Phila. (Pa.) 199; Sparhawk v. Union Pass. R. Co., 54 Pa. St. 401; Denver, etc., R. Co. v. Denver City R. Co., 2 Colo. 673; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75; Hogenkamp v. Paterson Horse R. Co., 17 N. J. Eq. 83; Gloessner v. Anheuser-Busch Brewing Co., 100 Mo. 509; Osborne v. Brooklyn City R. Co., 5 Blatchf. (U. S.) 366; Davis v. New York, 14 N. Y. 506; Fanning v. Osborne, 102 N. Y. 441; Milhau v. Sharp, 27 N. Y. 611; Nichols v. Ann Arbor, etc., R. Co., 87 Mich. 361. Compare Musser v. Fairmont, etc., St. R. Co., 7 Am. L. Reg. 284.

In Roberts v. Easton, 19 Ohio St. 78, it was held that where a city council grants permission to construct a street railroad without the consent of the owners of property on the street being obtained, as required by the statute, the construction of the railroad may be enjoined at the suit of the owners of property on the street in which it is about to be constructed.

4. Stamford v. Stamford Horse R. Co., 56 Conn. 381; 36 Am. & Eng. R. Cas. 140. See also Spokane St. R. Co. v. Spokane Falls R. Co., 46 Fed. Rep. 322, where a court of equity refused to enjoin a city from tearing up the tracks of a railroad company illegally laid.

In Easton, etc., Pass. R. Co. v. Easton, 133 Pa. St. 505; 43 Am. & Eng. R. Cas. 253; 19 Am. St. Rep. 658, it was held that the city could not tear up the tracks unless they amounted to a public nuisance dangerous to the safety of the citizens. See also Asheville St. R. Co. v. Asheville, 109 N. Car. 688.

**VI. CONSTRUCTION OF FRANCHISES AND LICENSES.**—It is a settled rule that charters of incorporation are to be construed favorably to the public and strictly against the corporators. By this, however, is not meant that the grant is to be construed technically and narrowly so as to defeat the very purposes for which it is made, but that, giving the language its ordinary meaning, nothing will be included unless obviously within the scope of such meaning.<sup>1</sup> Thus, the grant of an exclusive right to construct and operate horse railways, does not include authority to construct and operate a cable road, notwithstanding, at the time of the grant, the former was the only street railway in practical use

But a railway track laid upon a city street in good faith under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, cannot be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though by reason of the manner of its construction it may obstruct the street to such a degree as to amount to a nuisance. *Easton, etc., Pass. R. Co. v. Easton*, 133 Pa. St. 505; 43 Am. & Eng. R. Cas. 253; 19 Am. St. Rep. 658.

1. See *CORPORATIONS*, vol. 4, p. 213; *RAILROADS*, vol. 19, p. 804; *STATUTES*, vol. 23, p. 140; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 544; *St. Louis v. Missouri R. Co.*, 13 Mo. App. 524.

Words and phrases in a statute conferring upon a corporation its franchise and special privileges, which are ambiguous or admit of different meanings, must receive that construction which is most favorable to the public. *People v. Broadway R. Co.*, 126 N. Y. 29; 48 Am. & Eng. R. Cas. 692.

In *Cooley's Const. Lim.*, p. 394, the author observes: "Grants of the franchise to be a corporation which confer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless of great value to the corporators, and are therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be strictly construed against the corporators. The just presumption in every such case is that the state has granted in express terms all that it designed to grant at all."

In *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 22, Black, C. J., for

the court, used the following language: "When a state means to clothe a corporate body with a portion of its own sovereignty, and to disarm itself to that extent of the power that belongs to it, it is so easy to say so that we will never believe it to be meant when it is not said. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation." And the Supreme Court of the *United States*, in terms equally emphatic, has said: "Every reasonable doubt is to be resolved adversely to the corporation. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation; a doubt is fatal to the claim. This doctrine is vital to the public welfare; it is axiomatic in the jurisprudence of this court." *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 666.

And in *Pennsylvania R. Co. v. Philadelphia Belt Line R. Co.*, 49 Leg. Int. (Pa.) 5, Gordon, J., said: "If language means anything, and if almost wearying reiteration in unnumbered cases can be regarded as establishing a principle, then one doctrine must be taken as accepted—that is, that the corporate grant against a public right is to be strictly construed in favor of the public." See also *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 76, holding that where a corporation is authorized by a general grant to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take by implication all such powers as are reasonably necessary to enable it to accomplish the purpose for which it was formed. See *infra*, this title, *Motive Power*.



and the latter was practically unknown.<sup>1</sup> So a grant of power relating to connections with other roads has reference to such roads only as exist at the time of the grant.<sup>2</sup> And, under a power to construct a road "on, over, and along" certain alleys, there is no power to construct the tracks "by the side" of the alleys mentioned.<sup>3</sup> But the right to construct and operate the

1. *Omaha Horse R. Co. v. Cable Tramway R. Co.*, 30 Fed. Rep. 324; 32 Fed. Rep. 727. The contention in this case was that at the time of the grant cable roads were practically unknown, as the only known form of street railways was the horse railway; that the terms street railroad and horse railroad were, in common parlance, used to describe the same thing; that in construing the grant the court should carry itself back to the time at which it was made, and that these terms horse railroad and street railroad, being then used interchangeably, it must be presumed that the legislature meant by the use of one term all that it would have meant by the use of the other, and that, therefore, all that would today be included within either term was within the scope of the grant. But the court negatived this contention, holding itself bound by the well-established rule of construction that legislative grants are to be construed against the grantee and in favor of the public, and nothing shall pass unless it is obvious that the intent was that it should pass. *Bridge Proprietors v. Hoboken*, 1 Wall. (U. S.) 116, is an analogous case. Here the legislature gave the plaintiff the right to build a toll bridge with the provision that no other bridge should be built within certain limits for a period of ninety-nine years. Subsequently the defendant, within the time limited, proceeded to construct a railroad bridge within the prescribed limits, and its construction was sought to be enjoined by the plaintiffs as an invasion of their franchise. The Court of Errors and Appeals of *New Jersey* denied the injunction, and on appeal to the Supreme Court of the *United States* its ruling was affirmed. The court, in *Omaha Horse R. Co. v. Cable Tramway R. Co.*, 30 Fed. Rep. 324, speaking with reference to this case, said: "In other words, as the railroad bridge was unknown at the time of the grant, the supreme court held that it was not included within the exclusive franchise. It was something not thought of by the legislature, and was,

therefore, not within the limits of the exclusive grant. That case is even stronger than this, for a railroad bridge is certainly one form of a bridge, and therefore, within the very letter of the grant; but a cable road is not one form of a horse railroad and not within the strict words of the grant." To the same effect is *People v. Newton*, 112 N. Y. 396, *affirming* 1 N. Y. Supp. 197; 38 Am. & Eng. R. Cas. 391.

And the exclusive right to construct and operate a horse railway in a city is not infringed by the construction in the same city of a road to be operated by steam. *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

Authority to build either a horse railroad or a steam railroad within a city confers a continuing option to use either steam or animal power or both upon its road, or any part of it, which may be exercised from time to time. Under it, the use of either motive power may be changed, and the other substituted as the company may see fit. *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 612; 29 Am. & Eng. R. Cas. 326.

But under a municipal ordinance authorizing the construction of a railway on certain streets "to be operated by electricity or such other power as will not necessarily obstruct the use of said streets by the public," the absolute right to operate its cars by steam is not conferred; the question as to whether the use of steam would "necessarily obstruct the use of said streets" being one of fact for the jury. *Houston v. Houston, etc., R. Co.*, 84 Tex. 581; 50 Am. & Eng. R. Cas. 380.

2. *People's Pass. R. Co. v. Marshall*, 8 Pa. Co. Ct. Rep. 273.

3. *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11; 10 Am. & Eng. R. Cas. 313. See also *Trenton Horse R. Co. v. Trenton*, 11 L. R. A. 410.

In *Burns v. Multnomah R. Co.*, 15 Fed. Rep. 177; 10 Am. & Eng. R. Cas. 289, the company was authorized to lay its tracks on certain streets, "beginning at the ferry landing at the foot of M street." It appearing that the ferry landing and the foot of M street were differ-

road carries with it authority to construct such switches and turn-outs as may be necessary for the successful operation of the road.<sup>1</sup> In *South Carolina*, it is held that under a charter authorizing the construction of the road "from" a city there is no authority to enter the city, but that the boundary of the city is the *terminus a quo*;<sup>2</sup> but in other jurisdictions the words "to" and "from" a place are held to mean to or from a point within the place, to or from which the construction is authorized;<sup>3</sup> and this would seem to be the better view. Upon the principle stated above, street railway franchises are never construed as exclusive, unless such construction is unavoidable.<sup>4</sup>

ent and not contiguous places, it was, therefore, held that the ambiguity must be resolved against the corporation, and the agreement construed so as to read simply, "at the foot of M street."

In *Stamford v. Stamford Horse R. Co.*, 56 Conn. 381; 36 Am. & Eng. R. Cas. 140, the charter specified four terminal points between which tracks might be laid, and the streets through which they were to run, omitting one which was named in the company's petition for a charter, and adding two that were not named; the section closing "and over and across any highway between any of the points of commencing or termination aforesaid." It was held that the company had no right to occupy any streets not specified, and that the borough might have an injunction against the laying of tracks in any such streets. See also *In re South Beach R. Co.*, 119 N. Y. 141.

But where the charter authorized the company to construct its tracks "upon and over such streets" in the city "except in certain streets therein mentioned," it was held that this could not be construed to prevent the company from laying its tracks "across" one of the excepted streets. *State v. Newport St. R. Co.*, 16 R. I. 533. See also *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 137; 5 Am. & Eng. R. Cas. 253.

The charter of the defendants contained this clause: The president and directors of said company are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point in the township of O., in the county of E., to some suitable point in O. street or some street north of said street or south of M. street, in the city of Newark. It was held that this clause had reference not to the route but to the termination of the road, and that

thereby the road of the company was not excluded from being located in or through M. street. *McFarland v. Orange, etc., Horse Car R. Co.*, 13 N. J. Eq. 17; *aff'd* 13 N. J. Eq. 561.

1. *Houston v. Houston, etc., R. Co.*, 84 Tex. 581; 50 Am. & Eng. R. Cas. 380. See also *LATERAL OR BRANCH RAILROADS*, vol. 12, p. 940.

A charter of a horse railroad provided that "said railroad shall be laid out by the mayor and aldermen in like manner as highways are laid out." A single-track road was laid out by the mayor and aldermen without any turn-outs, but with a provision in the record of laying out that "said horse railroad company may construct such suitable turnouts on either side of said center line as they may find necessary in the transaction of the business to be done by said railroad." It was held that the company had no authority to construct a turnout, although necessary for its business, and required by the public convenience, without a laying out by the mayor and aldermen. *Concord v. Concord Horse R. Co.*, 65 N. H. 30; 38 Am. & Eng. R. Cas. 425.

2. *North Eastern R. Co. v. Payne*, 8 Rich. (S. Car.) 177.

3. *Mason v. Brooklyn City, etc., R. Co.*, 35 Barb. (N. Y.) 373; *Farmers' Turnpike R. Co. v. Coventry*, 10 Johns. (N. Y.) 389; *Western Pennsylvania R. Co.'s Appeal*, 99 Pa. St. 155. Thus, authority to construct and operate a railway from the city of Chicago to any point in the town of Evanston, authorizes the location and operation of the road from any point within the city of Chicago. *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611; 29 Am. & Eng. R. Cas. 326.

4. *Gulf City R. Co. v. Galveston City R. Co.*, 65 Tex. 502; *Fort Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 169; 32 Am. & Eng. R. Cas. 283; *Jer-*

sey City, etc., R. Co. *v.* Jersey City, etc., Horse R. Co., 20 N. J. Eq. 61; 21 N. J. Eq. 550; New York Cable R. Co. *v.* Chambers St., etc., R. Co., 40 Hun (N. Y.) 29; Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364; New York, etc., R. Co. *v.* Forty Second St., etc., R. Co., 50 Barb. (N. Y.) 285; Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365; 13 Am. Rep. 181; Louisville City R. Co. *v.* Central Pass. R. Co., 87 Ky. 223; 21 Fed. Rep. 358; 36 Am. & Eng. R. Cas. 463; 20 Am. & Eng. R. Cas. 542; Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239; 5 Am. & Eng. R. Cas. 327; Brooklyn Cent., etc., R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Brooklyn Cent., etc., R. Co. *v.* Brooklyn City R. Co., 33 Barb. (N. Y.) 420.

In *Mayor, etc., of Houston v. Houston City St. R. Co.* (Tex.), 50 Am. & Eng. R. Cas. 280, it was held that the grant to a company of the right to occupy the city streets did not confer an exclusive privilege, since the terms of the grant did not absolutely prohibit the city from extending similar privileges to other companies.

A grant made under legislative sanction by a city to a street railway company of the right, not in express terms exclusive, to construct and operate a railway upon its streets, confers upon the company no exclusive privilege. Over that portion of any street upon which its track switches, or turnouts do not lie, a railway company has no authority, but the city's dominion over it remains unchanged and unimpaired and is as full and complete for all purposes as it was over the entire street before the privilege of constructing a road thereupon was granted. Accordingly, if a city should choose to grant to another company the privilege of laying a track upon the same street, the company already operating a road thereon would have no right to object so long as the free and unobstructed use of its own track is not interfered with; and the new grant may, with the consent of the legislature, be made. *Gulf City R. Co. v. Galveston City R. Co.*, 65 Tex. 502; *Fort Worth St. R. Co. v. Rosedale R. Co.*, 68 Tex. 169; 32 Am. & Eng. R. Cas. 283; *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61; 2 Dill. Munic. Corp. (4th ed.), § 727.

By the second section of the *Georgia* act of February 23, 1866, incorporat-

ing the Atlanta Street Railway Company it is declared that such company shall have exclusive power and authority to survey, lay out, construct and occupy, use and employ street railways in the city of Atlanta, subject to the approval of the city council thereof for each route selected first obtained before the work thereon shall be commenced. It was held that there were no words in this charter which grant to the company the unconditional exclusive power and authority to construct and use street railroads in all of the streets of the city of Atlanta, but on the contrary that the grant is limited and restricted, to each route that may be selected by the company in the streets of the city of Atlanta which shall be approved by the city council. *West End, etc., R. Co. v. Atlanta St. R. Co.*, 49 Ga. 151.

The charter of a street railway company provided that, "the city is authorized to contract with said railway company as to the construction, maintenance, and operation of said railway upon such terms as it may agree upon with said company, any laws now existing to the contrary notwithstanding." It was held that this would not override a subsequent general law under which another corporation claimed to use the tracks of the first-named company, although under that charter an exclusive right was granted by the city. *New Bedford, etc., St. R. Co. v. Acushnet St. R. Co.*, 143 Mass. 200.

A municipal ordinance granting a corporation the exclusive right for a term of years to use its streets for the construction and operation of a street railway, to be operated by animal power only, and providing that the city should not, until after the expiration of the term, grant to or confer upon any person or corporation any privileges which would impair or destroy the rights and privileges granted to such corporation, does not deprive the city of the power to confer upon another company, before the expiration of the term, authority to build railways on its streets to be operated by power other than animal power. *Teachout v. Des Moines Broad Gauge St. R. Co.*, 75 Iowa 722.

And where a city, "for the purpose of providing street railways," granted, for a term of years, to a company the exclusive privilege of using its streets, it was held that such privilege attached only when the actual use, or its equivalent, began, and that the municipality was not precluded from permitting an-

**VII. CONDITIONS ANNEXED TO GRANTS—1. Generally.**—The fact that the constitution prescribes certain conditions upon which street railways may be constructed and maintained does not preclude the legislature from imposing others not inconsistent therewith.<sup>1</sup> Likewise when the consent of the municipal authorities is necessary, they are not limited to a mere granting or denial thereof, but may, in their discretion, prescribe conditions on which they will give it, provided they are not repugnant to the grant by the legislature, or to constitutional or statutory provisions on the same general subject.<sup>2</sup> The mere fact that the performance of the stipulated conditions by the company will subject it to great inconvenience and involve a large expenditure of money is not a sufficient excuse for non-performance.<sup>3</sup> The most usual conditions are that the consent of the municipality or of the abutting owners, or of both, shall be obtained, or that the road shall be constructed within a specified time.<sup>4</sup> Other conditions, however,

other company to use streets on which the first company declined to build, and on which it was under no obligation to build. *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

1. *In re Thirty-fourth St. R. Co.*, 102 N. Y. 343.

**Absolute Grant—Impairment of Obligation.**—When the council of the city, in the exercise of power conferred by the legislature, makes an absolute grant to a railway company of the right to build its road on certain streets, and the company accepts the grant and builds a part of the road at great expense, the legislature may not by a subsequent amendment of the city charter make the right of the company to build the residue of the road dependent on the consent of a majority of the property owners of the street. *Hovelman v. Kansas City R. Co.*, 79 Mo. 632; 20 Am. & Eng. R. Cas. 17. See *supra*, this title, *The Charter as a Contract*; and *infra*, this title, *Consent of Local Authorities*.

2. 2 Dill. Mun. Corp. (4th ed.), § 706 (559).

In *Re Kings County El. R. Co.*, 105 N. Y. 97, among the conditions imposed by the city council was one that the company should consent that the city assessors might arbitrate all damages occasioned to property owners by the building of the road; and another fixing the times within which different parts of the road should be constructed, different from that prescribed by the commissioners appointed and acting in pursuance of statutory authority. It was held that these conditions related

to matters over which the legislature and the commissioners had entire control, and were repugnant to the legislative requirements in the one case, and to the condition prescribed by the commissioners in the other, and their action could neither be superseded nor affected by that of any other body. See *infra*, this title, *Consent of Local Authorities*.

3. *St. Joseph County v. South Bend, etc.*, R. Co., 118 Ind. 68. See also *People v. Broadway R. Co.*, 126 N. Y. 29; 48 Am. & Eng. R. Cas. 692.

An ordinance authorizing a railway company to extend its track from its then terminus to the corporate limits, required the track to be extended to a certain park, being a point short of the city limits, by a given time, and from that point on to the city limits, so soon as the same could be constructed, operated and kept in repair without actual loss, and the company to accept the ordinance within ten days after its approval by the mayor. The ordinance was accepted and the road was built and operated to the park. On mandamus to compel the construction and operation of the track to the city limits, the answer showed that it could not be constructed, operated, and kept in repair without actual loss, which was admitted by demurrer to the answer. It was held that the answer showed a good reason for not compelling the company to build and operate such part of the road. *People v. Chicago West Div. R. Co.*, 118 Ill. 113.

4. See subordinate sections under this division of the article.

have been imposed and enforced; for example, that the company shall obtain the consent of another company already occupying the street before it may construct its road therein;<sup>1</sup> or that it shall purchase the omnibuses, horses, etc., of an omnibus line operated upon the streets covered by the franchise, or upon parallel streets.<sup>2</sup>

**2. Consent of Local Authorities.**—The complete and ultimate control of all streets and highways rests in the legislature, and it is therefore competent for that body, in the absence of constitutional provisions to the contrary, to authorize the occupation of the streets of a city by a street railway company, without the city's consent.<sup>3</sup> In some of the states, however, are found constitutional provisions requiring the consent of the municipal authorities, and in others there are statutes to the same effect.<sup>4</sup>

1. Art. 3, § 18, of the *New York* Const. does not prohibit the imposition of such a condition. *In re* Thirty-fourth St. R. Co., 102 N. Y. 343, *rev'g* 37 Hun (N. Y.) 443. And in a statute prohibiting any company from laying a track in that portion of the street in which another company has laid its track without the consent of such other company, the words "that portion of" a street must be construed to mean the whole width of the street. *Forty-second St., etc., R. Co. v. Thirty-fourth St. R. Co.*, 52 N. Y. Super. Ct. 252. See also *New York, etc., R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 309.

2. *Cooper v. Passenger R. Co.*, 3 Phila. (Pa.) 252; *Green, etc., St. R. Co. v. Moore*, 64 Pa. St. 79.

3. *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *Harrisburg City Pass. R. Co. v. Harrisburg* (Pa. 1892), 24 Atl. Rep. 56; *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *Milwaukee v. Milwaukee, etc., R. Co.*, 7 Wis. 85; *Chicago, etc., R. Co. v. Newton*, 36 Iowa 299.

4. Const. of *New York*, art. 3, § 18, par. 14; Const. of *Missouri*, art. 12, § 20; *Atlantic, etc., R. Co. v. St. Louis*, 3 Mo. App. 322 (case of an ordinary railroad); *In re Rochester Electric R. Co.*, 57 Hun (N. Y.) 56; *Houston v. Houston St. R. Co.*, 84 Tex. 581; 50 Am. & Eng. R. Cas. 380. See also *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. St. 1; 36 Am. & Eng. R. Cas. 125.

A railway wholly within the limits of a city, and proposed to be constructed exclusively under the surface of the street, is a street railroad within the

meaning of art. 3, § 18, *New York* Constitution. Accordingly, as applicable to such a railway, the provision of the *New York* act of 1880 (ch. 582, Laws 1880), that the determination of commissioners "may be taken in lieu of the consent of said authorities," is unconstitutional and void. *In re New York District R. Co.*, 107 N. Y. 42, *affirming* 42 Hun (N. Y.) 621.

But this provision of the constitution is not violated by a statute authorizing an existing railway company to substitute cable power for horse power without requiring the consent of the local authorities. Such a statute confers no substantial franchise, but is merely a regulating act. *In re Third Avenue R. Co.*, 121 N. Y. 536; 43 Am. & Eng. R. Cas. 222, *reversing* 56 Hun (N. Y.) 537. And it seems that the consent of the local authorities is not necessary as a condition precedent to an application for commissioners to determine the expediency of constructing the road. *In re People's R. Co.*, 112 N. Y. 578; 38 Am. & Eng. R. Cas. 404.

Under the *Ohio* act of April, 1861, § 5, a village incorporated for the special purpose of being a road district, is not one of the municipal corporations, whose consent to the construction of a street railway is required. *Cincinnati, etc., R. Co. v. Cumminsville*, 14 Ohio St. 523.

**Consent of Commissioner of City Works—Location of Power House of Cable Road.**—See *Brooklyn Heights R. Co. v. Brooklyn*, 18 N. Y. Supp. 876. In this case the charter of the company authorized it to construct a cable road from C street through M street to W street ferry, and to erect necessary power and car-houses in streets "adjacent to M street west of the mill," the

Where such requirement exists, the obtainment of the consent is a condition precedent to the right to use the city streets, and if it is never secured the whole grant fails.<sup>1</sup> So that where an exclusive franchise is granted conditioned upon the consent of

location to be approved by the commissioner of city works. The commissioner having approved the location of the power-house in a neighboring parallel street, it was held that a subsequent ordinance of the council could not operate to withdraw such consent and render another consent necessary.

**New York—Who Are "the Local Authorities" Whose Consent Is Necessary.**—Under the Street Surface Railway act, ch. 252, § 3, *New York Laws of 1884*, authorizing companies organized thereunder to acquire a right of way through streets or highways, provided that "the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to construct and operate such railroad . . . be first obtained," where the railroad is proposed to be constructed upon a highway in a town, "the local authorities," whose consent is required, are the officers whose duties and powers concern the supervision, maintenance and care of the highway—that is, the highway commissioners of the town. *In re Rochester Electric R. Co.*, 123 N. Y. 351; 46 Am. & Eng. R. Cas. 157.

1. *People's Pass. R. Co. v. Memphis* (Tenn. 1875), 16 S. W. Rep. 973; 10 Wall. (U.S.) 38; *In re Rochester Electric R. Co.*, 123 N. Y. 351; 46 Am. & Eng. R. Cas. 157. See also *Smith v. East End St. R. Co.*, 87 Tenn. 626; 38 Am. & Eng. R. Cas. 470; *Paterson, etc., R. Co. v. Mayor, etc., of Paterson*, 24 N. J. Eq. 158.

*In Musser v. Fairmount, etc., R. Co.* (Pa. 1859), 7 Am. Law Reg. O. S. 284, an act was passed granting a right to construct a street railway, provided the consent of the city should be obtained. The city council by ordinance declared their disapproval of the act, and declined to allow the streets to be so used. It was held that the power designated by the legislature was exhausted, and that no subsequent ordinance of the city council consenting to the use of the streets could revive the privilege nullified by the ordinance of disapproval. The court, by Thompson, J., said: "The only power that can revive those privileges is the legislature, and to that the company must

appeal. If the council could disapprove and afterwards, without regard to time, approve, where would be the end and limit of their right of choice or election? The rights and privileges of the company under such circumstances might with truth be said to be vagrant; indeed, sometimes in abeyance, sometimes active, and again in abeyance, as the changes and opinions of a changing majority might happen to be."

*In Larimer, etc., St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533, it was held that under the *Pennsylvania* statute the consent of the city to the construction of a street railroad upon its highway was a condition precedent thereto, and without it a company incorporated under the act had no right, present or prospective, to occupy streets for that purpose. And, therefore, such a company not having obtained such consent has no standing by a bill for an injunction to question the right of another company subsequently incorporated to occupy for its railroad streets covered by the prior charter.

*In Re Rochester Electric R. Co.*, 123 N. Y. 351; 46 Am. & Eng. R. Cas. 757, a turnpike company, which was maintaining a highway as a turnpike road, had acquired from adjoining landowners the right to a strip of land on each side of the highway for a bridle-path, and had given consent to a company organized under the act mentioned above to use a portion of said bridle-path for its railroad. It was held that this was not the consent required by the act; that it had no effect save as it regarded the rights and interests of the turnpike company; that the highway had not ceased to be such because used as a turnpike, and the administrative duties of the highway commissioners of the town remained unimpaired, so far as its exercise was required for the preservation of the rights and interests of the public, and that their consent was requisite.

*In Massachusetts*, it is held that the construction of a track for a horse railroad over a turnpike road, under a valid agreement with the turnpike company, by a corporation, whose charter contains a restriction making it "void so

the city and such consent is never secured, the legislature is guilty of no violation of the charter contract in granting the same privileges to another company.<sup>1</sup>

The city may make its consent conditional upon the company's

far as relates to the right to construct said road in any town until the act has been accepted by the selectmen," will not be restrained by injunction as a nuisance in a town traversed by the turnpike road, merely because the selectmen of the town have not accepted the charter. *District Attorney v. Lynn*, etc., R. Co., 16 Gray (Mass.) 242.

And in *Cincinnati v. Columbia*, etc., St. R. Co., 17 Wkly. L. Bull. 192, it was held that where a village was incorporated twenty-one years after the consent to the construction and operation of a street railway was obtained from a turnpike company, the consent of the municipality was not necessary.

The charter of a street railway company empowered it to lay rails in the streets of the city upon first obtaining the consent of the city council. By a supplement, it was positively authorized to construct several tracks specified in the supplement without any condition or reference to the consent of the council. It was held that, as to such tracks, the consent of the council was not necessary. *Jersey City v. Jersey City*, etc., R. Co., 20 N. J. Eq. 360.

But where the charter of a railway company required the consent of the city authorities, and a supplement was silent as to consent, and a second supplement was made subject to the restrictions, and carrying with it all the privileges of the original charter, it was held that the company must obtain the consent of the city authorities before it could extend its track. *Philadelphia v. Citizens' Pass. R. Co.*, 48 Leg. Int. (Pa.) 220.

Where a charter was granted to a company for the purpose of building and using a passenger railway in certain streets, subject "to all the ordinances of the council of the said city," the company, by accepting their charter in the terms in which it was granted, agreed to obtain the consent of the council to their work, agreeably to the ordinance of the city. *Philadelphia v. Lombard*, etc., R. Co., 3 Grant's Cas. (Pa.) 403.

**Nebraska—Vote of Electors.**—In *Nebraska*, consent to the construction and operation of a street railway may be obtained by a majority vote of the electors

of the municipality. *Comp. Laws of Nebraska*, 1881, § 622; *State v. Bechel*, 22 Neb. 158. In this case, the question of giving consent to a company to construct and maintain a street railroad upon the streets of the city of Omaha was submitted to the electors of said city on the day of the general city election, and the ballot upon that proposition was taken at the same place, by the same election officers, and but one poll list made, and the votes were canvassed and returned in some of the precincts and wards upon the same tally-sheet and return, but in all of the wards a separate ballot-box was prepared into which the vote upon the proposition was deposited, but without other formality to separate the vote from the vote of the general election. The registry of voters for the city election showed that there were over ten thousand names registered. There were over eight thousand votes cast at the general election. The number of votes cast upon the question of consent to construct and operate the street railway was sixteen hundred and fifty, of which fourteen hundred and seventy were in the affirmative, and one hundred and eighty in the negative. It was contended on the part of the plaintiff that the proposition submitted received the consent of the majority of the electors, for the reason that a majority of the votes cast upon this particular question were in the affirmative, and that the vote deposited in the ballot-box prepared for the reception of ballots cast upon the proposition should, for the purpose of the canvass, be taken as the full vote of the city. But the court held that there were not two elections—namely, the general city election and the election upon the proposition submitted; on the contrary, they constituted but one election, and such being the case a majority of the votes cast at such election was not in favor of the construction and operation of the proposed street railroad, as required by the law of the state, and, therefore, the consent of a majority of the electors was not given.

1. *People's Pass. R. Co. v. Memphis* (Tenn. 1875), 16 S. W. Rep. 973; 10 Wall. (U. S.) 38.

The same is true in case of a breach

making an agreement to observe, and be subject to, all ordinances of the city then in force, or thereafter to be passed, provided they are not unreasonable;<sup>1</sup> or it may require that the character of the road-bed, and of the poles, wires, track, etc., shall be first approved by the city council.<sup>2</sup> And in general it may impose any condition which in the exercise of its discretion it may deem proper as the terms upon which its consent shall be given;<sup>3</sup> except that it may not annex conditions which are repugnant to the grant of the franchise by the legislature, or to constitutional or statutory provisions upon the same general subject.<sup>4</sup>

**3. Consent of Abutters.**—As a street railway does not constitute an additional burden upon the land, the consent of owners of abutting property to its construction and operation is not essential, unless required by the constitution or by statute.<sup>5</sup> In many

of any other condition; as, for example, to construct the road within a given time. *Oakland R. Co. v. Oakland, etc.*, R. Co., 45 Cal. 365; 13 Am. Rep. 181. See *infra*, this title, *Construction of Road Within Specified Time*.

**1. The City's Consent May be Conditional.**—See *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444; *Providence v. Union R. Co.*, 12 R. I. 473.

It may require as a condition to its consent that the company shall engage to carry passengers for one fare to points beyond its line, the statutes having provided means by which the company may acquire a right to use the tracks of other companies which extend to such points. *People v. Barnard*, 110 N. Y. 548; 36 Am. & Eng. R. Cas. 70; *reversing* 48 Hun (N. Y.) 57.

Or it may require that the company shall keep the streets occupied by it cleaned and in good repair. *Pittsburgh, etc., R. Co. v. Birmingham*, 51 Pa. St. 41; *infra*, this title, *Repair of Streets*. Or that the company shall pay an annual bonus for the use of the streets. *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127; *Providence v. Union R. Co.*, 12 R. I. 473.

**2.** *Electric R. Co. v. Grand Rapids*, 84 Mich. 257; *Detroit v. Detroit City R. Co.*, 37 Mich. 558.

**3.** Under the *New York* constitutional and statutory provisions the city authorities have absolute power to grant or withhold their consent. *People v. Barnard*, 110 N. Y. 548; 36 Am. & Eng. R. Cas. 70, *rev'g* 48 Hun (N. Y.) 57. See also *Providence v. Union R. Co.*, 12 R. I. 473.

**4.** *In re Kings County El. R. Co.*, 105 N. Y. 97; *Harrisburg City Pass. R.*

*Co. v. Harrisburg* (Pa. 1892), 24 Atl. Rep. 56.

In *Electric R. Co. v. Grand Rapids*, 84 Mich. 257; 46 Am. & Eng. R. Cas. 26, where the ordinance granting the right to construct an electric railway provided that the poles should be approved by the city council, the council approved iron poles for the territory within the fire limits and wooden ones for that without. Afterwards the council attached a condition that in consideration of the approval of wooden poles, the company should provide transfer tickets without extra cost. It was held that this condition was void as being in conflict with section 14 of the incorporation act providing that a city shall not revoke its consent once given, nor deprive the company of the rights and privileges conferred. The council having made an approval could not be compelled by *mandamus* to do so again merely because of the void condition attached.

In *People v. Barnard*, 48 Hun (N. Y.) 57; 110 N. Y. 548; 36 Am. & Eng. R. Cas. 70, the city comptroller, after awarding the franchise to the highest bidder at the sale, required a bond containing conditions not required by the statute, nor by the resolution of the common council, and refused to accept a bond containing all the prescribed conditions. It was held that the comptroller had no right to require the bond he insisted on, and that *mandamus* would lie to compel his acceptance and approval of the bond offered.

**5.** *Smith v. East End St. R. Co.*, 87 Tenn. 626; 38 Am. & Eng. R. Cas. 470; *State v. Bell*, 34 Ohio St. 194; *Wiggins Ferry Co. v. East St. Louis Union R.*



of the states, however, there are constitutional or statutory provisions to the effect that no street railway shall be constructed or operated without the consent of a majority in interest of the owners of land abutting on the street to be occupied.<sup>1</sup>

Co., 107 Ill. 450; 20 Am. & Eng. R. Cas. 9; *Hodges v. Baltimore*, etc., R. Co., 58 Md. 603; 10 Am. & Eng. R. Cas. 270; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Paterson*, etc., Horse R. Co. v. *Paterson*, 24 N. J. Eq. 158. See *supra*, this title, *Legal Status*; *infra*, this title, *Right of Abutters to Compensation*.

In *Smith v. East End St. R. Co.*, 87 Tenn. 626; 38 Am. & Eng. R. Cas. 470, the charter provided that no street should be occupied until the consent of the city expressed by ordinance should be obtained; there was also a provision (Tenn. Code, § 1925) that the powers granted were "in no manner to interfere with the rights of private citizens or private property." It was held that this did not require the consent of owners of abutting property; that § 1925 was merely a saving of all rights of action for any unlawful use or obstruction of the public highways, or other wrongs or abuses.

1. See Const. of *New York*, art. 3 § 18; *Hunt v. Chicago Horse*, etc., R. Co., 121 Ill. 638, reversing 20 Ill. App. 283 (construing act of 1872, art. 1, § 5, par. 19); *Roberts v. Easton*, 19 Ohio St. 78.

In *Illinois* a requirement of this character is held not to be applicable to a regular steam railroad, though it is operated only in the streets of a city. *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 107 Ill. 450; 20 Am. & Eng. R. Cas. 9.

**Statute Requiring Consent and also that the Privilege be Awarded to the Best Bidder.**—Under a statute requiring the consent of abutting owners before a valid grant of the use of the street may be made and also that the right to build the road shall be awarded to the corporation or individual who offers the best terms to the public, it has been held that the consent need not in terms be given to the person who is the lowest bidder, for the contract can be awarded to him alone, and the consents, no matter by whom obtained or to whom given, are, in substance, assents to the construction and operation of the railway in the designated streets, and therefore must inure to the benefit of the best bidder. *State v. Bell*, 34 Ohio St. 194.

**Owners.**—The term "owners," as used in statutes requiring the consent of abutting property owners has been held to mean one who has at least a freehold estate. Under these statutes it has been held that abutting property may be represented by life tenants and tenants by the curtesy or dower, but that a father cannot consent for his daughter, the husband for his wife, tenants in common for each other, guardians for their wards, an administrator or an executor, with power to sell, for the estate, or a president of a private corporation without the authority of the board of directors, and a doubt has been expressed as to whether or not a city council may act in the matter for a municipal corporation. *Booth on St. R.*, citing *Rapp v. City*, etc., R. Co., 12 Wkly. L. Bull. 119; *Bullock v. West Chicago Rapid Transit R. Co.*, 23 Chic. L. N. 149.

*New York.*—In *New York* there is a constitutional requirement that no street railway shall be constructed except upon the consent of the owners of one-half in value of the property bounded on the street. But in case the consent of such property owners cannot be obtained, the supreme court is authorized to appoint commissioners who may, after hearing all the parties interested, determine whether such railway ought to be built, and their determination when confirmed by the court may be taken in lieu of the consent of the property owners. Constitution of *New York* (1883), art. 3, § 18. This provision has been construed in many cases:

The consent of the property owners need not be under seal, though it is required by statute to be in writing. *In re Cortland*, etc., Horse R. Co., 31 Hun (N. Y.) 72.

The report of the commissioners is inoperative until confirmed by the court. And the exercise of the discretion of the supreme court is not reviewable by the court of appeals. *In re Kings County El. R. Co.*, 82 N. Y. 95; 2 Am. & Eng. R. Cas. 431. In this case an application under the act of 1875 (similar to the constitutional provision above quoted) was signed by ten more than the requisite number of property hold-

ers and verified by one of them, who made oath that he knew each and saw them sign. The verification was held sufficient, it not being necessary that the application should be verified by each subscriber. See generally *In re Saratoga Electric R. Co.*, 58 Hun (N. Y.) 287; *In re Thirty-fourth St. R. Co.*, 102 N. Y. 343; *In re Lockport, etc., R. Co.*, 77 N. Y. 557; *In re New York Cable R. Co.*, 40 Hun (N. Y.) 1; *In re Rochester Electric R. Co.*, 123 N. Y. 351; 46 Am. & Eng. R. Cas. 157.

Where the refusal of the consent of abutting owners is based upon a submission to them of improper plans by the commissioners, such refusal does not authorize the commissioners to decide on amended plans, nor can the supreme court confirm the same if the amended plans have never been submitted to the property owners. *In re New York Cable R. Co.*, 109 N. Y. 32, *affirming* 45 Hun (N. Y.) 153.

Where the commissioners appointed under *New York Laws* 1884, ch. 252, to determine the question whether or not a surface street railroad shall be constructed in the streets of the city, have reported, as required by section 6 of the above act, to the general term by which they were appointed, that the road should not be constructed, the general term may not, in the absence of proof of fraud or manifest irregularity, send the case back for a further hearing, or appoint other commissioners to rehear the matter. But if it appears that the commissioners have refused to hear the parties or to take any evidence, or that the report is such as to show fraud or irregularity, the general term may send back the matter to the commissioners for a further hearing. An erroneous ruling, however, by the commissioners, in excluding testimony or in admitting immaterial or even incompetent or hearsay evidence, will not warrant it in so doing. *In re Nassau Cable Co.*, 36 Hun (N. Y.) 272.

Where a surface railroad company has been unable to obtain the consent of property owners to the construction of its line, as required by ch. 252. *New York act of 1884*, it may apply to the general term of the supreme court for the appointment of three commissioners to determine whether or not the railroad shall be constructed and operated, without first obtaining the consent of the municipal authorities. Such consent is in all cases an absolute

prerequisite to the acquisition of the right to construct any surface street railroad under the act, but it may be obtained either after or before that of the property owners, or after or before the application to the court. And it is sufficient to sustain such an application that the affidavits show that the consent of the property owners "cannot be obtained;" the reasons for the refusal need not be given. The fifth section of the act requires notices of the application to be served upon those property owners only whose names appear upon the assessment roll; occupants or lessees whose names do not appear are not entitled to notice. *In re Broadway Surface R. Co.*, 34 Hun (N. Y.) 414.

In *Benedict v. Seventh Ward R. Co.*, 51 Hun (N. Y.) 111, it appeared that the plaintiffs were the owners of the lot on the west side of a certain street in the city of Syracuse, on which was a dwelling in which they resided; that the defendant corporation had laid a single railroad track in the street, and the plaintiffs did not consent, pursuant to the act under which the defendant was incorporated, that the road might be constructed in the street or the track laid in the street in front of their lot. Upon the trial, the plaintiffs made no attempt to prove that the consent required by the constitution and the street railroad act had not been obtained, but sought to maintain an action by an offer to prove that the center line of the street and the plaintiffs' east line coincided, and that the west rails of defendant's track were on their land without their consent. Upon an appeal from a judgment dismissing the complaint, it was held that as the action was brought to restrain the defendant from laying or operating a track in the street "upon which the plaintiffs' lands abut," upon the ground that defendant had not obtained the consent for the construction of the road from the owners of one-half in value of the property bounded on the street, or of the general term of the supreme court, as required by section 18, art. 3, *New York Const.*, and of the *Street Surface Railroad act*—but not on the ground that the plaintiffs owned the land in front of their lot and had not consented to its use by the defendant—the trial court properly held that the plaintiffs were not entitled to recover upon the theory that the defendant was a trespasser upon the land, if

In such case, the consent of the owners is absolutely essential and they may enjoin the construction of the railway unless it be obtained; the mere intention of applying for consent in the hope or expectation of obtaining it, gives no right.<sup>1</sup> But it seems that those not owners of abutting property, though citizens and taxpayers, have no ground of complaint.<sup>2</sup> And in an application for an injunction, the action of the city council in granting permission to construct a railway is not conclusive against property owners of the fact that a majority's consent has been obtained.<sup>3</sup>

any, which the plaintiffs owned in the public street.

1. *Roberts v. Easton*, 19 Ohio St. 78; *Hunt v. Chicago Horse, etc.*, R. Co., 121 Ill. 638, *rev'd* 20 Ill. App. 283; 2 Dill. on Corp. (4th ed.), § 721 (572); *In re People's R. Co.*, 112 N. Y. 578.

And until the requisite consent is obtained the company has no such right in the street as will entitle it to an injunction against the construction of another road therein, although its route has been located by commissioners as required by statute. *New York Cable R. Co. v. Forty-second St., etc.*, R. Co., 13 Daly (N. Y.) 118.

Paragraph 90, § 1, art. 5, of the *Illinois* act for the incorporation of cities and villages prohibiting the grant of the right to lay any railroad track in any street to any steam or horse railway company, except upon a petition of the owners of the land representing more than one-half of the frontage of the street, etc., is a limitation upon the power granted by paragraphs 9, 24, 25 of the same section. Such power lies dormant and cannot be exercised until the requisite number of lotowners along the street authorize its exercise by petition. When this is done, the council is vested with power to act, and not before. *Hunt v. Chicago Horse, etc.*, R. Co., 121 Ill. 638, *rev'd* 20 Ill. App. 282.

But under a charter requiring that, before a railway shall be constructed in the streets of a city, the consent of a majority of the property owners along the proposed route, and of the city, should be first obtained, the consent of a majority of the property owners is not a condition precedent to the consent of the city; the consents are independent, and it is immaterial which is first obtained. *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

2. *Simmons v. Toledo*, 5 Ohio C. Ct. 124; *Sommers v. Cincinnati*, 8 Am. L.

Rec. 612; *Harrison v. Mt. Auburn Cable R. Co.*, 17 Wkly. L. Bull. 265. Compare *Knorr v. Miller*, 5 Ohio C. Ct. 609.

3. *Roberts v. Easton*, 19 Ohio St. 78. In this case the court by Day, J., said: "If the action of the city authorities is regarded as a conclusive and unquestionable determination of the facts requisite to the legality of their action, then the disabilities imposed by statute will be removed by construction and the power sought to be restrained is practically unlimited. The power of the city authorities to act in the premises, does not depend upon something to be done or determined by them, but upon a condition required by the statute. Nor is there anything in the act that implies that they are authorized to determine by their own action that the prerequisite consent has been obtained upon which they have the power to act." See also *Sommers v. Cincinnati*, 8 Am. L. Rec. 612; *Bullock v. West Chicago Rapid Transit Co.*, 23 Chic. L. N. 149; *Corry v. Gaynor*, 22 Ohio St. 584; *Hays v. Jones*, 27 Ohio St. 218. But it will not be presumed that the municipal authorities acted without such consent when their proceedings purport to be predicated upon it. *Cincinnati College v. Nesmith*, 2 Cinn. Super. Ct. Rep. 24.

In *Ohio* it is held that while the common council may not evade the statute requiring the consent of adjoining owners, by substituting one route for another, it may, however, allow the application as to a part only of the route covered by the application and petition. *Simmons v. Toledo*, 5 Ohio C. Ct. 124.

**Acquiescence—Evidence of Consent.**—The acquiescence of property owners, whose consent is necessary as a condition precedent to the construction and operation of a railway, in standing by and seeing the company construct and operate their road under a claim of right, will be regarded as evidence of

For the purpose of consent the municipality is to be regarded as the owner of an open public square dedicated to the public use forever, whether the fee be in the corporation or not, or in whomsoever it may be.<sup>1</sup>

It has been intimated by very respectable authority that lot-owners may attach reasonable conditions to their consent.<sup>2</sup>

Where a single-track street-railway has been lawfully constructed with the requisite consent of the owners of property on the street, and it is afterwards proposed to construct another track on the same street, the consent of any of the property owners to the construction of the first track cannot be deemed an assent to the construction of the second against those who remonstrate against the added track.<sup>3</sup> Property owners may revoke their consents before final action is taken by the municipality.<sup>4</sup>

**4. Construction of Road Within Specified Time.**—A provision in a street railway franchise requiring the road to be constructed within a specified time is a condition subsequent, failing to perform which, the rights of the company are liable to forfeiture.<sup>5</sup>

consent. *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

And after the lapse of ten years, and the acquiescence of property holders, and the destruction of all written evidences by fire, very slight evidence will suffice to establish the fact that consent was obtained as required by the statute. *Chicago City R. Co. v. People*, 73 Ill. 571.

1. *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

2. *People v. Chicago West Div. R. Co.*, 118 Ill. 113. In this case, certain property owners in the city of Chicago petitioned the municipal authorities to grant permission to a street railway company to extend its line to a point named, and requested the council to pass an ordinance or to issue such order as it might legally issue, to compel the company to lay its tracks and run its cars upon the said extended line without unnecessary delay. It was held that the petition did not request the grant of the permission upon any condition whatever, although the consent to the laying of the track might have been made to depend upon conditions which the council could not have disregarded.

3. *Roberts v. Easton*, 19 Ohio St. 78. But where the original grant was for a double track, the city, after expenditures for construction and equipment by the company, may not limit it to a single track. *Burlington v. Burlington St. R. Co.*, 49 Iowa 144. See *supra*, this title, *Consent of Local Authorities*.

4. *Bullock v. West Chicago Rapid Transit Co.*, 23 Chic. L. N. 147; *Hays v. Jones*, 27 Ohio St. 218.

5. *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632; 20 Am. & Eng. R. Cas. 17; *People v. Los Angeles Electric R. Co.*, 91 Cal. 338; *People v. Broadway R. Co.*, 126 N. Y. 29; 48 Am. & Eng. R. Cas. 692; *reversing* 56 Hun (N. Y.) 45; *In re Brooklyn El. R. Co.*, 125 N. Y. 434; *affirming* 11 N. Y. Supp. 171; *In re New York Cable R. Co.*, 40 Hun (N. Y.) 1; *Atchison St. R. Co. v. Nave*, 38 Kan. 744; 36 Am. & Eng. R. Cas. 29. See generally *CONDITION*, vol. 3, p. 422; *CORPORATIONS*, vol. 4, p. 302; *ESTATES*, vol. 6, p. 900; *infra*, this title, *Loss of Rights and Franchises*.

Section 502, *California Civ. Code*, does not declare that a failure to comply with the provision requiring work to be commenced within one year shall work a forfeiture, but that a failure to comply with that and also the provision which requires the work to be completed within three years, shall have such effect. *Omnibus R. Co. v. Baldwin*, 57 Cal. 160.

**What Amounts to Construction—Question of Fact.**—To prevent a forfeiture for failure to construct a road within a specified time there must be a substantially constructed track, and what constitutes such a track is usually a question of fact for the jury; where it is such, it is error to instruct the jury that the road was sufficiently constructed "if

the ties were laid, and the rails placed and spiked thereon." *Houston v. Houston, etc., R. Co.*, 84 Tex. 581; 50 Am. & Eng. R. Cas. 380.

**Several Routes.**—Defendant, a street railway corporation, organized in pursuance of ch. 303, *New York* laws of 1868, and which had constructed and was operating its road in the city of Brooklyn, was, by an amendatory act procured by it, passed in 1860 (ch. 451, *New York* Laws of 1860), authorized to lay tracks for several distinct routes, some of which were beyond the corporate limits, but all of which were parts of an entire system, on certain streets, avenues and plank roads specified, which had been at that time legally opened and graded. Some of the routes were authorized to be extended and others to be laid through certain other streets whenever "they shall have been legally opened and graded." Defendant was required to complete tracks upon the said several streets and avenues or roads named on or before October 1st, 1861, "or as soon thereafter as the said streets and avenues within said city shall have been opened, graded, and paved, and upon any plank road or roads whenever the consent of the plank-road company shall have been obtained." In an action to have declared forfeited the franchise granted by the act of 1860, it appeared that on some of the routes, defendant, in that year, constructed a single line or track through some of the streets named which were not opened, graded and used as streets, and operated the same until the year 1874, when it removed the track and had not since maintained or operated a road therein; and for twelve years prior to the commencement of the action it had not maintained or operated a road upon any of the routes mentioned in said act, although most of the streets named had, at that time, been "opened, graded, and paved." The defendant contended that it was not bound to build its road on any one of the routes until all the streets upon it were opened and graded so that the road could be constructed on the whole route. It was held that under the act the defendant was required to lay its tracks within the time specified upon such of the streets named as were opened and graded, and upon the other streets so soon as they were opened, graded and paved; that defendant could not accept the franchises and leave them in abeyance; that the fact that it would not have been profitable to construct

roads on the route specified, until each route was opened the entire length thereof, was no excuse for failure to comply with the requirements of the act, and that such failure was a good ground for forfeiture, and the court had power to declare the franchise forfeited. *People v. Broadway R. Co.*, 126 N. Y. 29; 48 Am. & Eng. R. Cas. 692.

**Right Reserved by City to Determine When Company Shall Build Other Lines**—**Sufficiency of Notice to Build.**—By the ordinance authorizing the construction of a street railway on one of several designated streets in the city of Fort Worth, the municipality reserved to itself the right to determine when the demands of traffic would necessitate a road over any of the others; and if the company, on being notified on which of the streets a new railroad was desired, did not comply with the notice in twelve months, then the right to those streets was forfeited. The company accepted the ordinance and built the road on one of the streets. It was held that the passage of an ordinance thereafter, giving again to the company the right to construct a street railway over two of the streets designated in the first ordinance, and requiring their completion within ninety days, was a sufficient notice under the requirements of the first ordinance, that the city desired a new road built; and a failure to build thereafter, within the time after notice required by the first notice, operated a forfeiture of the right to build on any of the streets designated in the first ordinance. *Fort Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 163.

**When Time Begins to Run Under N. Y. Rapid-transit Act.**—Under "The Rapid-transit act" of *New York*, which required the commissioners to fix the time within which roads must be constructed, it is considered that the time is properly fixed as beginning to run from the time of obtaining the requisite consent, omitting the time unavoidably consumed in legal proceedings of condemnation or otherwise. *New York Cable Co. v. New York*, 104 N. Y. 1; *In re Kings County El. R. Co.*, 105 N. Y. 97.

**Extension of Time—Postponement of Right—Not Abandonment.**—Where the charter authorized the company to build a single or double track road over any streets in the city as had been or should be authorized by the council, and full permission was given by ordinance to lay a track, in which a time was named for its completion, and a forfeiture pro-

But where the failure to complete the road is due to extrinsic causes, in no wise the fault of the company, for example, by injunctions,<sup>1</sup> or by interferences on the part of the police officers of the city acting under the direction of the mayor,<sup>2</sup> the right of the company is not lost—and in the latter case the city may be enjoined from interfering with the laying of the track after the expiration of the time. And it seems that if the municipality

vided for in case of non-completion, and before the expiration of the time the ordinance was amended and the time extended for the period of ten years, it was held that this latter ordinance extended the time for ten years after the expiration of the time fixed by the previous ordinance. After this latter ordinance was adopted the company passed a resolution accepting the terms of the ordinance on condition of the repeal of certain other ordinances, and agreed to postpone the laying of the track for the time mentioned. Afterwards the council accepted the proposition contained in the resolution reciting that the company had obligated itself to postpone the laying of the track for the period of ten years and the amendatory ordinance was affirmed. It was held that this did not constitute an abandonment of the right to construct, but merely a postponement of the right. *McNeil v. Chicago City R. Co.*, 61 Ill. 150.

**Stipulation that City May Resell Privilege Upon Default—What Included.**—An article of a contract entered into between the city of Jefferson and K., granting to the latter the right to build street railroads through the corporate limits of the city, stipulated that in case of failure by the contractors of either of said roads to commence or complete either of said works or any part thereof within the period therein prescribed, or in case the councilmen are dissatisfied with the manner in which the works are being executed, the council shall have the right to annul the contract without putting the contractor in default. It was further stipulated that in the event of the failure of the contractor to complete the works within the time prescribed he should forfeit all claims for work done, and the municipality shall have the right to resell the privilege and right of way at the risk of the contractor and his sureties *in solido*. It was held that under the authority of this article to resell, nothing but the right of way and privilege could

be resold, and that if the railroad was once fairly completed, this provision, having fulfilled its coercive purpose, ceased to have further force. *Young v. Magazine St. R. Co.*, 24 La. Ann. 53.

**Sufficiency of Complaint.**—It is held that where the complaint in an action to forfeit a charter does not set out when the company began the work of construction, and thereby show that the limit of time has elapsed within which the work must be done, it fails to state a cause of action. *People v. Los Angeles Electric R. Co.*, 91 Cal. 338.

1. *State v. Cockrem*, 25 La. Ann. 356. In this case it was also held, that because the injunction taken in 1866 was not dissolved until 1872, it was not to be inferred that it was kept so long in force by the wish and connivance of the company, when the city was a party to the injunction suit, and having the same right to push the case, did not do so. See also *Chicago v. Chicago, etc., R. Co.*, 105 Ill. 73; 10 Am. & Eng. R. Cas. 306.

In *People v. Broadway R. Co.*, 126 N. Y. 29; 48 Am. & Eng. R. Cas. 692, *rev'd* 56 Hun (N. Y.) 45, it was held that the neglect of a street railway company to lay its tracks for twelve years was a cause for forfeiture on the ground of non-user; and the fact that the company was prohibited by a statute from building one of its lines was no reason for not forfeiting the franchise therefor when it appeared that when the statute was passed the company had already been in default for five years. It was held, also, that a later statute providing that "failure of any railroad company to construct its road heretofore shall not cause a forfeiture of its corporate powers," did not apply to a railroad company which had willfully and intentionally failed to construct its road, although able to do so. *Compare In re Kings Co. El. R. Co.*, 105 N. Y. 97, *rev'd* 41 Hun (N. Y.) 425.

2. *Chicago v. Chicago, etc., R. Co.*, 105 Ill. 73; 10 Am. & Eng. R. Cas. 306.

the same grade does not release it from the duty to raise or lower it if subsequent changes in the street necessitate a change.<sup>1</sup> The rails and ties must be of such a kind, and so laid, that the public will not be prevented from making use of that part of the street for their vehicles.<sup>2</sup>

The street railway company becomes liable for all injuries resulting as a proximate consequence of failure to comply with this duty.<sup>3</sup> Upon the principle that there can be no action for dam-

with which the plaintiff was thrown out of his carriage and injured. It was held that the company was guilty of negligence, and that recovery might be had; that it was immaterial whether the projection of the spike resulted from the failure of the city to repair the street at the place of accident. See also *Carpenter v. Central Park, etc., R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 416.

1. *Little Rock v. Citizens' St. R. Co.* (Ark.), 50 Am. & Eng. R. Cas. 456 (in this case provision was made in the charter that the company should change its grade to conform always to that of the street); *Ashland St. R. Co. v. Ashland*, 78 Wis. 271.

2. *Spokane St. R. Co. v. Spokane Falls*, 46 Fed. Rep. 322; *Carpenter v. Central Park, etc., R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 416; *Fitts v. Cream City R. Co.*, 59 Wis. 323; 15 Am. & Eng. R. Cas. 462 (injury caused by defective turntable used by the street railway company); *Alton, etc., R. Co. v. Deitz*, 50 Ill. 210; 99 Am. Dec. 509.

Where the company has no authority to change the construction of the pavement between the rails of its track at the point where the city had left a depression for a surface drain to a grating opening into the sewer, it is not liable for an injury to a horse caused by stepping into the depression, though the statute requires such companies "to have and keep" the space between their tracks in permanent repair. *Snell v. Rochester R. Co.* (Supreme Ct.), 19 N. Y. Supp. 496.

A company authorized to construct a railroad to be operated exclusively with horse power and for the purpose of passenger travel, has the right to lay only such rails as are suitable for the purpose of a passenger railway, and cannot subject the public to the greater inconvenience of having in the streets a heavy rail to be used for the movement of freight trains. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 519.

But a company chartered under a

special act of the legislature and authorized to carry freight as well as passengers and to use steam as a motive power, although it is named in the title of the charter as a passenger railway, has the power to change its rails from the ordinary size in use by street railways to the heavier rails commonly used in the transportation of freight by steam railways, notwithstanding they are more obstructive of public travel. *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1; 46 Am. & Eng. R. Cas. 219. See *Easton, etc., Pass. R. Co. v. Easton*, 133 Pa. St. 505; 43 Am. & Eng. R. Cas. 253; 19 Am. St. Rep. 658, as to the power of a street railway company to change the style of its rails where the rail adopted creates no greater inconvenience in the use of the street.

3. **Liability for Injuries Resulting from Negligent Construction.**—In addition to the cases already cited, the general rule of the text is upheld and applied in the following cases: *Galveston City R. Co. v. Nolan*, 53 Tex. 139; 3 Am. & Eng. R. Cas. 387; *Cline v. Crescent City R. Co.*, 41 La. Ann. 1031; *McKenna v. Metropolitan R. Co.*, 112 Mass. 55; *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133; *Schild v. Central Park, etc., R. Co.*, 133 N. Y. 446; *Eagen v. Forty-second St., etc., R. Co.*, 19 N. Y. St. Rep. 676.

The fact that the company in constructing its track has complied with all the requirements of an ordinance of the city prescribing the manner in which the road shall be constructed, and that the construction of the road has been examined and approved and accepted by an agent of the city, charged with the duty of such examination, is not a defense to an action by an individual for injuries received in crossing the track, from defects in its construction. *Delzell v. Indianapolis, etc., R. Co.*, 32 Ind. 45.

But the burden rests upon the plaintiff to show negligence on the part of the company. And where the evidence

ages arising from the proper exercise of a lawful authority, street railway companies are not liable for consequential damages necessarily occasioned by the construction of the road.<sup>1</sup>

When the municipal authorities have the power to determine on what particular streets a railway shall be constructed, the

fails to show that the injury resulted from any neglect of duty on the part of the company there can be no recovery. See *Nivette v. New Orleans, etc.*, R. Co., 42 La. Ann. 1153; *Eagen v. Forty-second St., etc.*, R. Co., 19 N. Y. St. Rep. 676.

In *McKenna v. Metropolitan R. Co.*, 112 Mass. 55, a party driving along a switch was run into by a street car improperly on the switch. The fact of the car being on the switch was owing to a defective switch connection which it was the duty of another company to keep in repair. But the company using the track was held liable; it could not escape by showing the neglect of duty by the other company.

In *Fitts v. Cream City R. Co.*, 59 Wis. 323; 15 Am. & Eng. R. Cas. 462, a sleigh running along the street, was caught in a projecting catch of a turntable and damaged. It was held that the question of negligence in the construction of the table was for the jury.

Where the evidence establishes negligence on the part of the company in the construction of its track, the fact that it does not appear that any complaint was ever made to the company of the condition of its track, does not relieve it from liability, though it may be considered by the jury in rendering a verdict. *Schild v. Central Park, etc.*, R. Co., 133 N. Y. 446. *affirming* 16 N. Y. Supp. 701.

**Improper Cable Slot.**—In *Griveaud v. St. Louis Cable, etc.*, R. Co., 33 Mo. App. 458, it appeared that G. was injured while driving along the street, by the wheels of one side of his buggy dropping through the slot of a cable road. The evidence showed that G.'s buggy wheels were of the standard width, that the slot constructed by the defendant was likely to widen by the action of frost and thaw and the passage over it of heavy freight wagons, and that defendant was fully aware of these facts. It was held that if the unusual width of the slot was owing to defects in original construction and design, the defendant was liable; and that if the injuries resulted from a widening of the slot, which was liable to occur, de-

fendant was equally liable, because the duty of inspection was commensurate with the necessity of such inspection. See also for a case of similar injury, *Keitel v. St. Louis Cable, etc.*, R. Co., 28 Mo. App. 657, holding, also, that it is not necessary that the company should have had notice of the defect.

**Electric Wire Improperly Hung.**—The case of *United Electric R. Co. v. Shelton*, 89 Tenn. 423; 46 Am. & Eng. R. Cas. 206, was an action for damages for the death of a horse caused by its coming in contact with the trolley wire of the electric railway company. It appeared that the wire of a telephone company had become impaired where it crossed the railway wire, and was in such a condition as to arrest the notice of a prudent man engaged in the business of either company. The fall of a burning building broke the telephone pole, which caused the telephone wire to break and fall across the uninsulated railway wire. While in this condition, the horse came in contact with the telephone wire and was killed. It was held that both companies were guilty of negligence, and liable for the value of the horse.

1. See NUISANCES, vol. 16, p. 1000; RAILROADS, vol. 19, p. 923; Wood on Nuisances, § 753 *et seq.*; *Briggs v. Lewiston, etc.*, Horse R. Co., 79 Me. 363; 32 Am. & Eng. R. Cas. 167; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; 17 Am. & Eng. R. Cas. 184.

In *Inter-State Consolidated, etc.*, R. Co. v. *Early*, 46 Kan. 197, a city having established the grade of a street, authorized a street railway company to construct its road thereon. In bringing the street to the grade the company made a deep cut in front of plaintiff's property. Under the *Kansas* statute a city may establish the grade of its streets, and it is only when an established grade is changed that damages can be allowed to property owners. It was held that the company was not liable for damages resulting from the change of grade, nor for the failure of the city to bring to the grade that part of the street not occupied by the company.

A company required by ordinance to



that a slight deflection may be made.<sup>1</sup> For a material departure from its authorized route the company may be indicted for maintaining a public nuisance, or may be enjoined from operating its road.<sup>2</sup> Where the company has been duly authorized to use a street, and there only remains some ministerial duty to be performed by the officers of the municipality before it can be put in position, the court will, in the event of refusal by such officers, award writ of *mandamus* to compel the performance of the necessary duty. The extension of a street railway can be authorized only by

was held that the company could derive no benefit from a general ordinance granting authority to construct street railways on any street in a city, where no route had been previously selected by the company and submitted to the council for approval, since the ordinance was void, not having been passed in pursuance of the requirements of the charter. *West End, etc., R. Co. v. Atlanta St. R. Co.*, 49 Ga. 151. See also *Concord v. Concord Horse R. Co.*, 65 N. Y. 630, for an application of this rule to turn-outs, etc., which must be located in the manner prescribed.

1. *Elmira v. Maple Ave. R. Co.*, 4 N. Y. Supp. 943; *State v. Newport St. R. Co.*, 16 R. I. 533; *Com. v. Wilkesbarre, etc., R. Co.*, 127 Pa. St. 278 (the company departing slightly from the center of the street in order to reach its own property).

2. See *supra*, this title, *Unauthorized Use of Streets*, for a full discussion of this subject and of the proper remedies to be used.

3. *In re Third Ave. R. Co.*, 121 N. Y. 536; 43 Am. & Eng. R. Cas. 222; *Com. v. R. Co.*, 14 W. N. C. (Pa.) 402; *State v. Cockrem*, 25 La. Ann. 356. In this latter case, a city surveyor was compelled to furnish the levels and plans required for the building of the road, this duty being enjoined upon him by the original ordinance authorizing the construction of the road. See also *Trenton v. Trenton Horse R. Co.* (N. J. 1890), 19 Atl. Rep. 263.

**Re-Location.**—A company organized under the New York Street-railway Law of 1884, which has obtained the right to maintain a route on certain streets, is not authorized under section 23 of the General Railroad Law of the State to change its route without the consent of the local authorities, or the consent of the owners of private property upon which the new line is proposed to be laid. *In re South Beach R. Co.*, 53 Hun (N. Y.) 131.

The charter of a railway company conferred the power of re-location of an ordinance of a city was passed giving the company permission to construct and operate its road in and on certain streets of the city, and on a bridge to be built at a certain place. Such ordinance was confirmed by a vote of the legislature, which conferred the same power as the ordinance, until the same might be altered, changed or amended by the city council, with the consent of the company, and gave the company power to amend, alter or change the ordinance, with the company's consent. It was held that the company, having once located and built its track within the city, had still ample authority, with the consent of the city, to locate its track within the city, and take up its former track. *McCart v. Chicago, etc., R. Co.*, 112 Ill. 611; 611 Am. & Eng. R. Cas. 326.

A railroad company which has been authorized by the city to change the track of its railroad cannot be enjoined from so doing by an individual property holder situated on the line of the road upon the ground that such change would likely prove detrimental to the public health and would therefore constitute an irreparable injury to him. *Holmes v. New Orleans City R. Co.*, 23 La. Ann. 535.

**Parallel Lines.**—Where statutes have been enacted for the protection of existing street railway franchises, and prohibiting parallel lines to be laid in a street within certain distances, the test of what is a parallel road cannot always be determined either by the location of the termini or the general direction of the entire line; to constitute the parallelism which is within the prohibition of the statute, it is sufficient that the two roads are substantially parallel and the infringement is a substantial infringement. *St. Louis R. Co. v. Northwestern St. Louis R. Co.*, 69 Mo. 65; *St. Louis R. Co. v. South St. Louis*

legislature, or its duly empowered agents ;<sup>1</sup> and where this power has been delegated by the legislature to the common council of a city, the courts will not interfere with its exercise, except in a plain case of fraud or abuse.<sup>2</sup> The grant of a franchise to extend a street railroad, though subject to the city charter then existing, will not be controlled to its destruction or material impairment by a subsequent charter adopted by the city.<sup>3</sup>

**X. USE OF STREETS—OPERATION OF ROAD—1. Repair of Streets.**—Independently of charter provisions and of subsequent statutes and ordinances, the street railway company is bound so to construct and maintain its road that the free use of the whole street by the public shall not be materially impaired.<sup>4</sup> And if any injury occurs by reason of failure so to construct and repair its tracks,

R. Co., 72 Mo. 67; 6 Am. & Eng. R. Cas. 624.

Street railways are not within the provisions of the constitution of *Pennsylvania*, art. 17, § 4, prohibiting the consolidation of parallel or competing railroads, since they are not competing within the sense of the prohibition. *Gyger v. Philadelphia, etc.*, R. Co., 136 Pa. St. 96.

The *New York* Laws of 1884, ch. 252, § 15, authorizing companies organized thereunder to lease or transfer their rights to run upon or over any portion of their railroad track, to any other street surface railroad company authorized to run upon such a route, contained a proviso that the section should not be construed to authorize any of the said companies to lease their rights to any other company owning and operating a parallel road. This proviso was held not to apply to a company owning a road which happened to be parallel for a portion of its length with another, but which also owned lines extending beyond the parallel portions, so as to prevent the companies from making traffic arrangements with each other for the use of their respective lines greatly to the benefit of the public; the intention of the legislature being to prohibit the monopoly of parallel lines and acquisition by one railroad company of the exclusive possession and control of a parallel road. *People v. O'Brien*, 111 N. Y. 1; 36 Am. & Eng. R. Cas. 78; 7 Am. St. Rep. 684.

1. *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63. In this case it was held that under the *New York* act of 1860, which made it unlawful to lay, construct, or operate, any railway in or upon the streets of the City of New York, except under the authority of the

legislature, the common council of the city could not authorize an extension of a street railway, unless, perhaps, where such extension was a necessary incident to the enjoyment of the previous grant.

2. *Sims v. Street R. Co.*, 37 Ohio St. 567.

3. The ordinance of the City of St. Louis, requiring street railway companies to keep the street between the rails, and to the extent of twelve inches outside of each rail, in perfect repair, etc., applies to an extension of a street railroad under a new charter obtained from the municipal authority. Although the original line had obtained an immunity from this burden, by accepting the provisions of previous legislation and paying a license on each car in addition to the annual tax required, it was held that this privilege could not extend to a new and additional franchise. *St. Louis v. Missouri R. Co.*, 13 Mo. App. 524.

The *Pennsylvania* constitution of 1874, and the act of 1878 making the consent of the local authorities necessary before a street railway company could construct its road in any city, town, etc., does not apply to a street passenger railway company incorporated in 1863; and being permitted by the legislature to extend its line, it cannot be enjoined by the town council from building its extension on the ground that their consent has not been obtained. *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. St. 1; 36 Am. & Eng. R. Cas. 125.

4. **Common Law Duty.**—*Memphis, etc.*, R. Co. v. State, 87 Tenn. 746; 38 Am. & Eng. R. Cas. 429; *Harrisburg v. Harrisburg Pass. R. Co.*, 1 Pears. (Pa.) 298. See *supra*, this title, *Construction; Road-Bed, etc.*

N. Y. 572; 26 Am. & Eng. R. Cas. 546, *affirming* 31 Hun (N. Y.) 241.

The same provision in respect to a single track has been held to mean between the rails and one foot on either side. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231.

A requirement in a charter that the company shall "keep the surface of the street, inside the rails and for two feet four inches outside thereof, in good repair," is construed to mean two feet four inches on each side of the track. *People v. Fort St., etc., R. Co.*, 41 Mich. 413.

A city ordinance granting to a street railway company the right to use certain streets, made provision for payment by the company of the expense of certain street improvements. It was held that it was only future improvements with which the company was chargeable, not improvements already made. *Gulf City St. R., etc., Co. v. Galveston*, 69 Tex. 660; 32 Am. & Eng. R. Cas. 300.

A company was required by ordinance to keep the pavement between its rails in good repair, and it was made the duty of the city to furnish material. The company, being directed to repair, asked leave to repave with cobblestones; the city refused to furnish materials, but made no objection to cobblestone, and offered no suggestions. In an action by the company to recover the cost of the materials, it was held that it was not bound to show that the necessity for repairs did not arise from its own neglect; and that any fit material might be used, and its value recovered from the city. *Fort Wayne, etc., St. R. Co. v. Detroit*, 39 Mich. 543; 34 Mich. 78.

The charter and an ordinance required that the company shall keep the whole street "in perpetual good order and repair from curb to curb." Under this it was held that the company was bound to keep the street cleansed from dirt and filth necessarily accumulating there. *Pittsburgh, etc., Pass. R. Co. v. Birmingham*, 51 Pa. St. 41.

Under a statute which provides that street railway companies shall pay a tax in lieu of repairing streets "outside of their tracks," the companies having double tracks on a street are not liable for the expense of repairing the street between the double tracks. *St. Louis v. St. Louis R. Co.*, 50 Mo. 94.

"Macadamizing" is not paving within the meaning of an ordinance requiring street railway companies to pave cer-

tain parts of the street. *Leake v. Philadelphia* (Pa. 1892), 24 Atl. Rep. 351; *State v. Ramsey County*, 33 Minn. 164.

In *Pittsburgh, etc., Pass. R. Co. v. Pittsburgh*, 80 Pa. St. 72, it was held that a provision in the charter of a railway company requiring them to keep so much of the street "from curb to curb as may be used by them in perpetual good repair at the expense" of the corporation, required them to remove a deposit of rocks, stone, etc., eight or ten feet in depth, and one hundred feet in length, which was washed down by an extraordinary rain.

#### Agreement to Re-construct the Street.

—A provision of an ordinance granting a charter to a street railway company, which requires the company to "reconstruct said street," was held not to require the company, after completing its road with the same kind of material as that used in the city, to reconstruct its portion with new and different material subsequently adopted by the city. *Norristown v. Norristown Pass. R. Co.* (Pa. 1892), 23 Atl. Rep. 1060. Such a provision is satisfied with but one reconstruction. *Borough v. R. Co.*, 9 Pa. Co. Ct. Rep. 98.

**Repaving.**—In *Fort Wayne, etc., R. Co. v. Detroit*, 34 Mich. 78, where there was an ordinance requiring a street railway company "to keep the surface of the street inside the rails and two feet four inches outside thereof, in good order and repair; provided, however, that upon the repaving of said street the materials for repaving shall be supplied at the expense of the city," and the city directed the company to "raise and repair" that portion of the pavement which is within the rails, it was held that the city was bound to bear the expense of the materials as such repairs amounted to repaving within the meaning of the proviso. And see *Fort Wayne, etc., R. Co. v. Detroit*, 39 Mich. 543.

**Change of Grade.**—In *Ashland St. R. Co. v. Ashland*, 78 Wis. 271, where by the ordinance under which, and subject "to the conditions and limitations" of which, a railway company was authorized to construct its track, it was provided that "the road-bed shall at all times correspond with the actual grade of the streets," and that in case of change, by the common council, in the actual grade of any of the streets, the railway company shall relay the track of said railway to correspond to such grade at its own expense, it was held

trarily fixed by the municipality, but the method appointed by the legislature must be pursued.<sup>1</sup>

But, in the absence of authority acquired by the means just mentioned, one street railway company has no right to use the tracks of another company without its consent, and will be prevented from so doing by injunction.<sup>2</sup> A statute prohibiting street railway companies from leasing their rights or franchises

Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 223; 36 Am. & Eng. R. Cas. 463. See also Cambridge R. Co. v. Charles River St. R. Co., 139 Mass. 454; 26 Am. & Eng. R. Cas. 62; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262.

1. In the absence of special statutory provisions the same proceedings must be had to determine the amount of compensation as where any other private property is condemned or taken. See EMINENT DOMAIN, vol. 6, p. 604; Canal, etc., R. Co. v. Crescent City, etc., St. R. Co., 41 La. Ann. 561; 40 Am. & Eng. R. Cas. 329; Canal, etc., R. Co. v. Orleans R. Co., 44 La. Ann. 54.

A municipality in granting to any company a franchise may reserve the right to authorize other companies to use its tracks, and also the right to fix the compensation; and, in such case, the company by accepting the franchise becomes bound by the stipulation and cannot claim the right to have damages assessed in the usual way. Kinsman, etc., R. Co. v. Broadway, etc., R. Co., 36 Ohio St. 239; 5 Am. & Eng. R. Cas. 227; Pacific R. Co. v. Wade, 91 Cal. 449; 50 Am. & Eng. R. Cas. 362.

In *Massachusetts*, the compensation to be paid is to be determined by the board of railroad commissioners, and it is within their discretion to establish rules apportioning the expenses, and regulating the mode of estimating compensation. No exception lies to their exercise of this discretion when no question of law arises. Cambridge R. Co. v. Charles River St. R. Co., 139 Mass. 454; 23 Am. & Eng. R. Cas. 62; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290. Formerly the compensation was determined by commissioners appointed by the court. Metropolitan R. Co. v. Broadway R. Co., 99 Mass. 238; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Boston, etc., R. Co. v. Western R. Co., 14 Gray (Mass.) 253.

In *New York*, it is provided by statute that the compensation for the joint use of a limited portion (one thousand

feet) of the track of another company shall be determined by commissioners appointed by the court, or by the board of railroad commissioners, when the companies interested shall unite in request for that board to act. Rev. Statutes (1889), p. 815. Similar provisions will be found in the statutes of other states.

A, a street railroad company, obtains the right to construct and operate its road through certain streets upon certain express terms and conditions, and subject to such conditions as the council might thereafter prescribe. Afterwards another company, C, was organized, to which was granted the right of way along certain streets, and also upon a portion of the route already occupied by A, and upon its track, upon the payment to A of a reasonable compensation. These companies failing to agree upon the amount to be paid, the council prescribed a certain sum which was tendered to A, but refused by it. Thereupon, A brought suit against C to enjoin it from using any portion of its track, alleging, among other things, that the compensation tendered was inadequate; all of which C denied. It was held, first, that A did not acquire an exclusive right to use the route upon which its road was constructed; second, that A's property in its track was subject to be taken for a like public use in common upon compensation being first made; third, that while the amount of compensation must usually be determined otherwise, yet the council having stipulated for the right in such a case was entitled to prescribe a reasonable compensation; fourth, that without proof that the compensation so prescribed and tendered was inadequate, A was not entitled to an injunction. Kinsman St. R. Co. v. Broadway, etc., R. Co., 36 Ohio St. 239; 5 Am. & Eng. R. Cas. 327.

2. Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 223; 36 Am. & Eng. R. Cas. 463; Jersey City, etc., R. Co. v. Jersey City,

mechanical power, however, does not change the character of the railway as being not an additional burden on the street.<sup>1</sup>

At the present time the motive power contemplated is prescribed usually by the charter.<sup>2</sup>

1. *Taggart v. Newport St. R. Co.*, 16 R. I. 668; 43 Am. & Eng. R. Cas. 208; *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 76; *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270. See also *Clement v. Cincinnati*, 16 Wkly. L. Bull. 355.

2. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207; 11 Am. & Eng. R. Cas. 42; 44 Am. Rep. 788; *Denver, etc., Horse R. Co. v. Denver, etc., R. Co.*, 2 Colo. 681; *Allegheny v. Ohio, etc., R. Co.*, 26 Pa. St. 355; *Third Ave. R. Co. v. Newton*, 112 N. Y. 396; 38 Am. & Eng. R. Cas. 391.

**Construction of Charters—Use of Electricity.**—In *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 393; 43 Am. & Eng. R. Cas. 234, the court by Coffey, J., said: "As the grant of a special charter or franchise to a corporation is construed strictly against the corporation, where the right to use one motive power is prescribed, the company cannot successfully maintain its right to use another or different power." *Elliott on Roads and Streets* 360; *People v. Newton* (Supreme Ct.), 1 N. Y. Supp. 197; 112 N. Y. 396; 38 Am. & Eng. R. Cas. 391; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 681; *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579; *Birmingham, etc., St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465; 58 Am. Rep. 615; *Mayor, etc., of Allegheny v. Ohio, etc., R. Co.*, 26 Pa. St. 355; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207; 11 Am. & Eng. R. Cas. 42; 44 Am. Rep. 788.

A company incorporated under *Pennsylvania* act of May 14, 1839, providing for the formation of a corporation for the purpose of constructing street railways for public use in the conveyance of passengers by any other power than locomotives, may construct and operate a street railway using electricity as the motive power. *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419; 47 Am. & Eng. R. Cas. 57. And a statute authorizing a turnpike company to operate a street railroad and to use "the power of horses, animals or any mechanical or other power, or the combi-

nation of them, which such company might choose to employ, except the force of steam," embraces electricity as a motive power. *Hudson River Telephone Co. v. Watervliet Turnpike, etc. Co.*, 56 Hun (N. Y.) 67. Where a statute provides that a street railway shall be operated "with steam, horse or other power," although the word "steam" must be struck out, because steam cannot be used without compensation to abutting owners, the statute is sufficient to authorize the adoption of electricity as a motive power. *Taggart v. Newport St. R. Co.*, 16 R. I. 668; 43 Am. & Eng. R. Cas. 208.

The use of electricity as a motive power for propelling street cars has not been shown to be so dangerous as to justify the court in enjoining it. *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608. And in *Ohio* it is held that the use of wires in city streets for conducting electricity to operate street railway cars is not within the contemplation of *Ohio* act, March 12, 1886, forbidding the use of uninsulated wires, which relates only to wires conducting electricity for power purposes and for lighting streets and buildings. *Simmons v. Toledo*, 5 Ohio Ct. 124. But the *Connecticut* Gen. St. § 3595, providing that the mayor and common council of a city may permit and regulate the use of any improved motive power for drawing cars on any horse railroad, does not allow an electric company, even with the permission of the mayor and council, to propel its cars by the use of overhead wires, where the charter of the company declares only that the company may propel its cars "in any mode that does not involve" the use of such wires. *Farrell v. Winchester Ave. R. Co.* (Conn. 1891); 23 Atl. Rep. 757.

In *State v. Trenton* (N. J. 1892), 23 Atl. Rep. 281, it was held that the *New Jersey* statute of 1886 (Supp. Rev., p. 369, § 30), which provides "that any street railroad company in this state may use electric or chemical motors or grip cables as the propelling power of its cars instead of horses, provided it shall first obtain the consent of the municipal authorities," did not authorize the erection of poles and the stretch-

A company must bring the car to a full stop wherever a passenger desires to get on or off,<sup>1</sup> must furnish him safe and reasonable means of entrance and exit,<sup>2</sup> and when necessary should require the conductor or driver to assist feeble or infirm

ciously. It is immaterial whether it results from the negligence or willfulness of the defendant's agent. *Weed v. Panama R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474." The same doctrine is supported by other high authority. *Lyons v. Broadway, etc., R. Co.*, 32 N. Y. St. Rep. 232; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77; 12 Am. & Eng. R. Cas. 119; 43 Am. Rep. 141 (company liable for false imprisonment by gate-keeper in causing wrongful arrest of passenger); *Koetter v. Manhattan R. Co.*, 59 Hun (N. Y.) 623; *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547; 34 Am. & Eng. R. Cas. 462; *Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498; *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546; 8 Am. & Eng. R. Cas. 354; 42 Am. Rep. 43; *Nieto v. Clark*, 1 Cliff. (U. S.) 145; *Pendleton v. Kinsley*, 3 Cliff. (U. S.) 416; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39; *MASTER AND SERVANT*, vol. 14, p. 819.

1. **Duty to Stop Car for Passengers to Get Off and On.**—The car must come to a full stop if passengers desire it, and stop long enough to give them a reasonably safe opportunity to alight. *Chicago City R. Co. v. Mumford*, 97 Ill. 560; 3 Am. & Eng. R. Cas. 312 (recovery allowed where car was stopped but not long enough for passenger to get completely off); *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247; *Crissey v. Hestonville, etc., R. Co.*, 75 Pa. St. 83; *Poulin v. Broadway, etc., R. Co.*, 61 N. Y. 621 (car starting suddenly before passenger had completely alighted); *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270; 44 Am. & Eng. R. Cas. 422-3, note (similar case); *Dale v. Brooklyn City, etc., R. Co.*, 1 Hun (N. Y.) 146, *aff'd* 60 N. Y. 638; *Malhado v. Brooklyn City R. Co.*, 30 N. Y. 370 (no excuse afforded to company by fact that passenger being on front platform without objection preferred his request to stop to the driver instead of the conductor); *Wolfkiel v. Sixth Ave. R. Co.*, 38 N. Y. 49; *Roberts v. Johnson*, 58 N. Y. 613; *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.) 435; *Kelly v. New York, etc., R. Co.*, 39 Hun (N. Y.) 486; *Maher v. Central Park, etc., R. Co.*, 39 N. Y.

*Super. Ct.* 155; *Dickson v. Broadway, etc., R. Co.*, 41 How. Pr. (N. Y.) 15. **CARRIERS OF PASSENGERS**, vol. p. 761.

This duty varies with the character and physical condition of the passenger. Feeble and infirm passengers are entitled to a longer time for getting on and leaving the car than are ordinary persons. *Colt v. Sixth Ave. R. Co.*, 33 N. Y. Super. Ct. 189, *aff'd* 49 N. Y. 67; *Bonney v. Bushwick R. Co.*, 1 How. Pr. N. S. (N. Y.) 66. Where the car is about to stop at the request of one passenger, another passenger who is alight at the same time is not negligent in failing also to prefer a request to stop. *Rathbone v. Union R. Co.*, 13 R. I. 700; 13 Am. & Eng. R. Cas. 58.

In *Dougherty v. Missouri R. Co.*, 8 Mo. 325; 21 Am. & Eng. R. Cas. 497; 51 Am. Rep. 239, the plaintiff was injured by the sudden starting of the car just after he had gotten on. He was allowed to recover, on the ground that it was the company's duty to stop long enough for him to get into the car and seat himself, or to take hold of the strap if there was no seat; and while it may start the car before the passenger has had time to do either, it must exercise "the utmost care" in starting so as not to injure him. *Birmingham Union R. Co. v. Hale*, 90 Ala. 8; *Birmingham Union R. Co. v. Smith*, 90 Ala. 60.

After the car has been stopped and the passenger has alighted, it is still a part of the company's duty not to start the car until the passenger has had time to get a safe distance from the car. If he is injured by the car's starting before he has had time to move out of danger, the company must be responsible. *Highland Ave., etc., R. Co. v. Burt*, 92 Ala. 291; 48 Am. & Eng. R. Cas. 56.

As to whether a passenger's boarding or leaving the car while it is moving instead of waiting until it has come to a stop, constitutes contributory negligence, see *infra*, this title, *Contributory Negligence of Passengers*.

2. In *Neslie v. Second, etc., St. R. Co.*, 113 Pa. St. 300; 27 Am. & Eng. R. Cas. 180, plaintiff, in alighting from a car with a child in her arms, slipped and fell, thereby sustaining severe injuries. A passenger was standing on the platform

Therefore, where a passenger is intoxicated or bel  
or insulting manner to his fellow passengers, he r  
from the car.<sup>1</sup> So also if a person refuses to pay  
may be expelled.<sup>2</sup> It is not necessary, however,  
tender the exact amount of his fare; he may tend  
amount, and the conductor must furnish change.<sup>3</sup>

of imputable contributory negligence  
discussed in CONTRIBUTORY NEGLIGENCE, vol. 4, p. 82 *et seq.*

1. **Intoxicated Passengers.** — *Murphy v. Union R. Co.*, 118 Mass. 228; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190 (not bound to expel a drunken passenger unless he misbehaves); *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744. See generally RAILROADS, vol. 19, p. 903; Beach on Contributory Negligence (2d ed.), § 286.

In *Lemont v. Washington, etc., R. Co.*, 1 Mackey (D. C.) 180; 1 Am. & Eng. R. Cas. 238; 47 Am. Rep. 238, the passenger was unable from sickness to sit up, and was vomiting so that his presence caused much annoyance to passengers. The conductor expelled him from the car. It was held that whether the sickness proceeded from drunkenness or not, the expulsion was justifiable, and that no undue violence having been used, the company was not liable for damages. The court distinguished the case from that of a passenger on an ordinary railroad train. See also *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 46 Am. Rep. 668.

In *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; 37 Am. & Eng. R. Cas. 117, a passenger while riding was stricken with apoplexy, attended with severe vomiting, to the inconvenience and great discomfort of the other passengers. The driver, thinking that he was drunk, removed him while in a speechless condition, laid him in the open street, on a cold, rainy December day and there left him without any effort to procure him attention. It appeared that he had ridden for some distance without misbehavior. It was held that the mistake of the driver, in supposing that the passenger was drunk, could not excuse the company, and that, having been guilty of a gross failure of its duty as carrier, it was liable for the death of the passenger.

If the passenger, by reason of intoxication, or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passen-

gers, he may be expelled, though he has not yet committed any offense or annoyance. See *Dunsmuir v. R. Co.*, 111 Cal. 87 Am. Dec. 714. Cf. *Duane, 4 Wall.* (U. S. that while the carrier transports a drunker or one whose character is such that not after having admitted a passenger and receiving fare, he may be expelled unless he misbehaves).

2. See RAILROAD TICKETS AND FARE. *Market St. R. Co.*, 81 Cal. Eng. R. Cas. 671; 1 Am. & Eng. R. Cas. 671; 1 Rown v. Christopher, 34 Hun (N. Y.) 471.

In *Ellis v. Milwaukee & St. Paul R. Co.*, 67 Wis. 135; 27 Am. 58 Am. Rep. 858, the plaintiff taken passage on a street car, formed by the conductor he was on did not pay for the ticket, and that he was ejected from the other car and pay at the point of divergence, a transfer ticket, v. He then left the car and was ejected from the other bound for his destination, which he was ejected from. An ordinance that the rate of fare for a passenger in any horse rail car in the city should be five cents. The plaintiff was riding after the passage of an action to recover for the expulsion, the court held that the plaintiff was not entitled to regulation of the several distinct lines of cars were run between was a reasonable ordinance referred to to connecting line constructed. See *Washington, etc., R. Co. v. South Boston R. Co.*, 31 Am. & Eng. R. 16 Am. & Eng. R.

3. *Barrett v. Market St. R. Co.*, 40 Am. &

The car company must employ competent and reliable servants, and provide safe machinery and appliances.<sup>1</sup> The driver of the

a distance of two feet. The driver was giving no attention to the track in front of him, and did not see the child until the car passed over him. *Rosenkranz v. Lindell R. Co.* (Mo. 1892), 18 S.W. Rep. 890. Other illustrative cases are *Senn v. Southern R. Co.* (Mo. 1892), 18 S.W. Rep. 1007; *Hyland v. Yonker R. Co.* (Supreme Ct.), 1 N.Y. Supp. 363; *Brown v. Twenty-third St. R. Co.*, 56 N.Y. Super. Ct. 356; *Dorman v. Broadway R. Co.*, 5 N.Y. Supp. 769; *Levy v. Dry-Dock, etc., R. Co.* (Supreme Ct.), 12 N.Y. Supp. 485; *Howland v. Union St. R. Co.*, 150 Mass. 86 (boy run over while waiting in street to procure ice from a passing cart).

Where plaintiff, a boy, stepped on an elevated railway track, in order to reach a hydrant, and walked toward an engine standing on the track, it was negligence in the engineer to start the engine without looking to see if the plaintiff had gotten out of the way and without giving him warning. *Corcoran v. New York El. R. Co.*, 19 Hun (N.Y.) 368.

In *McCann v. Kings County El. R. Co.*, 19 N.Y. Supp. 668, it was held that the railroad company was not liable for injuries resulting from the negligence of the servants of a contractor employed by said company to paint its structure, on the ground that the injury did not result from the performance of the work but from the manner of its performance.

**Distinction Between Passengers and Pedestrians.**—The distinction between the duty owing to passengers and that owing to ordinary pedestrians is plain. In the one case the relation of carrier and passenger exists with all the high and special duties which attend that relation; in the other case only the ordinary duty arising from one user of the highway to another exists. *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Goll v. Manhattan R. Co.*, 57 N.Y. Super. Ct. 74; *NEGLIGENCE*, vol. 16, p. 427.

It is not competent to ask a driver which he regarded it as his duty to look out for—passengers or persons that he might run over. *Hyland v. Yonkers R. Co.*, 4 N.Y. Supp. 305.

**Trespassers.**—Where a person is a trespasser the only duty due him is to refrain from willful and deliberate in-

jury. *RAILROADS*, vol. 19, p. 935. Thus, where a person was putting up a telegraph wire in a street and was injured by a passing street car striking the wire, he was not allowed to recover, in the absence of evidence that the driver acted wantonly and recklessly. *Banks v. Highland St. R. Co.*, 136 Mass. 485; 19 Am. & Eng. R. Cas. 139.

**New York Cases.**—See, for other cases applying these various doctrines, *Dorman v. Broadway R. Co.*, 16 N.Y. St. Rep. 753; *Weil v. Dry-Dock, etc., R. Co.*, 25 N.Y. St. Rep. 608; *Mallard v. Ninth Ave. R. Co.*, 27 N.Y. St. Rep. 801; *Baker v. Eighth Ave. R. Co.*, 62 Hun (N.Y.) 39; *Giraldo v. Coney Island, etc., R. Co.* (Supreme Ct.), 16 N.Y. Supp. 774; *Wolf v. Houston, etc., R. Co.*, 50 Hun (N.Y.) 603; *Stone v. Dry-Dock, etc., R. Co.*, 46 Hun (N.Y.) 184; *Block v. Harlem Bridge, etc., R. Co.*, 55 Hun (N.Y.) 607; *Levy v. Dry-Dock, etc., R. Co.*, 58 Hun (N.Y.) 610; *Mentz v. Second Ave. R. Co.*, 3 Abb. App. Dec. (N.Y.) 274; *aff'd* 2 Robt. (N.Y.) 356; *Silberstein v. Houston, etc., R. Co.*, 117 N.Y. 293; 40 Am. & Eng. R. Cas. 268; *rev'd* 22 N.Y. St. Rep. 452; *Dorman v. Broadway R. Co.*, 117 N.Y. 655; *Manahan v. Steinway, etc., R. Co.*, 125 N.Y. 760; *rev'd* 30 N.Y. St. Rep. 562; *Fenton v. Second Ave. R. Co.*, 126 N.Y. 625; *rev'd* 56 Hun (N.Y.) 99; *Wilson v. Brooklyn El. R. Co.*, 9 N.Y. Supp. 277.

**1. Competent Servants and Proper Machinery Must be Provided.**—*Barksdull v. New Orleans, etc., R. Co.*, 23 La. Ann. 180; *Fort Worth St. R. Co. v. Witten*, 74 Tex. 202; *Hayes v. Gainesville, etc., St. R. Co.*, 70 Tex. 602; 34 Am. & Eng. R. Cas. 97.

In *Wall v. Helena St. R. Co.* (Mont. 1892), 29 Pac. Rep. 721, in an action for damages, it appeared that at the time of the injury a boy fifteen years old was the driver; had there been a competent driver in charge the injury could have been prevented. The company was held liable.

In *Dintruff v. Rochester City, etc., R. Co.*, 57 Hun (N.Y.) 585, the evidence was that the driver would have been able to control the horses and thus prevent the accident, but for the fact that the rear brake had been mischievously interfered with by boys;



car should at all times have his team or the mechanical power which propels the cars under his control, and so make use of this control as to avoid injury whenever possible.<sup>1</sup> For this reason

that the usual way of preventing such interference, the possibility of which was a matter of common knowledge, was by tying the brake down; and that the superintendent of the railway knew that the brake of that car had been tied down at one time to prevent just such interference. It was held that this was negligence on the part of the company.

**Duty to Light the Track.**—An instruction to the effect that the company must provide its cars with such lights as will enable the driver, with the aid of the street lights, to see the track ahead and thus avoid injury, is erroneous. *Memphis City R. Co. v. Loague*, 13 Lea (Tenn.) 32; 15 Am. & Eng. R. Cas. 459; *Wharton on Neg.*, § 639.

**Willful Injuries by Driver.**—In *Tuller v. Voght*, 13 Ill. 277, the owners of a stage line were held liable for a willful injury committed by one of their drivers in running into a private vehicle. But this holding was under a statute specially providing that such liability should exist. A similar statute in *New York* entitled "Of the law of the road and the regulation of public stages" was held not to apply to street railways, so that under it a street-car company is not liable for willful injury committed by its driver. *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295.

1. **Driver's Duty.**—*Schierhold v. North Beach, etc.*, R. Co., 40 Cal. 447; *Humbird v. Union St. R. Co.* (Mo. 1892), 19 S. W. Rep. 69; *Pope v. Kansas City Cable R. Co.*, 99 Mo. 400; 43 Am. & Eng. R. Cas. 290; *Winters v. Kansas City R. Co.*, 99 Mo. 509; 40 Am. & Eng. R. Cas. 261; 17 Am. St. Rep. 591; *Silberstein v. Houston, etc.*, R. Co., 117 N. Y. 393; 40 Am. & Eng. R. Cas. 268; *rev'g* 4 N. Y. Supp. 843.

Where there is evidence that the driver of a street car, which ran over and injured plaintiff, was inside the car when the accident occurred, plaintiff is entitled to an instruction that the company would be liable unless the driver was standing on the platform, with the lines from the horses in his hands, and exercising a reasonable degree of watchfulness to prevent all injuries to persons crossing and traveling on and over the street. *Brooks v. Lincoln St. R. Co.*, 22 Neb. 816; 37 Am. & Eng. R. Cas. 560.

In *Fenton v. Second Ave. R. Co.*, 56

*Hun* (N. Y.) 100, the fact that although the deceased fell on the track twenty feet in front of the car no effort was made by the driver to stop the car until the horses were over the deceased, was considered evidence of negligence to sustain a recovery. For a similar case see *Mentz v. Second Ave. R. Co.*, 2 Robt. (N. Y.) 356, *aff'd* 3 Abb. App. Dec. (N. Y.) 274; *Pope v. Kansas City R. Co.*, 99 Mo. 400; 43 Am. & Eng. R. Cas. 290. Compare *Citizens' R. Co. v. Carey*, 56 Ind. 396.

**Evidence as to Driver's Being Overworked.**—In *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 111; 43 Am. & Eng. R. Cas. 315, it was held that evidence that the driver of the car was overworked, was not admissible for the purpose of proving that his condition might have caused the accident, no such ground being alleged in the complaint and there being no evidence that the accident was occasioned by the fatigue or sleepiness of the driver.

And in *Philadelphia City R. Co. v. Henrice*, 92 Pa. St. 431; 4 Am. & Eng. R. Cas. 544; 37 Am. Rep. 699, it was held that the witness could not be asked how many hours the drivers and conductors were employed each day for the purpose of showing that the driver was physically unable to discharge his duty. The court went on to say that it might be shown that the driver of the car was asleep or intoxicated at the time of the accident, and that a presumption of negligence would properly arise from such fact. Such presumption could not arise out of a mere inference however; it must be founded upon a proven fact.

**Driver's Intoxication—Evidence.**—In an action for injuries sustained by being struck by a car negligently driven in consequence of the driver's negligence, evidence that the driver had, on that same trip, missed a switch at a certain street; that he had failed to respond to the conductor's signal to stop at another street; had driven rapidly, and that a person had been thrown down in attempting to get aboard, is admissible, as showing a series of acts indicative of such intoxication at the time of the accident as to incapacitate him from the proper control of the car. And the fact that the driver had had drink just before starting on the trip is admissible, as

fore cause its servants who operate the cars to exercise the care which the increased danger demands;<sup>1</sup> it cannot set up any superior-right to the use of the streets at such points, but must recognize and respect the equal rights of all others.<sup>2</sup>

**b. CONTRIBUTORY NEGLIGENCE—CHILDREN, ETC.**—If the negligence of the injured party is the proximate cause of the injury he may not recover therefor.<sup>3</sup> And whether he has been guilty of such contributory negligence is always a question of fact for the jury,<sup>4</sup> unless, as in some cases, there is no dispute as to the facts, and but one conclusion can be drawn from them.<sup>5</sup>

One is not necessarily negligent because he walks along the track of a street railway, though he is bound to keep his eyes and ears open, and exercise ordinary care to get out of the way of an approaching car;<sup>6</sup> and it has been held that one who walks on

the track, it is improper to charge that the company owed him no active vigilance to guard against injuring him, as it was the duty of the company to use at least ordinary care, and incidentally whatever "active vigilance" might be implied thereby. *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372. See also *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1.

**Statutory Provision**—*Texas*.—Rev. Stat. of *Texas*, art. 2899, provides that street-car companies shall be liable for injuries to persons on the track only when the injury is caused by the "gross negligence" of the company's servants. *Dallas City R. Co. v. Beeman*, 74 Tex. 291. Before the passage of this act the rule in *Texas* was the same as in other jurisdictions. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32. See also *San Antonio St. R. Co. v. Cailloutte*, 79 Tex. 341.

1. **At Crossings.**—*McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; 40 Am. & Eng. R. Cas. 254; *Winters v. Kansas, etc., R. Co.*, 99 Mo. 509; 40 Am. & Eng. R. Cas. 261; 17 Am. St. Rep. 591; *Streetzel v. St. Paul City R. Co.*, 47 Minn. 543.

2. *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; 40 Am. & Eng. R. Cas. 254. Here it was held that the jury was properly instructed that the company "had no right to so occupy the street and use the same with its cars as to make it extremely dangerous to cross the street at all times."

3. See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15 *et seq.*; COMPARATIVE NEGLIGENCE, vol. 3, p. 367; NEGLIGENCE, vol. 16, p. 386; *Rose v. West Philadelphia R. Co.* (Pa. 1888), 12 Atl. Rep. 78.

4. Almost every case involves perplexing and controverted facts and resort is always in such cases, to the jury. *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; 40 Am. & Eng. R. Cas. 254; *Little v. Grand Rapids St. R. Co.*, 78 Mich. 205; *Howland v. Union St. R. Co.*, 150 Mass. 86; *Cowan v. Third Ave. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 610.

5. Thus when a boy, nearly six years old, attempts to pass under a freight car, drawn by horses, moving along a street, he is guilty of contributory negligence, and is not entitled to recover damages for any injury he may sustain by reason of such attempt, and the court may so instruct a jury as a conclusion of law. *McMahon v. Northern Cent. R. Co.*, 39 Md. 438; *Bulger v. Albany R. Co.*, 42 N. Y. 459. In another case in an action by the plaintiff for injuries received by being struck by a cable car while crossing the track, she testified that she was in the habit of looking for cars at crossings, but could not say whether she did on this occasion or not. The avenue was entirely clear, and plaintiff, whose eyesight was good, could easily have seen the approaching car. An eye witness testified that plaintiff went on the track without looking on one side or the other, and with her head down. It was held error to submit the case to the jury, because the plaintiff was guilty of negligence as a matter of law. *Cowan v. Third Ave. R. Co.*, 10 N. Y. St. Rep. 916. See also *Halpin v. Third Ave. R. Co.*, 40 N. Y. Super. Ct. 175; *Buzby v. Philadelphia Traction R. Co.*, 126 Pa. St. 559; 42 Am. & Eng. R. Cas. 144.

6. In *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414, the court said: "The company is not authorized to run its cars

the track when he might, with safety and comfort, walk elsewhere, must be considered to do so at his own peril.<sup>1</sup>

It is a frequent combination of circumstances that the plaintiff is injured by getting off a street car upon which he was a passenger, and being struck by an approaching car on a parallel track, just as he alights. In such cases if the plaintiff could have avoided the injury by looking or listening he is guilty of contributory negligence which will bar his recovery.<sup>2</sup>

A person standing on the track or crossing cannot be said, as a matter of law, to be guilty of contributory negligence when he is there in the performance of some duty, and his failure to look out

recklessly, carelessly, or without reasonable prudence, and to answer the person who demands relief for injuries sustained by being run over by its car that if he had not been on the railroad track he would not have been injured—that it was contributory negligence on his part to walk on the track instead of the space by the side of the track. Such person is authorized to walk on the track, he using reasonable care and prudence to avoid injuries, but is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company." See also *Brooks v. Lincoln St. R. Co.*, 22 Neb. 816; 37 Am. & Eng. R. Cas. 560; *Kansas, etc., R. Co. v. Pointer*, 9 Kan. 620; *Gulf, etc., R. Co. v. Walker*, 70 Tex. 126. See also *RAILROADS*, vol. 19, p. 933.

1. In *Johnson v. Canal, etc., R. Co.*, 27 La. Ann. 53, a party was not allowed to recover because it appeared that the injury occurred while he was walking along the street-car track at eleven o'clock at night, there was a convenient and safe sidewalk near, and the noise of the horses approaching from behind ought to have afforded him sufficient warning. So in *Childs v. New Orleans City R. Co.*, 33 La. Ann. 154, recovery was denied where the injured party in spite of warnings and remonstrances insisted on walking along the narrow space between the two tracks. His conduct was considered to be such negligence as to bar his recovery, although the negligence of the car company was proven. See also *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615; *Schwartz v. Crescent City R. Co.*, 30 La. Ann. 15.

And in *Pennsylvania* it was held that a foot-passenger, who, in order to avoid the deep snow in the rest of the street, walks along the street-car track from

which the snow has been cleared, cannot recover for being run over by a car approaching from the rear, when it appears that she could have seen the car for a quarter of a mile when she got on the track, and that the bells could be heard for forty rods, but that she did not notice the car until it was nearly upon her, and then failed to step far enough aside on account of the high banks of snow, and was knocked down by the rear part of the car. *Warner v. People's St. R. Co.*, 141 Pa. St. 615.

2. *Passenger Struck by Approaching Car While Leaving Another Car.*—An illustrative case is that of *Creamer v. West End St. R. Co.* (Mass. 1892), 31 N. E. Rep. 391. The passenger was struck and killed by an electric car coming from the opposite direction upon a parallel track just as he stepped from the open car. When he arose to leave the dashers of the two cars were opposite each other; the car which struck was going at fifteen miles an hour; its gong was sounding, and there was nothing to prevent the deceased from seeing and hearing. Moreover, before he left the car the conductor and a passenger shouted to him to stop. It was held that a verdict must be ordered for the defendant. For similar cases in which a non-suit or verdict for the defendant has been ordered, see *McCann v. Sixth Ave. R. Co.*, 56 N. Y. Super. Ct. 282; *Buzby v. Philadelphia Traction Co.*, 126 Pa. St. 559; 42 Am. & Eng. R. Cas. 144; *Dunn v. Cass Ave., etc., R. Co.*, 98 Mo. 652; *Rose v. West Philadelphia R. Co.* (Pa. 1888), 12 Atl. Rep. 78. See also *Miller v. St. Paul City R. Co.*, 42 Minn. 454 (plaintiff negligent in standing between two parallel tracks only two feet apart, while waiting for car); *Palley v. Brooklyn City R. Co.* (Supreme Ct.), 4 N. Y. Supp. 384.

for approaching cars is caused by his attention being diverted to the duty which he is discharging.<sup>1</sup>

In crossing a track in front of an approaching car, a person must exercise ordinary care to protect himself from injury. He must have regard to the character of the crossing; whether easy and convenient or difficult; to the nearness of the approaching car; the speed at which it is coming; and to other circumstances. And if he pursues a course different from that which a man of ordinary prudence would have taken, he is guilty of contributory negligence and cannot recover.<sup>2</sup> This rule is varied, however, in the case of young children, who are not held to any greater degree of care than they are capable of exercising, and where the child is too young to be capable of any care the doctrine of contributory negligence is not applicable.<sup>3</sup> In the case of children, drivers are charged with notice of their incapacity, but, as to adults, have a right to pre-

**1. Persons Standing on Track in Discharge of Duty.**—Thus, where the plaintiff is flagging an approaching train at a public crossing, it is error to charge, as a matter of law, that he is bound to turn round from the steam cars which he is flagging and look out for the street car which ran over him. *D'Oro v. Atlantic Ave. R. Co.*, 13 N. Y. Supp. 789. See also *Little v. Grand Rapids St. R. Co.*, 78 Mich. 205, where the plaintiff was at work near the car track digging a ditch, and was prevented from hearing the car by other noises, the question of contributory negligence was submitted to the jury.

This rule, however, does not protect one who, while waiting for a car, stands between the parallel tracks which are so near together that his danger is apparent on the slightest reflection. *Miller v. St. Paul City R. Co.*, 42 Minn. 454.

**2. See generally CONTRIBUTORY NEGLIGENCE**, vol. 4, p. 15 *et seq.*

**Crossing Street in Front of Approaching Car.**—This rule of the text has been applied in many cases. *Fenton v. Second Ave. R. Co.*, 56 Hun (N. Y.) 99; *Dunn v. Cass Ave. R. Co.*, 98 Mo. 652; *Halpin v. Third Ave. R. Co.*, 40 N. Y. Super. Ct. 175; *Wells v. Brooklyn City R. Co.*, 58 Hun (N. Y.) 389; *O'Toole v. Central Park, etc., R. Co.* (Supreme Ct.), 12 N. Y. Supp. 347 (plaintiff standing on sidewalk over which the cars ran on a curve); *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; 40 Am. & Eng. R. Cas. 254; *Baxter v. Second Ave. R. Co.*, 3 Robt. (N. Y.) 510; *Cowan v. Third Ave. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 610;

*Meyer v. Lyndell R. Co.*, 6 Mo. App. 27. See also *Schmidt v. McGill*, 120 Pa. St. 412.

The plaintiff himself testified that, while riding on horseback, his horse fell, throwing him to the ground under the horse, some 150 feet ahead of the car, and that, while lying there, the wheel of the car ran over his arm. Four disinterested witnesses, who were riding on the car in a position to see the accident, testified that the horse fell by the side of the car. It was held however, that it was an abuse of discretion in the trial court not to grant a motion to set aside a verdict for the plaintiff, as being contrary to the evidence. *McCoy v. Milwaukee St. R. Co.* (Wis. 1892), 52 N. W. Rep. 93.

**Willful Injury.**—Contributory negligence of the injured party is no defense when the injury is willfully inflicted. Therefore, where the driver discovered the peril of plaintiff in time, and by the reasonable exercise of means at hand could have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit recovery notwithstanding the injured party was negligent. *Hays v. Gainesville St. R. Co.*, 70 Tex. 602; 34 Am. & Eng. R. Cas. 97.

**3. Injuries to Children.**—The subject of the contributory negligence of children is very thoroughly discussed in **CONTRIBUTORY NEGLIGENCE**, vol. 4, pp. 42, 53 *et seq.* See *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32; *Etherington v. Prospect Park, etc., R. Co.*, 88 N. Y. 641; 4 Am. & Eng. R. Cas. 617; *Collins v. South Boston R. Co.*, 142 Mass. 301; 26 Am. & Eng. R.

sume them to be possessed of the usual faculties, and will take reasonable care to protect themselves.<sup>1</sup>

As a rule the requirement that the party about to cross the track shall stop, look, and listen, is not insisted upon to the same extent as where the crossing is over an ordinary railroad.<sup>2</sup> In some jurisdictions, however, the requirement is rigidly insisted upon, and any failure to observe it will bar recovery.<sup>3</sup>

Cas. 371; 36 Am. Rep. 675; Philadelphia, etc., R. Co. v. Layer, 112 Pa. St. 414; 26 Am. & Eng. R. Cas. 376, note; Philadelphia City Pass. R. Co. v. Hassard, 75 Pa. St. 367; Farris v. Cass Ave., etc., R. Co., 8 Mo. App. 589; 1 Am. & Eng. R. Cas. 623.

An infant seventeen months old will not be charged with negligence. Chicago West Div. R. Co. v. Ryan, 131 Ill. 474; 43 Am. & Eng. R. Cas. 396. But the fact that a child may not be capable of contributory negligence, or that the negligence of his parents cannot be imputed to it does not always render the company liable upon mere proof of the fact of injury. The negligence of the company must be proven. Roller v. Sutter St. R. Co., 66 Cal. 230; 19 Am. & Eng. R. Cas. 333. Thus, injuries to a child which gets under the hindwheels of a street car, after the forewheels have passed safely, are not attributable to the negligence of the driver or of the conductor. Bulger v. Albany R. Co., 42 N. Y. 459. In another case a child two years old ran across the track of a horse-railroad company and was run over and killed by one of their cars. Bystanders shouted to the driver to stop, but his attention was turned in another direction. He was driving slowly and cautiously. Held, that no negligence was shown on the part of the driver. Boland v. Missouri R. Co., 36 Mo. 484. See also Maschek v. St. Louis R. Co., 71 Mo. 276; 2 Am. & Eng. R. Cas. 38; O'Connor v. Boston, etc., R. Co., 135 Mass. 352; 15 Am. & Eng. R. Cas. 362; Messenger v. Dennie, 137 Mass. 197; 50 Am. Rep. 295; 141 Mass. 335.

1. See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 79.

In Schulte v. New Orleans, etc., R. Co., 44 La. Ann. 509, an elderly lady afflicted with deafness and wearing a large bonnet which obstructed her sight was not allowed to recover; the company could not be held responsible for her infirmities. See also Wheelahan v. Philadelphia Traction Co. (Pa. 1892), 24 Atl. Rep. 688 (person driving across

having his view obstructed by the cover of his wagon); Cowan v. Third Ave. R. Co. (Supreme Ct.), 9 N. Y. Supp. 610.

2. Failure to Stop, Look, and Listen.— See the subject discussed in CROSSINGS, vol. 4, p. 945.

Thus, in Minnesota such failure is not regarded as being negligence *per se*. Shea v. St. Paul City R. Co. (Minn. 1892), 52 N. W. Rep. 902. In this case the car struck the plaintiff while he was driving over the crossing. The evidence showed that the car was running at an unusual and dangerous rate of speed; that no signals were given until the car was within fifty feet; that the plaintiff's view of the track was obstructed until he was near the track; that he looked in one direction before driving on the track; and that just as his horses stepped on the first rail he saw the car, but was unable to stop. It was held that the evidence presented a question for the jury and warranted a verdict for the plaintiff.

So in Pyne v. Broadway, etc., R. Co., 19 N. Y. Supp. 217, it is held that a person is not necessarily negligent in failing to look for approaching street cars before attempting to cross an ordinary street, but only when the situation and surrounding circumstances are such that a person of ordinary prudence would have looked. Following Moebus v. Herrmann, 108 N. Y. 349. Compare Baltimore Traction Co. v. Wallace (Md. 1893), 26 Atl. Rep. 518.

3. The Pennsylvania courts apply the general rule in all cases, whether street-car crossings or others. Ehrisman v. East Harrisburg City Pass. R. Co., 150 Pa. St. 180; Carson v. Federal St., etc., R. Co. (Pa.), 50 Am. & Eng. R. Cas. 462. Thus, where one undertakes to cross a street-car track with a wagon having a hood over it, confining his view of the track to thirty feet, the failure to lean forward so as to see an approaching car is negligence *per se* which will bar recovery for injuries sustained by the collision. Wheelahan v. Philadelphia Traction Co. (Pa. 1892), 24 Atl. Rep. 688.

Where the street-car line crosses an ordinary railroad the relative duties of the driver and engineer are the same as in case of ordinary travelers passing over the crossing. What these duties are has been already elaborately discussed.<sup>1</sup>

The doctrine of imputable contributory negligence, whereby it is sought to impute to children the contributory negligence of their parents or custodians, or to passengers the contributory negligence of their carrier, has received thorough treatment in a previous article.<sup>2</sup>

**4. Collision With Vehicles.**—As between a street car and an ordinary vehicle moving along the track, the street car has the superior right of way.<sup>3</sup> But it has been held that at crossings neither party has any paramount right of way, and that, in cases of collision at street crossings, the rights of the parties are to be determined by the law applicable to ordinary vehicles.<sup>4</sup> If either party fails to use that care which a man of ordinary prudence would have exercised under similar circumstances he be-

A child of ten years was crossing a public street on a diagonal cross walk. There were no obstructions to the view, no passing vehicles except a horse-car coming towards her and which she would have seen had she looked in that direction. It was held that a verdict in her favor could not be sustained. *Sheets v. Connolly St. R. Co.* (N. J. 1892), 24 Atl. Rep. 483.

In *Carson v. Federal St. R. Co.*, 147 Pa. St. 219; 50 Am. & Eng. R. Cas. 462, it is said that it may not be necessary to stop on approaching a street railway crossing, but it is necessary to look before driving upon the track. See *Christensen v. Union Trunk Line* (Wash. 1893), 32 Pac. Rep. 1018. See also for other cases holding a failure to stop, look, and listen, contributory negligence, *Cohen v. Dry-Dock, etc.*, R. Co., 40 N. Y. Super. Ct. 368; *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504; 46 Am. & Eng. R. Cas. 196; *Wood v. Detroit City St. R. Co.*, 52 Mich. 402; 19 Am. & Eng. R. Cas. 129; 50 Am. Rep. 259; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16; 34 Am. & Eng. R. Cas. 103 (party non-suited where it appeared that he saw the engine approaching but only shouted and did not stop); *Ehrisman v. East Harrisburg City Pass. R. Co.* (Pa. 1892), 24 Atl. Rep. 596.

**1. Line Crossing a Railroad.**—See *CROSSINGS*, vol. 4, p. 906 *et seq.* For cases in which the rules there set out have been applied to street-car drivers, see *Mantel v. Chicago, etc.*, R. Co., 33 Minn. 62; 19 Am. & Eng. R. Cas. 362 (action by driver); *Coddington v.*

*Brooklyn Crosstown R. Co.*, 102 N. Y. 66; 26 Am. & Eng. R. Cas. 393.

As to the right of a street railway to construct its road across the track of a railroad, see *Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co.*, 33 Barb. (N. Y.) 420; *RAILROADS*, vol. 19, p. 867.

**2.** See *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 82 *et seq.*

See also *Anderson v. Minneapolis St. R. Co.*, 42 Minn. 490; 43 Am. & Eng. R. Cas. 294; *Weissner v. St. Paul City R. Co.*, 47 Minn. 468; *Stutzel v. St. Paul City R. Co.*, 47 Minn. 543.

**3.** *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414; *Chicago West Div. R. Co. v. Bert*, 69 Ill. 388; *O'Neil v. Dry-Dock, etc., R. Co.*, 129 N. Y. 125; 52 Am. & Eng. R. Cas. 573; *Com. v. Hicks*, 7 Allen (Mass.) 573. See also *CROSSINGS*, vol. 4, p. 951.

**4.** *Buhrens v. Dry-Dock, etc., R. Co.*, 53 Hun (N. Y.) 571; *affirmed* 125 N. Y. 702.

In *O'Neil v. Dry-Dock, etc., R. Co.*, 129 N. Y. 125; 52 Am. & Eng. R. Cas. 573, the court said: "As the cars must run upon the tracks and cannot turn out for vehicles drawn by horses, they must have the preference, and such vehicles must, as they can in a reasonable manner, keep off from the railroad track so as to permit the free and unobstructed passage of the cars. In no other way can street railways be operated. As to such vehicles the railways have the paramount right to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The

comes liable for an injury resulting as a proximate consequence of his want of care, unless the injured party by his negligence contributed to the injury.<sup>1</sup>

Where the street car and vehicle are traversing the same street the car has the superior right of way over its track.<sup>2</sup> But this superior right of the car does not authorize its owner willfully or negligently to injure one who refuses to recognize it. The gen-

car has the right to cross and must cross the street, and the vehicle has a right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the right of the other." *Compare* Chicago West Div. R. Co. v. Ingraham, 131 Ill. 659; 41 Am. & Eng. R. Cas. 243.

1. *Collisions at Crossings*.—The cases arising here are nothing more than an application of this familiar rule of law. See generally COMPARATIVE NEGLIGENCE, vol. 3, p. 367; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15; CROSSINGS, vol. 4, p. 909; NEGLIGENCE, vol. 16, p. 398, and the cases cited in the preceding note.

In *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504; 46 Am. & Eng. R. Cas. 196, the plaintiff's carriage was struck by the car while she was attempting to cross the track. She knew that a car was coming and that it was near, having heard the bells, but she could not see it until she turned her horse on the track; she thought she would have time to cross. The car was moving at the usual rate on a down grade, and her horse was moving at a slow walk. It was held that she was guilty of contributory negligence which would bar recovery.

An instruction that it is the duty of the driver of a street car to exercise the highest degree of care to avoid any collision or accident; that his first and highest duty is to secure the safety of his passengers, and that he should exercise all the care that prudence might suggest in looking about and listening, so as to assure himself that his track was clear and safe, and that this duty is greater at a street crossing than at other ordinary places—does not hold the street car company to a stricter responsibility than the law imposes. The driver did not look toward the point whence the truck was coming;

had he done so the collision would have been avoided. It was held that the question of the driver's negligence was properly submitted to the jury. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401. For other similar cases see *Laughlin v. Street R. Co.*, 62 Mich. 220; 26 Am. & Eng. R. Cas. 377; *Patton v. Philadelphia Traction R. Co.*, 132 Pa. St. 76; *Moroney v. Brooklyn City R. Co.*, 9 N. Y. Supp. 546; *Gumb v. Twenty-third St. R. Co.*, 58 N. Y. Super. Ct. 1, 559; *North Side St. R. Co. v. Waut* (Tex. 1890), 15 S. W. Rep. 40 (recovery denied); *Carson v. Federal St., etc., R. Co. (Pa.)*, 50 Am. & Eng. R. Cas. 462 (plaintiff crossed track without stopping or looking—recovery denied); *Ward v. Rochester Electric R. Co. (Supreme Ct.)*, 17 N. Y. Supp. 427 (same); *Cohen v. Dry-Dock, etc., R. Co.*, 40 N. Y. Super. Ct. 368 (plaintiff in crossing track with vehicle was obstructed by blockade of trucks and run into by the street car—recovery allowed). *Mercier v. New Orleans, etc., R. Co.*, 23 La. Ann. 264.

*Instructions*.—Where an injury is sustained in consequence of a collision of a cable car with plaintiff's wagon, it is error to give an instruction that the company is guilty of negligence if the gripman "intentionally and carelessly" caused the collision, since the two terms are inconsistent. *Bindbeuthal v. Street R. Co.*, 43 Mo. App. 463.

2. See *supra*, this title, *Right to Exclusive Use of Tracks*; *Orange, etc., Horse R. Co. v. Ward*, 47 N. J. L. 560; 25 Am. & Eng. R. Cas. 359; *North Hudson Co. R. Co. v. Isley*, 49 N. J. L. 468; 34 Am. & Eng. R. Cas. 94; *Hogan v. Eighth Ave. R. Co.*, 15 N. Y. 380; *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530; *Chicago West Div. R. Co. v. Bert*, 69 Ill. 388. In one case the jury were instructed that a failure by the driver of the vehicle to observe the duty to turn out would constitute such contributory negligence as to bar a recovery for injuries resulting from the collision. *Quinn v. Atlantic Ave. R. Co.*, 12 N. Y. Supp.

eral rules as to the duty of the company to keep a reasonably careful lookout, to provide a headlight at night, etc., apply here as in other cases.<sup>1</sup> If, while the car and a vehicle are moving side by side, a collision occurs, there is a presumption that the driver

223; *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. (N. Y.) 314.

**Street Car Running Backwards.**—In other cases than those mentioned the rights of the parties are equal. The case of *Cook v. Metropolitan R. Co.*, 98 Mass. 361, affords a good illustration. The horses attached to the car, after pulling it part way up a ferry drop, stopped; the driver applied the brake and held the car stationary. C., who was driving a wagon, was about ten feet behind the car when it started, and followed after it, another team following him. The defendants usually had an extra horse to help to pull the car up the drop, but on this occasion there was none. The driver not being able to stop the car, it came back upon the horses of C. and injured them, C. being unable to get out of the way. In an action against the railway company it was held that there was evidence of due care on the part of C. and of negligence on the part of defendant. Compare *Fettritch v. Dickenson*, 22 How. Pr. (N. Y.) 248.

But see *Spaulding v. Jarvis*, 32 Hun (N. Y.) 621, as to negligence of both parties barring the recovery of the plaintiff, who left his carriage too close to the tracks of a railway, there being no evidence of willful injury, but only an error in judgment, both parties thinking there was room enough for the car to pass without striking the carriage.

1. The driver of a street car, who sees a carriage crossing the tracks in front of him on a walk, is not justified in going ahead, trusting that the carriage driver will get out of his way. The fact that the carriage driver can turn in any direction, and thus avoid the car, which is confined to its tracks, does not relieve the car driver of the duty to use ordinary care to avoid collision. *Gallagher v. Coney Island, etc.*, R. Co., 4 N. Y. Supp. 870; *Read v. Chicago West Div. R. Co.*, 8 Ill. App. 517; *Lamb v. St. Louis, etc., R. Co.*, 33 Mo. App. 489. See also *Liddy v. St. Louis R. Co.*, 40 Mo. 506. In *Ryberg v. Portland Cable R. Co.* (Oregon, 1892), 29 Pac. Rep. 614, the plaintiff turned on the track suddenly to avoid an obstacle placed in the street by the car company.

In *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, a police officer with his patrol wagon was driving along the track carrying an injured man. He saw the car coming and hallooed to the driver and tried to turn out, but had to do so slowly on account of the sick man. The car company was held guilty of negligence in causing the collision, since, if the driver had been looking ahead at all, it would have been avoided. See also *Quinn v. Atlantic Ave. R. Co.*, 12 N. Y. Supp. 223 (question for the jury as to negligence of both parties); *Berke v. Twenty-third St. R. Co.* (Supreme Ct.), 4 N. Y. Supp. 905; *Coughtry v. Willamette St. R. Co.*, 21 Oregon 245; (team frightened by motor—horses "danced" on the track in front of approaching motor—recovery not allowed); *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615; 38 Am. & Eng. R. Cas. 487 (very similar case).

In *Rascher v. East Detroit, etc., R. Co.* (Mich. 1892), 51 N. W. Rep. 463, the plaintiff was driving along the track at night and was run into by an electric car. The first warning of its approach which he had was the glimmer of the lights inside and then it was too late to turn out in time. Had there been a headlight he could have seen the car approaching at the distance of more than a mile. It was held that the plaintiff was not negligent in being on the track and that the other questions of negligence should be submitted to the jury. In such a case evidence is admissible that the public were in the habit of driving on the track, as bearing upon the question of defendant's negligence in running a car without lights. See generally *Lyman v. Union R. Co.*, 114 Mass. 83, as to the duty of the driver of a horse car when checking speed upon meeting a vehicle, to calculate for the sliding of the approaching wheel in the groove of the rail upon turning out.

**Failure of Approaching Vehicle to Turn to the Right.**—Where a vehicle meeting a car turned to the left instead of to the right as required by the statute, it is proper to refuse to charge that, as the plaintiff was on the wrong side of the street at the time of the accident, the presumption arises that the collision



of the vehicle was in fault. But even in such a case there may be ground for holding the street-car company guilty of negligence.<sup>1</sup>

**5. Frightening Horses.**—The right of a company to construct and operate its road along the streets carries with it the right to do whatever is necessary for the successful operation of the road; so that the company is not liable for injuries caused by horses becoming frightened at its cars, unless it can be shown that the fright was caused by some unusual sight or sound which the company was negligent in creating.<sup>2</sup> But if the use of the particular motor, the noise of which frightens the horse, was unauthorized, the company may be liable; as, for example, where street cars

was due to her fault, since a person has a right to travel on any part of the street, provided he regards the rights of others. *Spurrer v. Front St. Cable R. Co.* (Wash. 1892), 29 Pac. Rep. 346. Compare *Suydam v. Grand St., etc., R. Co.*, 41 Barb. (N. Y.) 375.

**Running Street Car on Wrong Track.**—Where a street car was proceeding rapidly on the left hand, instead of the right hand track, and came in collision with the plaintiff's team, which was prevented by a heap of snow from avoiding a collision, the refusal of the justice to charge the jury that the car had a right to travel on the left-hand track, was held error, for which the judgment should be reversed, as the mere fact of the car running on the left-hand track was not itself a fault on the part of the defendant which would subject it to damages. *Altreuter v. Hudson River R. Co.*, 2 E. D. Smith (N. Y.) 151.

1. As to the presumption, see *Suydam v. Grand St., etc., R. Co.*, 41 Barb. (N. Y.) 375; *North Side St. R. Co. v. Want* (Tex. 1891), 15 S. W. Rep. 40.

The driver of a cart which keeps upon the track of a street-car company, and in front of one of its cars, and will not allow the car to pass him, but turns off suddenly, and is upset by the car, is guilty of negligence, and there is no culpability on the part of the company. *Adolph v. Central Park, etc., R. Co.*, 33 N. Y. Super. Ct. 186.

But if the wagon, whether standing still or moving, is so close to the track that it is evident that the car cannot pass it, and a collision occurs, the car company may be liable for the injury occasioned. *Koch v. St. Paul City R. Co.*, 45 Minn. 407. See also generally *Geist v. Detroit City R. Co.* (Mich. 1892), 51 N. W. Rep. 1112, where it was held that the question of negligence was for the jury.

2. Thus, in *Hazel v. People's Pass. R.*

*Co.*, 132 Pa. St. 96; 43 Am. & Eng. R. Cas. 400, the car had run off the track and was being put back in the usual manner and with the usual noises; a horse standing on the street twenty or thirty feet from the car became frightened, reared up and fell, and was killed. It was held that, in the absence of other evidence of negligence, a recovery could not be allowed. See also *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522.

The frightening of horses by an electric street railway does not make the railway a nuisance. *Loneragan v. Lafayette St. R. Co.*, 15 N. J. Law. Jour. 233.

A team standing near the tracks of a street railway became frightened by the passing of a snow-plow which the railway company was in the habit of using to clear its track, and in their flight, one of the horses was injured and the carriage broken. It appeared that the driver was standing near the door of his carriage, without the reins in his hands, reading a newspaper, and did not see the plow until it was passing him. It was held that the negligence of the driver contributed to the injury, and precluded any recovery by the owner. *Gray v. Second Ave. R. Co.*, 34 N. Y. Super. Ct. 519; *aff'd* 65 N. Y. 562.

Where a person with full knowledge of the danger, drives a young horse alongside an electric street railway for the express purpose of testing him, to see how he will act, and the horse takes fright at an approaching train and runs away and injures the driver, the driver's negligence is a bar to his recovery. *Cornell v. Detroit Electric R. Co.*, 52 Mich. 495; 46 Am. & Eng. R. Cas. 201.

A motor-man on an electric street car is not, as matter of law, bound to stop merely because a horse that is being driven on the same street becomes frightened at the appearance and noise of the car; and the company

were operated by steam under consent of the city, but the city had no authority to give such consent, the action of the car company was unlawful, and it became responsible for damages resulting therefrom.<sup>1</sup>

**6. Snow and Ice on Tracks.**—If a track becomes incumbered with snow, the street-car company has the right and it is its duty to remove it.<sup>2</sup> But in the exercise of this right, due regard must be had to the rights of the public; and if, by dumping the snow from its tracks in a careless or negligent manner, it renders the street unsafe and persons using it are injured thereby, the company may be held liable.<sup>3</sup>

**7. Liability of Lessor and Lessee.**—A street railway company has, in the absence of specific legislative consent, no authority to trans-

will not be liable for his failure to stop it, unless the circumstances were such as to show a wanton and willful disregard of the driver's safety. *Chapman v. Zanesville Street R. Co.* (Ohio), 27 Ohio L. J. 70. The motor-man may act upon the presumption that teams not upon or approaching the track, but standing on the side of the street, are hitched, or, if not hitched, are not liable to become frightened and run away.

Sounding the gong of an electric street car to warn persons of its approach, causing horses which were hitched in the street to become frightened and run away, does not constitute negligence rendering the company liable for injuries sustained by the team, where it is not shown that the driver knew the horses were frightened, and the sounding of the gong was not a violation of law or of any city ordinance. *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615; 38 Am. & Eng. R. Cas. 487; *North Side St. R. Co. v. Tippins* (Tex. 1890), 14 S. W. Rep. 1067; *Hargis v. St. Louis, etc., R. Co.*, 75 Tex. 23; *Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199; 41 Am. & Eng. R. Cas. 535. See also for other instances *Piollet v. Simmers*, 106 Pa. St. 95; 51 Am. Rep. 496; *Pittsburgh, etc., R. Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580.

1. *Stanley v. Davenport*, 54 Iowa 463; 37 Am. Rep. 216.

2. The character and extent of this duty may be affected in particular cases by the relative obligation of the company and of the municipality in regard to the repairing and keeping in order of the part of the street covered by the tracks. See *supra*, this title, *Repair of Streets*.

The municipality may provide such rules and regulations as to the removal of snow as seem to be demanded by the public interest and convenience; and therefore may pass an ordinance forbidding the removal of snow and ice from any part of the road, although such prohibition may necessitate a temporary disuse of the tracks. *Union R. Co. v. Cambridge*, 11 Allen (Mass.) 287.

It cannot be charged as a matter of law that the disposition of snow cleared from the track in a public street in such a way as to raise the road above the level of the track was unlawful. *Wallace v. Detroit City R. Co.*, 58 Mich. 231.

**3. Removal of Snow.**—In removing the snow from its tracks, the company is bound to use such means as not needlessly to interfere with the proper use of the street. If an extraordinary storm occurs, the company must make extraordinary efforts. *Bowen v. Detroit City R. Co.*, 54 Mich. 496; 19 Am. & Eng. R. Cas. 131; 52 Am. Rep. 822. See also *Dixon v. Brooklyn City, etc., R. Co.*, 100 N. Y. 170; 26 Am. & Eng. R. Cas. 203. It must be careful not to interfere with the natural flow of water from the street, either by obstructing the gutter or otherwise; but it is not bound to haul the snow away, and is only liable where it has failed to exercise ordinary care. *Short v. Baltimore City Pass. Co.*, 50 Md. 73; 33 Am. Rep. 298.

In *Broadway, etc., R. Co. v. New York*, 49 Hun (N. Y.) 126, it was decided that the Broadway and Seventh Avenue Railroad Company was not authorized by its charter, which provided that it should run as often as the convenience of passengers should require, and that the mayor and com-

for its property and franchises to another company.<sup>1</sup> Therefore, if an injury occurs from the operation of the road by the lessee,

mon council should do no act to hinder or obstruct the operation of the railroad, to throw snow from its track, for the purpose of keeping it open on the street along its lines, to such an extent as to impede or prevent public travel thereon.

Where the street is so narrow as not to admit of two teams passing each other on either side of the car track, it is negligence for the company to throw snow from its track with a snow-plow so as to cause a ridge of snow on either side of the track so high when packed down by travel as to upset a sleigh, necessarily going thereon in turning out to allow a team to pass. *Somerville v. City R. Co.* (Supreme Ct.), 17 N. Y. Supp. 719; *Laughlin v. Street R. Co.*, 62 Mich. 220; 26 Am. & Eng. R. Cas. 377. See also *Prince v. Twenty-third St. R. Co.*, 1 Abb. N. Cas. (N. Y.) 71; *Elliott on Roads and Streets*, p. 581; *Troy v. Troy, etc., R. Co.*, 3 Lans. (N. Y.) 270; *aff'd* 49 N. Y. 657.

In *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73, the plaintiff sought to recover for injuries to himself and horse, caused by the alleged negligence of the defendant in piling up snow on each side of the track. It appeared that he was driving a sled heavily loaded with lumber and drawn by two horses, and, seeing the danger in crossing the defendant's tracks, approached them in a cautious manner, using all the care possible; but when partly across, the front runners of his sled being much lower than the hind ones, owing to the bank of hard snow, the load became disengaged and fell forward on the plaintiff and his horses. The court held that the fact of his seeing the obstruction and knowing its dangerous character, was not conclusive evidence of negligence on his part, and that it was a question for the jury to determine whether he was justified in attempting to cross the tracks and whether he used due care in doing so.

So, where an injury was caused by a switch laid down by a street railway company in an improper manner and obscured from view, by reason of the company using salt on its tracks, which had caused the slush to run down and cover the switch, it was held that the general question of negligence by the railway company was properly sub-

mitted to the jury. *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 122; 3 Am. & Eng. R. Cas. 398.

1. See *CORPORATIONS*, vol. 4, p. 237; *FRANCHISES*, vol. 8, p. 634 *et seq.*; *RAILROADS*, vol. 19, p. 895; *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64; 32 Am. & Eng. R. Cas. 406; *Fanning v. Osborne*, 102 N. Y. 441; 25 Am. & Eng. R. Cas. 252; *Middlesex R. Co. v. Boston, etc., R. Co.*, 115 Mass. 347.

By statute in *New York*, directors have an implied authority to lease the road, and the assent of stockholders is not essential. *Metropolitan El. R. Co. v. Manhattan R. Co.*, 11 Daly (N. Y.) 373; 14 Abb. N. Cas. (N. Y.) 103; 15 Am. & Eng. R. Cas. 1, holding otherwise was overruled in *Beveridge v. New York El. R. Co.*, 112 N. Y. 1; 39 Am. & Eng. R. Cas. 199. In each case the subject of leases of elevated roads was exhaustively discussed.

One street railway corporation leased its railway to another, which covenanted to assume all the liabilities and burdens imposed on the lessor by its charter. On the refusal of the lessee to comply with an order of the town to alter the track, the town revoked part of the location and threatened to revoke the rest. It was held that the lessor could not maintain a bill in equity against the lessee to compel it to alter the track; the remedy being to alter it and sue at law. *Medford, etc., R. Co. v. Middlesex R. Co.*, 111 Mass. 232.

In *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433, it is laid down that although a railroad corporation cannot without legislative consent lease its road to an individual, yet it may, under the authority conferred by *New York Laws of 1839*, ch. 218, lease its road to another corporation, and that a person injured while the lessee is operating the road and is in full possession of it cannot proceed against the lessor. See also *Hart v. New Orleans, etc., R. Co.*, 4 La. Ann. 261. In an action against the lessee of a street railway company for injuries caused by negligence in the construction of its tracks it was held that it was wholly immaterial that the lease under which it was operating the road was contrary to the statutes, and that the lessee was liable notwithstanding. *Feital v. Middlesex R. Co.*, 109 Mass. 398.

the injured party may recover from either the lessor or the lessee, both being equally liable.<sup>1</sup>

**XIII. ELECTRIC RAILWAYS.**—Electric street railways are embraced within the rule of law that street railways do not constitute an additional burden on the street.<sup>2</sup>

Controversies have arisen from the fact that the electric current applied in the operation of the electric street railway has affected injuriously the action of neighboring telephone wires. Although this difficulty is a new one, the tendency on the part of the courts is not to recognize this difficulty as conferring a right of action or a right to an injunction in favor of the telephone.<sup>3</sup>

1. For the reasons for this rule of law see RAILROADS, vol. 19, p. 897 *et seq.*, where the subject is fully discussed. See also Railroad Co. v. Hambleton, 40 Ohio St. 496; 14 Am. & Eng. R. Cas. 126, a case involving the raising of the grade of a street; Abbott v. Johnstown, etc., Horse R. Co., 80 N. Y. 28. The rule of the text is sustained in Ricketts v. Birmingham St. R. Co., 85 Ala. 600; 37 Am. & Eng. R. Cas. 12; and it is there held that the injured passenger, having sued the original company (the lessor), need not show that the railroad was actually operated by such company at the time of the injury. The rule applies in a suit against the lessor, even though the lessee agrees to assume all liability and to defend all suits brought against the original company, and to pay all judgments entered against it. Braslin v. Somerville Horse R. Co., 145 Mass. 64; 32 Am. & Eng. R. Cas. 406.

A party was injured by being thrown from his wagon by a collision with a car owned by one company but drawn by the horses of another company and driven by the latter company's driver. In a suit against the latter company recovery was allowed. Weyant v. New York, etc., R. Co., 3 Duer (N. Y.) 360. See also Wasmer v. Delaware, etc., R. Co., 80 N. Y. 212; 1 Am. & Eng. R. Cas. 122 (defective track in street); Gilmore v. Utica, 121 N. Y. 561; 43 Am. & Eng. R. Cas. 225.

2. See *infra*, this title, *Ordinary Railroads in Streets and Highways*.

3. See TELEGRAPHS AND TELEPHONES, where the law of the subject will be treated fully. See also Keasbey on Electric Wires; Thompson on Electricity. See also the following cases where this subject is touched upon with more or less fullness: Cumberland Telephone, etc., Co. v. United Electric R. Co., 42 Fed. Rep. 273; 43 Am. & Eng.

R. Cas. 194, where Brown, J., indulges in an elaborate opinion on the subject; Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co., 56 Hun (N. Y.) 67; 61 Hun (N. Y.) 141; 121 N. Y. 397; Cincinnati Inclined R. Co. v. City, etc., Tel. Co., 48 Ohio St. 390; 46 Am. & Eng. R. Cas. 588; 12 L. R. A. 534; East Tennessee Telephone Co. v. Chattanooga Electric St. R. Co. (Ch. Ct. of Hamilton County, Tenn.), 30 Am. & Eng. Corp. Cas. 562, n.; Nebraska Telephone Co. v. York Gas, etc., Co., 27 Neb. 284; 30 Am. & Eng. Corp. Cas. 547.

In Railway Co. v. Telephone Assoc., 48 Ohio St. 390, the telephone company sought to enjoin the railway company from operating its cars by means of electricity, whereby the franchise of the telephone company was greatly impaired by reason of the railway company using a grounded circuit for its wires. The court held that using the earth for a return circuit did not become the peculiar and exclusive franchise of the telephone company by reason of its prior use, and that the superior easement which the public had in the streets could not be made subservient to the telephone company when admitted on the highway, without the clearest expression of legislative intent. In delivering the opinion of the court, Dickman, J., said: "As a general rule, an occupation of the streets otherwise than for travel and transportation is presumptively inferior and subservient to the dominant easement of the public for highway purposes; for, if not so, the primary object of a dedication and appropriation might be largely defeated. And the fact that permission is granted to occupy the streets or highways for a purpose other than travel, does not confer a prior and paramount right to occupy them to the exclusion of their use

The law relating to electric street railways in other respects is not peculiar, and is embraced in the treatment of the general subject.<sup>1</sup>

**XIV. UNDERGROUND STREET RAILWAYS.**—See UNDERGROUND RAILWAYS.

**XV. ELEVATED RAILROADS**—1. Under General Railroad Law.—The first elevated railroads in the State of *New York*<sup>2</sup> were built un-

for travel in a mode different from what obtained when such permission was given. The main purpose of streets or highways being to facilitate travel and transportation, new and improved agencies for effecting that purpose must be presumed to have been in contemplation in addition to those in existence when the ways were established. To this improved agency devised for the convenience and advantage of the community in general, the franchise of the telephone company to occupy the streets for carrying on its business must be secondary and subordinate."

1. **Injury Caused by Electric Shock.**—A passenger on an electric street railway line, in passing from one car to another, came necessarily in contact with the iron handles of the car, which had become heavily charged with electricity, by reason of defective insulation of the wires conducting the electricity for the motive power of the cars. In swinging around from the step of front car to that of the "trailer," with a hand on the handle of each car, his body formed, in this manner, a circuit for the passage of the electrical current, and he received a severe shock which rendered him insensible; and, being unable to loosen his hold, he was dragged some distance and severely injured. It was contended by counsel that the company had no knowledge of the peril to which its passengers were thus exposed in passing from one car to another; but it was held, that as the company had the means of readily ascertaining the escape of electricity from the works of the car, that the knowledge must be imputed to them, that if it escaped, the iron handles of the platform were liable to become charged therewith; and that the plaintiff was not, as a matter of law, guilty of contributory negligence in stepping from the platform of one car to the platform of another when the cars were in motion, there being no rule prohibiting passengers from doing so, nor any caution against the practice which has been frequently indulged in both by the

plaintiff and other passengers; and that the question was properly submitted to the jury. *Burt v. Douglass County St. R. Co.*, 83 Wis. 229.

**Negligence; Want of Evidence.**—In an action brought by an employé of an electric street railway company, for an injury caused by the alleged negligence of the company in not providing their motors with a "resistance coil," it was held that the fact that there was no evidence produced to show that at the time of the injury the device called a "resistance coil" had been discovered or invented, and none that it had been recognized as a useful improvement, justified the granting of a new trial by the court, because this question had been submitted to the jury as a ground upon which a recovery might be had. *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391.

2. There is very little elevated railroad law outside of *New York*. The recent adoption of the elevated system in the city of Chicago has not yet been productive of much litigation in the courts of *Illinois*. In *Lieberman v. Chicago, etc., Rapid Transit R. Co.*, 141 Ill. 140, it appears that said company was incorporated in January, 1888, under the general laws of the State of *Illinois*, and is operating an elevated railroad in the city of Chicago. The case establishes the right of a company so organized to build and operate an elevated road, and to condemn land for that purpose.

*Maryland.*—Art. 23, § 186, Pub. Gen. Laws of *Maryland*, provides that no elevated railroad shall be constructed in the city of Baltimore except under a special charter. In *Koch v. North Ave. R. Co.* (Md. 1892), 50 Am. & Eng. R. Cas. 401, it was held that a cable line elevated twenty feet above the surface of the street upon a structure similar to those in use in the city of New York, and to be so elevated for the distance of three-quarters of a mile along the street, for the purpose of avoiding danger from a steam railroad on the surface of the street, was with-

der special charters and under the general railroad law of 1850 and the acts amendatory thereof.<sup>1</sup> But in 1875, the Rapid-transit act, for the regulation of elevated railroads, was passed;<sup>2</sup> which was supplemented by the Rapid-transit act of 1891, having reference to elevated railroads in cities of more than one million inhabitants.<sup>3</sup> Elevated railroads may not now be constructed under the general railroad laws of the State of *New York*. Authority to build and operate them is to be found only in the rapid-transit

in the prohibition of the act, and could not be authorized by the common council of the city of Baltimore.

*Kentucky*.—In *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, it was held that a company chartered to build a "railroad" merely, had the right to elevate its tracks whenever the character of the country made it convenient or essential.

1. In *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. Cas. (N. Y.) 103; 15 Am. & Eng. R. Cas. 1, Van Brunt, J., gives, at length, the history of the elevated-railroad system in the city of New York.

2. The *New York* act of June 18, 1875, ch. 606, generally known as the Rapid-transit act, provides among other things, substantially the following: Upon the application of fifty reputable householders and tax-payers of any county, verified upon oath, showing the need of a steam railway, etc., the supervisors of said county shall appoint five commissioners; but if the proposed railway is wholly within a city, the mayor thereof shall appoint said commissioners, who shall organize themselves into a board with appropriate officers. Said commissioners shall determine the necessity of the proposed road; and, if the same is decided to be necessary, shall fix the route over which it shall be built, prepare the plans for its construction and appropriate articles of association for a company to build the same, and shall fix the time for the completion of the road. Such road shall not be built without the consent of the local authorities having control of the streets over which it is proposed to build it and the consent of the owners of one-half in value of the abutting property. If the consent of such owners cannot be obtained, the general term of the supreme court may, upon application, appoint three commissioners, and if they, after a due hearing of all parties concerned, determine that such road ought to be built,

their report, after confirmation by the court, shall be taken in lieu of the consent of the property owners, as provided by art. 3, § 18, const. of *New York*. The commissioners appointed by the mayor shall also, after due notice to all parties concerned, ascertain and determine the aggregate pecuniary damages arising from the diminution in value of the abutting property, and no corporation shall begin the construction of such road before depositing with some trust company money or securities equal in value to such aggregate damages. The company organized for the construction of such road may acquire and hold such real estate as is necessary for the maintenance and operation of the road; and for the purpose of acquiring title to the same may present to the supreme court a petition, containing certain averments prescribed by the act, for the appointment of five commissioners of appraisal, who, after due investigation, shall report to the court the value of the property sought to be acquired, together with a record of their proceedings. Upon the coming in of said report, the company may, after notice to all parties, move for its confirmation by the court. After such confirmation and the payment of all damages and costs, the company may enter upon and take possession of the land.

3. The *New York* Rapid-transit act of 1891 makes some material changes in the law. It provides, among other things, that, in cities of more than one million inhabitants, the commissioners appointed by the mayor shall be organized as a permanent board of rapid-transit railroad commissioners in and for the city for which they are appointed; provides for their organization, and prescribes their duties; empowers them, upon their own motion, to consider and determine the necessity of building new rapid-transit railways; and provides for the sale, at public auction and for the benefit of

acts provided for that purpose.<sup>1</sup> The rapid-transit acts are general in their operation and were enacted for the purpose of obviating the constitutional provision against the enactment of any private or local bill granting to any corporation, association, or individual the right to lay down railroad tracks.<sup>2</sup> But it has been held that private or local acts amending the charters of such elevated railroad companies as existed before the passage of the general rapid-transit acts, restricting or regulating the powers previously possessed by such companies, or waiving a forfeiture of their franchises, were not within the constitutional inhibition against special legislation.<sup>3</sup>

**2. Under Rapid-transit Acts — a. CONSTITUTIONALITY.** — The general rapid-transit act of the State of *New York* was vigorously attacked in the courts on the ground that it delegated legislative powers to the rapid-transit commission, and on the further ground that it was not a general law, and, for that reason, was unconstitutional; but the act was upheld against both objections.<sup>4</sup>

**b. RAPID-TRANSIT COMMISSION.** — The commissioners appointed by the county supervisors, or the mayor, as the case may be, must fix the route or routes of the proposed railway and decide upon a plan for the construction thereof before the owners of the abutting property may be called upon for their consent; and such consent is not withheld, within the meaning of the act, unless these conditions are complied with.<sup>5</sup> The act provides that the

the city, of the privilege and franchise to construct and operate any such road.

1. *Schaper v. Brooklyn, etc., Cable R. Co.*, 124 N. Y. 630; *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93; 46 Am. & Eng. R. Cas. 114.

2. *New York Const.*, art. 3, § 18, adopted Nov. 3, 1874.

3. *In re New York El. R. Co.*, 70 N. Y. 327; 3 Abb. N. Cas. (N. Y.) 401, affirming 7 Hun (N. Y.) 239; *In re Gilbert El. R. Co.*, 70 N. Y. 361; 3 Abb. N. Cas. (N. Y.) 434, affirming 9 Hun (N. Y.) 303.

4. *In re New York El. R. Co.*, 70 N. Y. 327; 3 Abb. N. Cas. (N. Y.) 401; *In re Gilbert El. R. Co.*, 70 N. Y. 361; 3 Abb. N. Cas. (N. Y.) 434. In the former of these cases, Earl, J., after enumerating the duties of the commissioners, said: "The act rests upon the legislative will, and in no way depends for its validity upon the action of the commissioners. Corporations organized under the act derive their franchises from the legislature, and in no proper sense from the commissioners; the commissioners perform no legislative acts; they enact no laws; they simply perform administrative acts in

carrying the law into effect and applying it." On the second point, he said: "It may be conceded, as claimed by the learned counsel for the appellants, that the practical effect and operation of this law is and must be in every instance local, special and private. Such is the practical effect and operation of all the general laws for the formation of corporations, except such as are in their nature public. Their object is the formation of private and local corporations, and the command of the constitution is that such corporations shall be formed under general laws. Under this act railway corporations may be formed, are authorized to be formed in every county, town, village and city in the state, and fifty householders and tax-payers may, anywhere, at any time, institute proceedings for the formation of a corporation under the act. The act is not stripped of the general character thus conferred upon it by the circumstance that local commissioners are to be appointed to carry it into effect."

5. In *Re New York Cable R. Co.*, 109 N. Y. 43, the court said: "The jurisdiction of the general term of the

commissioners appointed by the mayor shall fix a time within which the road shall be completed. And where the commissioners named a time, to begin to run from the date of obtaining the requisite consent of the property owners and local authorities, or, in case of a failure to obtain such consent, from the time of the confirmation of the report of the supreme court commissioners, it was held to be a substantial compliance with the requirements of the act.<sup>1</sup>

The commissioners appointed by the supervisors of the county or the mayor of the city, are also required to determine the plan upon which the railroad shall be constructed. Hence, under the acts, they must determine whether the railroad shall be an underground road, an elevated road, or a surface road;<sup>2</sup> and the plans

supreme court to appoint commissioners, depends for its exercise upon a refusal of the property owners to consent. The act makes special provisions for obtaining the consent of the owners of one-half in value of the property bounded on the routes of the proposed railway, and for a public notice by the mayor's commissioners inviting the submission of plans for the construction and operation of such railway, and appointing a time and place for a meeting to decide upon such plans. The original plans decided upon by the commissioners were adjudged to be in violation of the statute, and not plans at all within its plain intent of requirements. Hence, the action of property owners in refusing their consent thereto can in no sense form any basis for petitioner's present application. The property owners and the local authorities, when applied to for their consent, must have offered to them as a necessary prerequisite to an intelligent judgment, plans which leave no essential or material portions to the discretion of the company's directors. The present amended articles embodying new plans for construction of petitioner's railways have not been submitted for the inspection and examination of the property owners, nor has their consent been sought for as the act requires. Consequently, the conditions for an exercise of power by the supreme court in this matter do not exist." See also *In re Suburban Rapid Transit Co.*, 38 Hun (N.Y.) 553.

In *Re Board of Rapid Transit Com'rs* (Supreme Ct.), 18 N. Y. Supp. 320, it was held that it was not necessary for the commissioners to present to each property owner the maps, reports and statements adopted by them before

asking his consent to the adopted plan, but that it was sufficient if public notice were given of the adoption of the plans and an opportunity afforded for the property owners to consult them.

1. In *New York Cable Co. v. New York*, 104 N. Y. 1, the time fixed by the commissioners for the completion of the railroad began to run at the date of obtaining the consents required, and no time was limited for obtaining such consents. It was urged that the commissioners had not complied with the requirements of the statute in fixing the time within which the road should be completed, but the court held otherwise, Rapallo, J., saying: "I have with some hesitation come to the conclusion that the commissioners substantially complied in this respect with the rapid-transit act. That it is reasonable to consider that the intent of the act was that companies formed under the act should be limited in respect only to time during which it was possible for them to prosecute the work, and that time when legal barriers existed to their so doing, should not be counted." On this point all the judges concurred. See also *In re King's County El. R. Co.*, 105 N. Y. 97.

2. *New York Cable Co. v. New York*, 104 N. Y. 1, 32. In this case, the plans and specifications of the commissioners laid out several routes. Of these, the principal were to be surface roads, but several others were to be surface or elevated roads at the option of the company. The number of tracks was also left to the company, as was also the height of the elevated structure, the location of the columns, and the general plan of the structure. The power to erect stations and platforms was not defined or limited. Many



must also disclose, as far as reasonably practicable, to what extent the streets are to be encroached upon, and the abutting property thereon affected, and the means of transportation to be used.<sup>1</sup> But it is not necessary that the plan should state with absolute precision the extent to which the street shall be encroached upon, or the exact locality of the railroad in the street. It is sufficient if the plan is a general plan, so prepared as to give property owners notice of the general character of the encroachments which are to be made on their property, and revealing the general plan of construction and the general mode of operation of the proposed railway.<sup>2</sup>

c. CONSENT OF PROPERTY OWNERS AND LOCAL AUTHORITIES. —Until the consent of the local authorities and of the property owners, or in lieu thereof, the determination of the commissioners appointed by the supreme court, is obtained, the company is not entitled to an injunction against the construction of another road in the street.<sup>3</sup> When the consent of the local authorities of a city is duly given, the right to use the designated property of the city vests irrevocably in the company, and a subsequent purchaser from the city of abutting property holds subject to the use of the street by the railroad company.<sup>4</sup> The consent of a property owner to the construction of an elevated railroad in front of his premises, is, if it be unqualified and if he does not own the soil of the street in front of his premises, not only irrevocable after it has been acted upon, but is a release and abandonment of any easements he may have in the street. After such consent, the abutter is not entitled to claim damages consequent upon, or compensation for, the erection and operation of the railroad.<sup>5</sup> The local authorities of a city have no right to attach to their consent conditions subsequent relating to matters over which the legislature and commissioners have entire control, and no attempt to do so will operate to annul the consent once given.<sup>6</sup>

other defects of a similar nature existed, and it was held that the commissioners had not complied with the statute.

1. *New York Cable Co. v. New York*, 104 N. Y. 1, 33. The sufficiency of plans of rapid-transit commissioners was also passed upon in the matter of *Kings Co. El. R. Co.*, 112 N. Y. 47, and the plans in question in that case were sustained.

2. *In re Board of Rapid-Transit R. Com'rs* (Supreme Ct.), 18 N. Y. Supp. 320.

3. *New York Cable R. Co. v. Forty-second St., etc., R. Co.*, 13 Daly (N. Y.) 118.

The report of the supreme court commissioners does not operate as the consent of the property owners until it is confirmed by the court. *In re*

*Kings County El. R. Co.*, 82 N. Y. 102; 2 Am. & Eng. R. Cas. 431.

4. *Herzog v. New York El. R. Co.*, 14 N. Y. Supp. 296.

5. *White v. Manhattan R. Co.*, 139 N. Y. 19, *rev'g* 18 N. Y. Supp. 396.

But, in this case, it was held if the abutting property is owned by tenants in common, who are also partners in business, and use the property for partnership purposes, one of the partners has no implied authority to bind the firm and his co-tenants by executing the consent in the firm name.

6. *In Re Kings County El. R. Co.*, 105 N. Y. 97, it appeared that the common council of Brooklyn, in giving its consent to the building of a road imposed, among others, conditions that the city assessors might arbitrate all

d. SUPREME COURT COMMISSIONERS.—After the adoption of the plans by the rapid-transit commissioners and a failure to obtain the consent of the requisite number of property holders, the mayor's commissioners may make application to the general term of the supreme court for the appointment of three commissioners to determine the necessity for the road,<sup>1</sup> and under the act of 1875, notice of the application need not be given to the property owner.<sup>2</sup> It is the duty of these commissioners to determine whether or not the road planned by the mayor's commissioners ought to be built, and if they decide in the affirmative, their determination, when confirmed by the court, shall be taken in lieu of the consent of the property owners;<sup>3</sup> they shall give public notice of the time and place of their first meeting;<sup>4</sup> they shall give a full and fair hearing to all parties concerned, but the manner of conducting said hearing is largely discretionary.<sup>5</sup> These commissioners have

damages caused to property owners by the construction of the road, and that the time within which different portions of the road should be constructed should be different from that prescribed by the commissioners. It was held that these conditions were unreasonable and unlawful. The court said: "They relate to matters over which the legislature and commissioners have entire control. The statute determines how the damages of the landowner shall be ascertained, and confers upon the commissioners sole power and jurisdiction to determine when the various portions of the road shall be completed. Their action is as the action of the legislature and can neither be superseded nor in any way affected by that of any other body. . . . Again, it may be observed of these conditions imposed by the local authorities or accompanying their consent, as was said of the other and much more obvious terms, that they are in no sense conditions precedent to be performed before the consent takes effect and so become a component part of the scheme, but are conditions subsequent; the non-performance of which in the future shall, in the language of the resolution, 'render the consent void.' The power to recall a consent is not given by the act of 1875. Neither can it, by the operation of any cause set on foot by the local authorities, when once given, be annulled."

1. In *Re Kings County El. R. Co.*, 18 Hun (N. Y.) 378, reversed on other grounds, 78 N. Y. 383, it was held that under the Rapid-transit act of 1875, the application might also have been

made by the company. See Laws 1891, ch. 4, § 5, which provides that the board of rapid-transit commissioners may make the application in its own name; and in view of the fact that section 7 of that act provides for a sale of the franchise after obtaining the necessary consents, it would seem that no company can acquire any interest in the enterprise in cities where the act is in force until after the confirmation of the report by the general term.

2. In *re New York El. R. Co.*, 7 Hun (N. Y.) 241; affirmed 70 N. Y. 327. But Laws of 1891, ch. 4, § 5 (applicable to cities of more than one million inhabitants), provide for two weeks' notice of such application by publication in the daily newspapers of the city.

3. Art. 3, § 18, Const. of *New York*; Laws 1875, ch. 606, § 4, as amended by Laws 1881, ch. 485, § 1; Laws 1891, ch. 4, § 5.

4. In *Re New York El. R. Co.*, 7 Hun (N. Y.) 242; affirmed 70 N. Y. 327, it was held that a notice by publication in seven daily newspapers given eleven days before the meeting and posted in one hundred and fourteen conspicuous places along the line of the proposed road, was sufficient. Section 5, ch. 4, Laws of 1891, provides that the commissioners shall, within ten days after their appointment, cause public notice to be given in a manner directed by the general term of the supreme court of the time of their first meeting, and that they may adjourn from time to time until all their business is transacted.

5. In *re New York El. R. Co.*, 7

no power to review the proceedings of the mayor's commissioners, but of several routes proposed by the latter they may select some and reject others;<sup>1</sup> and if, with the consent of the company, they confine the construction of the road to one of several methods proposed by the mayor's commissioners, the property owners have no right to object.<sup>2</sup> After a due hearing they shall report their determination, together with the record of the proceedings and evidence, to the general term of the supreme court for confirmation. The court will examine the whole proceeding and pass upon the sufficiency of the facts to warrant the determination. It is within the discretion of the court to confirm or set aside the report, and the court of appeals will not review the decision.<sup>3</sup> This is a distinct judicial proceeding which is not subject to collateral attack in any subsequent proceeding.<sup>4</sup>

c. RIGHT TO ACQUIRE REAL ESTATE.—Elevated railroad companies have the right to acquire such real estate as is necessary for the maintenance and operation of their roads, and, when unable to agree with the owners as to the value of such land, may obtain it by condemnation proceedings, as provided by statute.<sup>5</sup>

Hun (N. Y.) 242; *affirmed* 70 N. Y. 237; 3 Abb. N. Cas. (N. Y.) 401. In this case it was held that it was not necessary that the witnesses appear before the commissioners for cross-examination, but that the proofs might be furnished by affidavit.

1. *In re* New York El. R. Co., 70 N. Y. 327; 3 Abb. N. Cas. (N. Y.) 401; *affirming* 7 Hun (N. Y.) 239.

2. *In re* New York El. R. Co., 70 N. Y. 327; 3 Abb. N. Cas. (N. Y.) 401; *affirming* 7 Hun (N. Y.) 239.

3. *In re* Kings County El. R. Co., 18 Hun (N. Y.) 378, it was held that the determination of the two sets of commissioners was conclusive upon the court as to the necessity of constructing the road upon the route selected, and that the court was confined to an inquiry as to whether the proceedings were regular and fair and whether the determination was reasonable and just. The case was reversed on other grounds in 78 N. Y. 383, and came again before the general term of the supreme court, 20 Hun (N. Y.) 217, where it was held that it was the duty of the court to pass upon the whole case upon its merits and to confirm the report, if the scheme could be accomplished with equity and fairness, and to refuse to confirm it if this could not be done. The report was not confirmed and the company appealed from the order. The appeal was dismissed, 82 N. Y. 95, on the ground that the

order was not appealable, but the court took occasion to say (page 102): "We are convinced that in view of the evil to be guarded against, and for the effectual protection of private rights so threatened as to need a specific constitutional provision for their safeguard, it was meant that the general term, in harmony with the analogies we have produced, should have the power and duty to review the whole case and to pass upon the sufficiency of the facts and circumstances to warrant the determination of the commissioners that there ought to be a street railroad in any municipality when there was not in favor of it one-half of the property owners to be affected." See also *In re* Atlantic Ave. El. R. Co., 58 Hun (N. Y.) 609.

4. *In re* Union El. R. Co., 112 N. Y. 61.

5. *New York Laws* 1875, ch. 606, § 17, provides for the appointment of five commissioners of appraisal upon the petition of the company to the supreme court. Said commissioners shall proceed to determine the value of the land sought to be condemned in the manner provided in section 20 of said act. Section 21 provides for the confirmation of the report of the commissioners by the court, and section 22 provides for an appeal from the order confirming or refusing to confirm said report.

*Laws* 1891, ch. 4, § 23, provide:

*f.* LOCATION AND CONSTRUCTION.—If the location of the main line be invalid for want of compliance with the law, the location of branch lines will also be invalid.<sup>1</sup> And a company which is authorized to construct a main line and branches may not abandon the main line and construct the branches.<sup>2</sup> If a company is given a choice of routes, an election of a certain route is binding and puts an end to its power to change the route.<sup>3</sup>

An elevated railway company has no right to project its stations or stairways into any streets except those over which it is authorized to lay its tracks, and an injunction may be had to restrain the company from extending its structures beyond the prescribed lines even in the slightest degree.<sup>4</sup> And if the structure is not built in the manner and of the material provided by law, it may be abated as a public nuisance.<sup>5</sup> But a court of equity will not, as a rule, interfere in details of the location and construction unless a plain case of irreparable injury can be established.<sup>6</sup>

**3. Recovery of Damages by Owners of Abutting Property—*a.* RIGHT TO RECOVER.**—The principal question to which the construction and operation of elevated railroads has given rise refers to the right of owners of property abutting on the streets occupied by such railroads to recover damages for injuries to their property resulting from the maintenance and operation of the road. When the question first came up in the trial court it was held, in sup-

"Every such corporation shall have the right to acquire and hold such real estate or easement or other interest therein or rights appertaining thereto as may be necessary to enable it to construct, maintain and operate the said railway or railways, and such as may be necessary for stations, depots, engine house, car houses, machine shops, and other appurtenances specified in the articles of association. And in case any such corporation cannot agree with the owner or owners of such property, it shall have the right to acquire title to the same in pursuance of the terms of and in the manner prescribed in title 1 of chapter 23 of the Code of Civil Procedure known as the condemnation law." See also, *infra*, this title, *Eminent Domain Proceedings*.

1. *In re Metropolitan Transit Co.*, 111 N. Y. 588; *affirming* 48 Hun (N. Y.) 620.

2. *Goelet v. Metropolitan Transit Co.*, 48 Hun (N. Y.) 520.

3. *Negus v. Brooklyn*, 10 Abb. N. Cas. (N. Y.) 180.

4. *Adler v. Metropolitan El. R. Co.*, 28 Abb. N. Cas. (N. Y.) 198; *Mattlage v. New York El. R. Co.*, 14 Daly (N. Y.) 1; *In re Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 506.

In *Adler v. Metropolitan El. R. Co.*, 28 Abb. N. Cas. (N. Y.) 198, the court awarded an injunction requiring the defendant company to remove a station projecting two feet into a side street, saying that the doctrine *de minimus non curat lex* did not apply to acts of wrongful trespassers.

But a private citizen may not maintain an action to abate such a nuisance unless he is specially injured thereby. *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173.

5. *Porth v. Manhattan R. Co.*, 134 N. Y. 615, *affirming* 58 N. Y. Super. Ct. 366.

6. In *Schmitz v. Union El. R. Co.*, 50 Hun (N. Y.) 407, it appeared that the elevated road if constructed as proposed would, in passing from one street to another, make a considerable curve at one corner, crossing the sidewalk in front of plaintiff's property, and within a few feet of his store building, and cutting off part of a house on the other corner. By cutting deeper into this house, the sidewalk could be saved. It was held that equity would not interfere, the radius of the curve being the same in either case; also that the fact that the house was owned by the company construct-

posed conformity with the previous decisions in the state, that the landowner had no right of recovery. The court of appeals, however, took a different view, and has constantly held in all the cases which have arisen that abutting property owners, even though they do not own the fee in the street, have a right to recover from a railroad company damages for the infringement of their easements in the street of light, air, and access. The cases are reviewed at length in the note.<sup>1</sup>

ing the road was immaterial. See also *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173.

1. **The Story Case.**—The first case arising in the court of appeals was that of *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; 11 Abb. N. Cas. (N. Y.) 236, reversing 3 Abb. N. Cas. (N. Y.) 478. The plaintiff, Story, held a lot on Front street ultimately, by virtue of a grant from the city. The deed contained a covenant that the streets should "forever thereafter continue and be for the free and common passage of, and as perfect streets and ways for, the inhabitants of the city and all others passing and returning through or by the same in like manner as the other streets of the city now are or lawfully ought to be." The trial court found, as a matter of fact, that the structure would to some extent obscure the light of the abutting premises; that the passing trains would also do this, and give to the light a flickering character objectionable for business purposes, and to some extent impair the general usefulness of the plaintiff's premises; that "the line of columns abridges the sidewalks and interferes with the street as a thoroughfare where such columns are located; that the fronts of the abutting buildings will be exposed to observation from passengers in the passing trains, and the privacy of those in the second or upper stories invaded." It also found that these things would be of a constant and continuous character, tending to occasion incidental damages to the plaintiff's premises and to depreciate its value. The railroad company made defense upon the ground that its acts were authorized by the legislature, and therefore that whatever injuries were occasioned to property were *damnum absque injuria*. The cases of *People v. Kerr*, 27 N. Y. 188, and *Kellinger v. Forty-second St.*, etc., R. Co., 50 N. Y. 206 and others were relied upon. These cases held that

the construction of a horse railroad along a street would afford no ground for the recovery of damages. The court of appeals, however, held that the plaintiff had a right to recover. The dedication of the street by the municipality—the covenant in the deed referring to the construction of a street and its maintenance—secured to the plaintiff the right and privilege to have it forever kept open as such. The value of the lot was enhanced by such dedication, and it must be presumed that the grantee paid and the grantor received an enlarged price by reason of this added value. It was not necessary that there should be any special or express grant; the dedication, the sale made with reference to it, and the consideration paid, were in themselves sufficient. The owner of the lot, then, acquired an easement in the street, although the fee remained in the city. The extent of this easement was to have the street kept open so that from it an access might be had to the lot, and light and air furnished across the open way. So that it having been established as a fact that the elevated structure would interfere with this arrangement, the plaintiff had a right to recover damages to the extent of the injury suffered by him. The court by Danforth, J., delivered an elaborate opinion, reviewing exhaustively the authorities on the subject. Tracy, J., delivered a concurring opinion, in the course of which he said, after stating the facts as to the character of the elevated structure: "Can the street be lawfully appropriated to such a structure, without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure without compensation, its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized to be supported upon brick columns, or upon brick arches

spanning the street. If a superstructure may be authorized which spans the entire carriageway at fifteen feet above the bed of the street one may be authorized which spans the entire street, from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles. The city undertook and agreed with the plaintiff's grantors that Front street, when constructed by them, should forever thereafter continue and be kept as a public street in like manner as other streets of the same city now are or lawfully ought to be. This fixes with definiteness and precision the character of the street which the parties to the contract intended to secure." The decision was not unanimous, Earl, Miller, and Finch, JJ., dissenting, the first in a lengthy opinion. But the case must stand as authority, it having been cited and approved and its decision adhered to in many subsequent cases. The majority of the court expressed the opinion that the grants from the city to Story's grantors conveyed the fee to the middle of the street, the city merely reserving an easement—i. e., the right of the public to use the land as a street. But the decision did not rest upon this point, as the court took the view that Story had a right to recover damages, even though the fee of the street was in the city. See also *Mattlage v. New York El. R. Co.*, 11 N. Y. Supp. 482; *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Super. Ct. 311.

**The Lahr Case.**—The next important case which arose was that of *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 269. The only difference between this and the Story case was that the street upon which Lahr's lot abutted was opened under the statute of 1813, which permitted the taking by the city of lands for streets, and the assessing of the cost of improvements upon the property benefited; there were no express covenants such as existed in the Story case. The court held, however, that the statute (of 1813), taken in connection with the trust declared therein, was equivalent to a contract or covenant by the city with the adjacent lot owners that the streets opened under the statute should forever remain open and public streets, and that the

necessary consequence was that they could not be appropriated to other than street uses to the injury of abutting owners except when due compensation was made. The court reviewed the decision in the Story case, and held that although it was pronounced by a divided court, it must be considered as decisive upon all points involved therein, not only upon those which it expressly decided, but also upon such as logically come within the principles there determined. The court then went on to detail the questions determined by that case. It was held that it was not essential to the acquisition of an abutter's right in the street, that the land in the street should have been originally taken from him, as in any event he is a party to proceedings to appropriate the land for the same, and liable to be assessed for its benefits, and therefore entitled to enjoy them. See *Stevens v. New York El. R. Co.*, 57 N. Y. Super. Ct. 416.

**Kane v. Elevated R. Co.**—In another case, *Kane v. New York El. R. Co.*, 125 N. Y. 186; 46 Am. & Eng. R. Cas. 137; and in *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; 46 Am. & Eng. R. Cas. 126, still another phase of the general question was presented. Pearl street, on which the plaintiff's lot was situated, was opened prior to 1664, and passed under the control of Great Britain upon the capitulation in 1664. There was no evidence of the circumstances attending the opening of this street, or whether the land in the street at the time it was laid out was public or private property. The railroad company contended that under this state of facts, the civil law, which was the law of Holland, should govern; that under such law, the sovereign was vested with the absolute title to the soil of all streets and highways, and that no private rights or easements existed therein; so that an owner of land adjacent to a street acquired no rights by reason of his adjacency, or from the fact that he had built upon the street, in reliance upon its continued existence as a street; but that it was competent for the sovereign to close the street, or to convert it at any time to any different public use, without making compensation. The court held that, assuming the powers of the sovereign under the civil law to be as broad as the railroad contended, and that the English crown succeeded to the same powers as to the streets of

New York city open prior to 1664, as existed in the sovereignty under the civil law, it still remained to be considered whether these powers had since been modified by grant, covenant, legislation, or otherwise, so as to vest in abutting owners an easement in the street. The court then proceeded to examine the Dongan charter, granted by the colonial government to the mayor and commonalty of New York city in 1686, which vested in the city of New York title to all its streets, and contained an express legislative declaration of a trust in respect to all such streets, upon the faith of which owners of abutting property are presumed to have acted. The legislature therefore could not abrogate this trust without making compensation for the injuries sustained by abutting owners. *Mortimer v. New York El. R. Co.*, 57 N. Y. Super. Ct. 244.

The Kane case also held that the right of the abutting owner to compensation is not affected by the fact that the title to the street is nominally in individual owners of lots on the opposite side of the street, where it appears that he has acquired a prescriptive right against such individual owners, and it does not appear that the railroad company claims under them. The cases of *Story v. New York El. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; and *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, were both examined and approved.

**Other Cases.**—The principles laid down in these four leading cases have been adopted and followed in all other cases arising on the same questions. See *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; *McGean v. Manhattan R. Co.*, 117 N. Y. 219; *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618; 43 Am. & Eng. R. Cas. 412; *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409; *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96; 46 Am. & Eng. R. Cas. 149; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138; *In re Brooklyn Rapid Transit Co.*, 62 How. Pr. (N. Y.) 404; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 43 N. Y. Super. Ct. 292. See also the cases cited throughout this section, and *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640.

The act of the legislature of March 16, 1790, by which the Battery was dedicated to public uses, and the sale

or appropriation thereof to, or for any private use thereafter prohibited, does not create a contract under which an adjoining owner may maintain an action to prevent the appropriation of any part of the Battery for elevated railway purposes. *Spader v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y.) 467. Compare *Patten v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y.) 306.

In *American, etc., Methodist Soc. v. Brooklyn El. R. Co.*, 46 Hun (N. Y.) 530, the railroad company made defense that as the avenue had been opened under chapter 132 of the act of 1835, which provides that the streets opened thereunder shall be converted to the use of the public in a manner now designated and settled by law, and "in such other manner as the legislature may hereafter deem proper to enact" it must be assumed that the abutting owners received under the proceeding instituted for the opening of the street full compensation for any use which the legislature might deem proper to enact. But the court held that this claim could not be sustained, as the words of the statute did not extinguish all private right in the street; that if such general words operated at all to extend the scope of the uses to which the land thereby taken could be subjected, their only effect would be to authorize such other uses of the street as might be of the same general nature as the uses "then settled and designated by law," of which the operation of an elevated road was not one.

Where there is no evidence to show how the street in which plaintiff's premises, injured by the operation of an elevated railway, was opened, it will be presumed that adjoining proprietors own the fee of the street. *Stewart v. Metropolitan El. R. Co.*, 56 N. Y. Super. Ct. 377. See also *Wager v. Troy Union R. Co.*, 25 N. Y. 529. And in an injunction proceeding against the railroad company, the burden of overthrowing the presumption is on the defendant. *Hochhalter v. Manhattan R. Co.*, 31 N. Y. St. Rep. 112.

An abutting property owner who, for a valuable consideration, consented to the erection of an elevated railway in front of his premises, will be enjoined from making excavations in the street impairing the supports of the structure. *Kings County El. R. Co. v. Cocks* (Supreme Ct.), 22 N. Y. Supp. 1017.

**b. FORM OF ACTION—PERMANENT OR TEMPORARY DAMAGES.**—In regulating the method of recovery by property owners for damages resulting from the maintenance and operation of elevated roads, the procedure recognized by the *New York* courts has no exact counterpart in other jurisdictions. The damages may be determined in eminent-domain proceedings instituted by the railroad company, or by a common-law action, or by an action for an injunction; the last method is that generally adopted, for reasons stated below.<sup>1</sup>

(1) *Eminent Domain Proceedings.*—These proceedings are instituted by the railroad company to acquire the right to occupy the streets and to interfere with the easements of abutting lotowners, so far as may be necessary for the proper construction and operation of the railroad. The easements are taken, within the meaning of the constitution, and the measure of damages is compensa-

**Right to Compensation—Experimental Section.**—The right of landowners to compensation was recognized in the early case of *In re East River Bridge*, etc., Transit Co., 26 Hun (N. Y.) 490, where it was held that the report of the commissioners would not be confirmed by the general term, until some provision had been made whereby the owners of lots and buildings abutting on the proposed route, whether they owned the fee of the street in front of their premises or not, would be compensated for the damages they might sustain by reason of the construction and operation of the road.

And the law authorizing the construction of an experimental section of the elevated road was held unconstitutional in not providing for compensation to property owners. *People v. Loew*, 39 Hun (N. Y.) 490.

*Kentucky.*—In *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, it was held that an elevated railroad was not an unreasonable obstruction of a street, and that the owner of abutting property was without remedy unless deprived of the reasonable use of the street.

1. See *infra*, this title, *Proceeding for an Injunction*.

Mr. Sedgwick, in his work on Damages (8th ed.), vol. 3, § 1211, criticizes adversely the *New York* procedure, saying: "How is it possible to define the nature of the right of action in these cases? If it is wholly equitable, how does the right to an injunction enable the court to prevent the injunction issuing if the party applying for it desires it? If the defendant instead

of paying the fee damages in a given case, submitted to the injunction, or if the plaintiff insisted on having it, what would happen? The fundamental difficulty is one which may be stated in a variety of ways, but in the last resort consists in the impossibility of reconciling two wholly opposite views: one being that what the legislature authorizes cannot be a nuisance, and that its interference with private property, short of absolute divestiture of title is *damnum absque injuria*; the other being that whatever injuries property is *pro tanto* a taking of it, . . . there is no reason why, the injury being permanent and necessarily so, the damage should not be paid for once for all in a common-law action, nor why the fiction should be resorted to that the plaintiff has a right to enjoin the defendant from enjoying the powers conferred upon it by the state."

This method of procedure is not a new one, however, in *New York*. A similar method for the recovery of damages was adopted as far back as 1857, in the case of *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651. That case was a suit in equity brought to restrain the railroad company from using the street with their railway, and to recover damages for past use. The conclusion arrived at, as expressed in the opinion of Selden, J., was that: "The defendants in constructing their road were guilty of an unwarrantable intrusion and trespass upon plaintiff's property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet as the trespass was of a



tion to the owner for the value of his easements at the time of the proceeding. The taking being lawful, consequential damages which do not constitute a "taking" of property are not to be considered. In this connection the well-settled principles of the law of eminent domain prevail. The damages are in the nature of prospective damages only.<sup>1</sup>

While there is some conflict of authority on the subject, the correct rule undoubtedly is that damages in eminent-domain proceedings are to be assessed for the value of the land as at the time of the appropriation by legal proceeding, and not at the time of the actual occupation.<sup>2</sup> It is to be observed, however, that while the actual market value at the time of the institution of the condemnation proceedings is usually the inquiry, yet, in assessing the damages, the decreased value resulting from the existence of the trespassing railroad cannot be taken as the basis

continuous nature he had a right to come into a court of equity and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief." See also *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; 50 Am. & Eng. R. Cas. 308. Compare *Stetson v. Chicago, etc., R. Co.*, 75 Ill. 74. The *Illinois* courts refuse to grant an injunction in such cases, and leave the landowner entirely to his remedy at law.

1. See the general subject discussed in *EMINENT DOMAIN*, vol. 6, p. 563, *et seq.*

**Land for Stations.**—Elevated stations are an essential part of the railroad, and therefore come within the term "public use" for which land may be condemned. The fact that a small portion of the stations were used for news stands, does not prove that stations of smaller size would adequately accommodate the traveling public, and does not, therefore, prevent the company from acquiring title by condemnation to the land on which the stations stand. *In re Metropolitan El. R. Co.* (Supreme Ct.), 2 N. Y. Supp. 278.

**2. Measure of Damages in Eminent-Domain Proceedings.**—See the subject discussed and the authorities examined in *EMINENT DOMAIN*, vol. 6, p. 565. See also *In re New York El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 857; *Chicago, etc., R. Co. v. Randolph Town Site Co.*, 103 Mo. 451; 47 Am. & Eng. R. Cas. 118, in which last case the rule of the text is clearly laid down, and the court, in construing a constitutional provision very, if not precisely,

similar to that of the *New York* constitution, held that the taking or appropriation within the meaning of the constitution related to the effect of the condemnation proceedings, and not to the unlawful occupation before the proceedings were begun. The court cited *Hampden Paint, etc., Co. v. Springfield, etc., R. Co.*, 124 Mass. 118, and quoted from the opinion in *Blue Earth County v. St. Paul, etc., R. Co.*, 28 Minn. 503; 10 Am. & Eng. R. Cas. 209, as follows: "The universal rule is that compensation must be fixed at the time the public make the appropriation. That this means the time of taking and appropriating the property by appropriate legal proceedings, and not to the time of some previous wrongful and tortious entry, necessarily follows from the constitutional provision which requires compensation first to be made. The fact that a railroad company has, in advance of proper condemnation proceedings, committed a trespass, and wrongfully taken possession of the land, gives it no right to insist that such proceedings subsequently instituted shall relate back to the date of the trespass."

**Particular Cases.**—In a proceeding by a railroad company for the condemnation of a right of way in a street in which the abutting owners had a mere easement, the measure of damages is the difference in the value of the property before and after the construction of the railroad. *In re Union El. R. Co.* (Supreme Ct.), 8 N. Y. Supp. 813; *In re Brooklyn El. R. Co.*, 55 Hun (N. Y.) 165; *Mortimer v. Manhattan R. Co.*, 57 N. Y. Super. Ct. 509.

for estimating the award. In such case the inquiry must be what would be the fair market value of the whole property at the time of the condemnation without the railroad; and the difference between that sum and the present market value of the property left with the railroad in existence, should constitute the measure of damages to which the owner should be entitled.<sup>1</sup>

All of the elevated roads constructed under the Rapid-transit act have, either by direct grant from the legislature, or by their succession to the rights and properties of other companies to whom the right had been granted, acquired the right to institute proceedings to condemn land for the location of their railways. These proceedings may be maintained as to land which the company has already occupied with its railway, and even after the owners have instituted suits against the company and recovered damages for the unlawful occupation.<sup>2</sup>

(2) *Common-law Action*.—Until the railroad company acquires

Where it appears that for the two years immediately prior to the construction of the road, the property was let for \$3,900, and that after the railroad went into operation, the rents were reduced to about \$3,000, an award of \$25,000 is excessive. *Thompson v. Manhattan El. R. Co.*, 8 N. Y. Supp. 641.

The rule as to the measure of damages is more fully discussed under the succeeding section in connection with injunction proceedings.

**Corner Lot.**—Where the landowner's lot is on the corner at the intersection of two streets at right angles, in estimating the compensation to him for so much of his easement in one of the streets as has been taken by the company in the construction and operation of its elevated railway, the street supposed to have it is properly determined by a line drawn from such corner of the two streets to the corner diagonally opposite. *Metropolitan R. Co. v. Levy* (Supreme Ct.), 13 N. Y. Supp. 367.

1. This is the statement of the rule by Peckham, J., in delivering the opinion of the court in *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 260; and he further says: "This inaugurates no new rule of damages in condemnation proceedings in this state. As the entry was unlawful it is, for the purpose of arriving at the value of the property, regarded as not made, and the inquiry is, 'What is the present value of such property without the presence of the structure which is there without right?' Its existence cannot be considered for the purpose of diminishing what would

otherwise be the present market value of the property." See also *In re New York El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 857.

The rule as to damages in condemnation proceedings is stated by Peckham, J., in delivering the opinion of the court in *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 271: "Generally, in regard to the taking of land, the rule may be said to be to pay the full value of the land taken, at its market price, and no deductions can be made from that value for any purpose whatever; then as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused to such land by the mere taking of other property, or whether in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded, and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter rule is true. *Henderson v. New York Cent. R. Co.*, 78 N. Y. 433; *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618; 43 Am. & Eng. R. Cas. 412; *In re Brooklyn El. R. Co.*, 55 Hun (N. Y.) 165."

2. **Right To Institute Condemnation Proceedings.**—*In re Metropolitan El. R. Co.* (Supreme Ct.), 2 N. Y. Supp. 278; *In re Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 503; 12 N. Y. Supp. 506; *In re Kearney*, 12 N. Y. Supp. 516, note; *Metropolitan El. R. Co. v. Dominick* (Supreme Ct.), 8

the right to interfere with the easements of abutting landowners, its occupation of them is a continuing trespass for which actions may be brought *de die in diem* to recover damages, as long as the unlawful trespass continues. But the law does not presume that the trespass will continue indefinitely; consequently the recovery in such actions is limited to damages which have accrued prior to the commencement of the action.<sup>1</sup> The Statute of Limitations

N. Y. Supp. 151; *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146.

A company formed under the Rapid-transit act, which has two tracks crossing each other, whereby the danger of collision is made great, may acquire the corner property at such crossing for the purpose of providing the curve necessary to allow the trains on one route to turn into the street occupied by the other so as to avoid such danger. *In re Union El. R. Co.* (Supreme Ct.), 4 N. Y. Supp. 85.

**Miscellaneous Matters of Procedure, etc.**—The court will not stay the proceedings of commissioners appointed to appraise the value of easements in process of condemnation by a railroad company. All rights can be saved by application for a stay, pending appeal, after the commissioners' report. *Metropolitan El. R. Co. v. Siefke* (Supreme Ct.), 15 N. Y. Supp. 224.

Notwithstanding the provision of laws of *New York*, 1850, ch. 140, § 18, that in condemnation proceedings "the company shall give notice" of a motion to confirm the report of the appraisal commissioners, the confirmation may be made upon motion of the property owner. *In re Metropolitan El. R. Co.* (Supreme Ct.), 22 N. Y. Supp. 128.

An order confirming the report of commissioners to appraise damages to abutting property caused by the operation of an elevated railway company cannot be reviewed on appeal for the purpose of correcting errors in the report. The appeal must be taken from the award, in pursuance of Laws N. Y. 1850, ch. 140, § 18. *In re Metropolitan El. R. Co.* (Supreme Ct.), 22 N. Y. Supp. 298.

No appeal to the Court of Appeals lies from the decision of the general term affirming an order which confirms the award of the commissioners of appraisal. *In re Metropolitan El. R. Co.*, 128 N. Y. 600.

Error in hearing an application by a rapid-transit company to acquire title to real estate, upon affidavits instead

of oral evidence, is waived by a failure to object to the introduction of the affidavits at the hearing. *In re Suburban Rapid Transit Co.*, 38 Hun (N. Y.) 553.

An injunction *nisi* against the operation of an elevated railroad in front of plaintiff's premises, will not be dissolved merely to enable defendant to acquire the title to plaintiff's property by appropriate legal proceedings, when it might have done so before the injunction was obtained. *Eno v. Metropolitan El. R. Co.*, 8 N. Y. Supp. 197. In *Eno v. Metropolitan Elevated R. Co.*, 1 N. Y. Supp. 521, it appeared that the amount awarded to plaintiff as owner, in condemnation proceedings had been deposited by defendant in bank, and the plaintiff had procured a modification of the order directing payment to himself. It was held that the damages not having been paid, nor the order recorded as required by the general railroad act, plaintiff was entitled to recover the same by action, with interest from the date of the confirmation of the award.

Where the court fails to appoint commissioners in condemnation proceedings to acquire title to real property for elevated railway purposes and to fix the time and place of their first meeting, the omission may, on proper application and notice, be supplied by the court, under Code Civ. Proc., §§ 724 and 3368, the first of which provides that the court may supply any omission in the proceedings, and the second making such provision applicable to condemnation proceedings. *Manhattan R. Co. v. Stroub*, 68 Hun (N. Y.) 90.

1. *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409.

In *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 109; 23 Am. & Eng. R. Cas. 9; 54 Am. Rep. 661, the court, by Earl, J., said: "The question, however, still remains, What damages? All her damage upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? We

confines the recovery in such actions to damages accrued within a period of six years prior to the action.<sup>1</sup> As a consequence of these principles, in estimating the damages, where such an action is brought, only such injuries to property can be considered as are temporary in their nature; as, for example, the actual decrease in the rental value or the temporary injury and inconvenience suffered by the landowner.<sup>2</sup> Injuries of a permanent character such as damage to the fee value of the premises, cannot be redressed in this action.<sup>3</sup>

have here for consideration an important principle of law which has to be frequently applied and which ought to be well known and fully settled. There has never been in this state before this case the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can well be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere;" *citing and quoting from Hambleton v. Veere, 2 Saund. 169; Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125; Esty v. Baker, 48 Me. 495; Cumberland, etc., Canal Co. v. Hitchings, 65 Me. 140; Bare v. Hoffman, 79 Pa. St. 71; 21 Am. Rep. 42; Anderson, etc., R. Co. v. Kernodle, 54 Ind. 314, all of which sustain the doctrine of the text. See also DAMAGES, vol. 5, p. 17; Pond v. Metropolitan El. R. Co., 112 N. Y. 186; Reming v. New York, etc., R. Co., 7 N. Y. Supp. 516.*

1. *New York Code Civ. Pro., § 382; Martin v. Manhattan R. Co. (Supreme Ct.), 18 N. Y. Supp. 238; Cornell v. Manhattan R. Co., 63 Hun (N. Y.) 350; Kearney v. Metropolitan El. R. Co., 14 N. Y. St. Rep. 854. The Statute of Limitations does not run against the landowner's right to an injunction. Galway v. Metropolitan El. R. Co., 128 N. Y. 132.*

2. *Pond v. Metropolitan El. R. Co., 112 N. Y. 186; Tallman v. Metropolitan El. R. Co., 121 N. Y. 124; 43 Am. & Eng. R. Cas. 411. In this latter case it is said: "In such an action the plaintiff cannot recover for the permanent diminution in the value of his lots. He can only recover the damages he sustains from day to day, or from month to month, or from year to year, in the use of his lots; and the question to be determined in such an action is, how much has the usable or*

rental value of the lots been diminished by the construction, maintenance, and operation of the railroad? As a basis for estimating the damages, the lots must be taken as they are used during the time embraced in the action, and the plaintiff's recovery must be confined to the diminished rental or usable value of the lots just as they were." If he desires more ample indemnity he should proceed with his remedy by injunction. *Quoted and approved in Hine v. New York El. R. Co. (Supreme Ct.), 13 N. Y. Supp. 510; Martin v. Manhattan R. Co. (Supreme Ct.), 18 N. Y. Supp. 238. See also Williams v. Brooklyn El. R. Co., 126 N. Y. 96; 46 Am. & Eng. R. Cas. 149; Blesch v. Chicago, etc., R. Co., 43 Wis. 183; New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432; 43 Am. & Eng. R. Cas. 403; Taylor v. Metropolitan El. R. Co., 50 N. Y. Super. Ct. 312; Uline v. New York Cent., etc., R. Co., 101 N. Y. 107; 23 Am. & Eng. R. Cas. 12; 54 Am. Rep. 661, and the numerous cases there cited.*

Two species of damage arising from the same cause, as diminution in the rental value and in the selling price of property, brought about by the erection of an elevated railroad, do not give two separate causes of action. *Paret v. New York El. R. Co., 18 N. Y. Supp. 580; Trask v. Hartford, etc., R. Co., 2 Allen (Mass.) 331.*

In an action by a life tenant for damages, it is proper to charge the jury that the change in the character of the neighborhood directly or indirectly attributable to the operation of the railroad, cannot be considered as causing damages for which the plaintiff might recover. *Moore v. New York El. Co., 8 N. Y. Supp. 769.*

3. *Tallman v. Metropolitan El. R. Co., 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409; Paret v. New York El. R. Co., 18 N. Y. Supp. 580; Uline v. New York Cent., etc., R. Co., 101 N. Y. 116; 23 Am. & Eng. R. Cas. 24; 54*

In *Pennsylvania* several cases have arisen, where ordinary steam railroads in entering a city placed the road on elevated structures, and the *New York* doctrine as to the right of abutting owners to recover has not been adopted.<sup>1</sup> And in *Kentucky* they may recover damages only where they suffer substantial injury.<sup>2</sup>

But an exception to the rule stated above has been allowed in some *New York* cases, and the owner permitted to recover damages for the permanent diminution in the value of his property, where at the outset of the trial this rule of damages was acquiesced in by the defendant.<sup>3</sup> The effect of these exceptional cases is to

Am. Rep. 661; *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 260. See also DAMAGES, vol. 5, p. 16 *et seq.*

In an action by the owners of a bank building against an elevated railway company to recover damages resulting from the erection and operation of defendants' road, evidence of damage accruing after the commencement of the action and before trial was held admissible, and that it was proper to exclude evidence that if plaintiffs' building was raised as high as the municipal ordinances would allow, plaintiffs' light would not be obstructed by the structure. It was held proper also to submit to the jury the question how much less that part of the building used for banking purposes was worth, as a bank, on account of defendants' structure. *Fifth Nat. Bank v. New York El. R. Co.*, 28 Fed. Rep. 231.

A cause of action against an elevated railway company on a bond given by the company with sureties to pay all damages assessed because of the operation of the company's road in front of plaintiff's premises, cannot be joined in the same complaint with a cause of action against the company for damages resulting from the construction and operation of the road. *Hart v. Metropolitan El. R. Co.*, 15 Daly (N. Y.) 391.

1. In *Pennsylvania*—**Authority to Construct.**—In *Philadelphia v. Philadelphia, etc., R. Co.*, 7 Pa. Co. Ct. Rep. 390, it was held that under its statutory power to intersect or to cross an established road a railroad company may not cross city streets with an elevated railroad without the consent of the city obtained in accordance with acts of June 9, 1874, and May 31, 1887.

The *Pennsylvania* act of April 15, 1869, authorizing the select and common councils of Pittsburgh to vacate streets and alleys in said city, was held not to authorize the grant of permis-

sion to a steam railroad company to build a short elevated railroad from its terminus at the foot of one of the city streets on the river along the public landing, as this was not a vacation of the street, but a joint occupation with the public. *McAboy's Appeal*, 107 Pa. St. 548; 20 Am. & Eng. R. Cas. 314.

**Right of Abutting Landowners to Recover.**—In *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541; 33 Am. & Eng. R. Cas. 116, it appeared that an elevated railroad was built on the south side of a street on which the plaintiff owned a building located on the north side, the street being twenty-four feet wide. It was held that the injuries sustained by the plaintiff were not the subject of compensation within the *Pennsylvania* constitution, art. 16, § 8, providing for compensation for property injured or destroyed. The same ruling was held in *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472; 30 Am. & Eng. R. Cas. 399. But the landowner is entitled to compensation for damages direct or consequential which he has suffered in consequence of the building and operation of the railroad. *Pittsburgh Junction R. Co. v. McCutcheon* (Pa. 1888), 7 Atl. Rep. 146.

See this subject treated more extensively *infra*, this title, *Ordinary Railroads in Streets and Highways*.

2. In *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, the court said: "Undoubtedly, if the structure shall be so located as to unreasonably obstruct the abutting lot owner's means of egress and ingress from and to his lot; or, if he suffers substantial injury by having smoke, sparks or cinders thrown into his house; or its walls be cracked by the movement of heavy trains, he would be entitled to recover for the damages directly resulting from such causes."

3. In *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 293, the court, by Ruger,

establish the principle that while the general rule of damages is to permit the plaintiff in a common-law action to recover only such damages as have been sustained up to the time of the commencement of the action, still should he attempt to recover for the permanent diminution in value, the defendant by acquiescence, or by not taking a proper exception, may allow him to do so.<sup>1</sup>

(3) *Proceeding for an Injunction*.—In this proceeding the courts of *New York* combine the effects of the common-law action and eminent domain proceedings and allow damages past, present, and prospective to be recovered in the single proceeding in which the landowner applies for an injunction to restrain the operation of the road; and the court, upon a proper showing by him, grants the injunction, but with the condition that it shall take effect at the end of a specified time unless the railroad company in the meantime shall pay to the plaintiff the damages occasioned by the interference of the railroad with his easements. This proceeding practically compels the company to make compensation for, and acquire title to, the easements impaired by its road, and the court having taken jurisdiction of the cause allows damages for past injuries by way of incidental relief.<sup>2</sup> It is the only means

J., said: "This action was brought upon the theory that the building of the defendant's railroad and its operation constituted a permanent appropriation of the street for railroad purposes inconsistent with its use for street purposes, and entitled the plaintiff to recover in a single action all of the damages occasioned to his property by such taking. The case was tried upon this theory, and the defendant admitted the permanency of the intended use and acquiesced in the rule of damages adopted by the trial court.

The rule of damages having been thus agreed upon, the case was taken out of the operation of the *Uline Case* (101 N. Y. 98; 54 Am. Rep. 661) recently decided by this court." Cases in which a similar exceptional rule has been adopted on the ground of the defendant's acquiescence are *Porter v. Metropolitan El. R. Co.*, 120 N. Y. 284; *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618; 43 Am. & Eng. R. Cas. 412; *Pond v. Metropolitan El. R. Co.*, 112 N. Y. 186.

1. Of this exceptional rule Mr. Sedgwick remarks: "It is hardly necessary to say that this is an anomaly. We know of no other class of cases in which the plaintiff, being allowed one rule of redress for the invasion of a proper right by law, obtains a totally different one by the acquiescence of the defendant. This matter is of more

than ordinary importance, for if there is any such general rule the measure of damages may be changed in any case and at the pleasure of the parties. And if a rule of damages why not in any other branch of law?" 3 Sedg. on Dam. (8th ed.), § 1189. The author then goes on to combat the propriety of this rule. The rule has the sanction, however, of the Supreme Court of the *United States*. In *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432; 43 Am. & Eng. R. Cas. 403, Gray, J., speaking for the court, says that the court is "relieved from the necessity of laying down a general rule on the subject of damages because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them;" citing *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 204; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433; 43 Am. & Eng. R. Cas. 219; *Shaw v. Stone*, 1 Cush. (Mass.) 243.

2. Practically all the suits brought against the elevated railroad adopt this method of procedure for obvious reasons, and the principles of the text are illustrated and applied in each of them. The *Story case* and those following it established the fact that the occupation

of the streets by the elevated railroad though sanctioned by the legislature is unlawful; that since such unlawful occupation occasions serious injury to owners of abutting property, they have a right to an injunction to restrain its continuance, and to recover damages for past injuries in the same proceeding by way of incidental relief. See *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418.

**Alternative Damages.**—But in view of the facts that railroad companies were authorized by the legislature to acquire land or other real estate necessary for a right of way; that great public benefits were expected to flow from the existence of the road; that substantial justice would be accomplished by other means, and that the railroad was built under the probable misapprehension that it had lawful authority to occupy the streets, the courts in granting the injunction refuse to make it operative until after the expiration of a reasonable time, in order that the railroad company may have an opportunity to condemn the property and thus acquire a right to occupy the street. See *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 298; *Nutting v. Kings Co. El. R. Co.*, 48 Hun (N. Y.) 348; *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; 3 *Sedgwick on Dam.* (8th ed.), § 1187; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268.

The suspension of the injunction for a reasonable time is however purely a matter of favor to the railroad and not of right. *Blumenthal v. New York El. R. Co.*, 17 N. Y. Supp. 481. Thus in *Woolsey v. New York El. R. Co.* (N. Y. 1892), 30 N. E. Rep. 387, it appeared that the day after the trial of the action was begun commissioners were appointed to condemn the easements in question. After the trial the parties by stipulation requested the court to find the value of the property taken, so that an injunction could be avoided by a payment of the amount so found. It was held that under this state of facts the court did not err in awarding the injunction; the contention of the railroad company was without merit, it appearing that for ten years it had occupied the land without

instituting a proceeding to condemn it. *Lawrence v. Metropolitan El. R. Co.*, 12 N. Y. Supp. 546; *aff'd* 126 N. Y. 483.

**Effect of Injunction Proceedings—Additional Tracks.**—It will be observed that upon payment of the alternative damages to avoid the injunction the railroad company merely acquires the right to impair the easements to the extent existing at the time of the proceeding. If additional tracks are built or a station erected it seems that further damages may be recovered. Thus in *Suarez v. Manhattan R. Co.* (Supreme Ct.), 15 N. Y. Supp. 222, it is held that where the jury find the value of the plaintiff's interest in the premises is lessened \$12,000 by the taking of the easements, this finding is simply as to the present value of the easements taken, on payment of which the railroad company may avoid the operation of the injunction, and is not a commutation of future trespass.

Under the constitutional provision (Const. *New York*, art. 1, § 6) for the protection of the right of private property, the company will be enjoined from constructing an additional track in front of plaintiff's premises, unless it has acquired the right to impose such additional burden on the plaintiff's property by condemnation as provided by statute. *Stroub v. Manhattan R. Co.*, 14 N. Y. Supp. 773.

Damages arising from the construction and maintenance of an elevated railway in front of plaintiff's premises and an injunction against the further operation of the road, may be obtained in one and the same action. The two causes of action are not improperly united in the same complaint. *O'Sullivan v. New York El. R. Co.*, 7 N. Y. Supp. 51.

In *Rich v. Manhattan R. Co.*, 19 N. Y. Supp. 543, which was an action for injunctive relief, the complaint alleged damages to the plaintiff's property as a whole. The proof showed that some parcels were injured and others benefited; and that, considering the property as a whole, there was an aggregate benefit. It was held that the plaintiff was not entitled to the relief sought.

The objection that a permanent injunction cannot issue in respect to one of several pieces of property affected by the operation of an elevated railway must appear on the record in order to be available upon appeal. *Steub-*

by which just compensation for the property taken can be compelled.<sup>1</sup> The proceeding being single in its character, although

ing *v. New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 313.

The court may, by virtue of its inherent powers, extend the time within which plaintiff, in an action against an elevated railway company to restrain the operation of its road, is required to tender to the company a release of his easement in the street in order that the injunction granted him should become operative. *Conklin v. New York El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 782.

The pendency of a common-law action for past damages resulting from the operation of an elevated railway, is no bar to recovery of such damages in a suit for equitable relief by injunction in which the pendency of such common-law action was not pleaded and in which plaintiffs tendered a discontinuance of such action. *Golden v. Metropolitan El. R. Co.*, 20 N. Y. Supp. 630.

The fact that the elevated railroad company had procured a condemnation of plaintiff's easement, and paid his prospective damages thereon awarded, constitutes no defense to his action for injunctive relief and for damages, since plaintiff had a right to recover his past damages in such action, which defendant could not defeat by proof of partial satisfaction of plaintiff's claim pending the action. In this case *Freedman, J.*, said: "Under these circumstances the right of the plaintiff to recover his past damages could not be defeated by proof that during the pendency of the action the defendants had in part satisfied plaintiff's claim. The defendants had no right, in such a case, to have the question of past damages tried by a jury. *Sears v. Metropolitan El. R. Co.*, 59 N. Y. Super. Ct. 201; *Bergman v. Manhattan R. Co.*, 14 N. Y. Supp. 384." See also *Renwick v. New York El. R. Co.*, 15 N. Y. Supp. 149.

In an action against an elevated railway company for damages to abutting property in which defendant deposited the sum conceived by it to be due plaintiff, the right of the latter to the fund so deposited, is not affected by the fact that he had no knowledge of the payment of the money into court after he had declined a tender thereof by defendant. *Taylor v. Brooklyn El. R. Co.*, 7 N. Y. Supp. 625.

The lessor of an elevated railway

company must be made a party to an action against the lessee to restrain the operation of the road in front of the plaintiff's premises. *O'Sullivan v. New York El. R. Co.*, 7 N. Y. Supp. 51.

In an action against an elevated railway company to restrain the operation of its road, an allegation of \$75,000 damages to plaintiff's property made simply as a basis for injunctive relief, the damages not being actually claimed, constitutes no basis on which to calculate a percentage as an extra allowance for costs in case of final judgment in favor of defendant. *Gray v. Manhattan R. Co.*, 22 N. Y. Supp. 771.

An order granting an extra allowance on past damages recovered in an action to restrain the operation of an elevated railway and denying an allowance on the amount of the fee value of the property, cannot be reviewed by the general term as to that part only which refuses the allowance. *Hamilton v. Manhattan R. Co.*, 57 N. Y. Super. Ct. 491.

In *Nutting v. Kings Co. El. R. Co.*, 48 Hun (N. Y.) 348, an injunction was sought to restrain the construction of the elevated road. The court held that in view of the fact that the railroad was of paramount importance to the city, and that great public benefits could be expected to flow from its existence, and that an action at law would afford a remedy in damages, an injunction would not be allowed. It was added that the ends of justice might be attained with more certainty and satisfaction if the damages claimed should be estimated after the operation of the road had been commenced and the results of such operation had been shown by experience. See also *Watson v. Metropolitan El. R. Co.*, 57 N. Y. Super. Ct. 364.

1. This expression is used in several cases. See *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 263; *Pond v. Metropolitan R. Co.*, 112 N. Y. 186; *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 123; 43 Am. & Eng. R. Cas. 409. See also *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132.

But there are two important elements of damage which cannot be considered in estimating the prospective or fee damages, viz., the noise of pass-



it involves an application for two distinct species of relief, cannot be separated into component parts. Thus, neither party can claim the right to a jury trial on the question of past damages;<sup>1</sup> nor can a decree of the trial court be reversed as to past damages and affirmed as to the injunction, or *vice versa*.<sup>2</sup>

In *Kentucky*, a court of equity will not interfere with the construction of an elevated railroad on the ground that the easements appurtenant to abutting property will be impaired thereby. The owners of such property must rely on their remedy at law.<sup>3</sup>

The easements for the impairment of which damages are to be awarded, are those of light, air, and access;<sup>4</sup> damages for noise cannot be recovered when the occupation of the street by the company is lawful and damages are awarded as compensation for the easements condemned.<sup>5</sup>

ing trains and the invasion of the privacy of dwellings. *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 292; *Messenger v. Manhattan R. Co.*, 129 N. Y. 502.

The relief is not granted on the ground that the maintenance and operation of the road is a continuing trespass, because the interests injuriously affected are incorporeal and not subject to trespass. The theory of the law is that it is a nuisance; and something more than nominal damages must be shown before an injunction will be granted. *Bernheimer v. Manhattan R. Co.*, 13 N. Y. Supp. 913. See also *Sanders v. New York El. R. Co.*, 15 Daly (N. Y.) 388.

1. Is a Single Proceeding.—See *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; 50 Am. & Eng. R. Cas. 308; *infra*, this title, *Right to Trial by Jury*.

2. *Gray v. Manhattan R. Co.*, 128 N. Y. 499.

3. *Kentucky*.—In *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, it was held that a court of equity would not interfere with the construction of an elevated railroad, because it might result in special injuries to the owners of abutting lots by reason of smoke, cinders, the cracking of walls, etc.; but that such owners might recover in a court of law for damages directly resulting from such causes.

4. *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 292; *Seebach v. Metropolitan El. R. Co.*, 18 N. Y. Supp. 208.

In *Drucker v. Manhattan R. Co.*,

106 N. Y. 164; 30 Am. & Eng. R. Cas. 418, the court said: "Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The dripping of oil and water, and possibly the frequent columns, interfere with convenience of access. These are elements of damage, even though the necessary concomitants of the construction and operation of the road, are not the product of negligence, for they abridge the landowner's easement, and to that extent at least are subjects for redress in an action for damages." In this case the question of damages from noise and vibration was not properly before the court, because no exceptions had been taken on that point, but a division of the court was foreshadowed at the end of the opinion. The court, referring to this, said: "The question which might involve the difference of opinion among us is not here presented."

5. In *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252, the question of damages resulting from noise and vibration was directly before the court, and it was held that such damages could not be recovered, and a judgment of the lower court which allowed one thousand dollars for such damages was modified by striking out said amount. It was, however, a majority opinion only. *Ruger, C. J., Peckham, and O'Brien, JJ.*, dissenting.

But where the occupation of the street is unlawful and past damages only are sought to be recovered in an action at law, the company is liable for the noise of its trains. *Kane v. New York El. R. Co.*, 125 N. Y. 164; 46 Am. & Eng. R. Cas. 148.

c. WHO MAY RECOVER—(1) *Personal Representatives*.—The right of action for injury to the value of real property occasioned by the maintenance and operation of an elevated road is a personal asset accruing to the owner upon the happening of the injury, and upon the owner's death, therefore, passes to his personal representative and not to his devisee. All that the devisee could recover in such a case would be damages sustained to the value of the property after the death of the deviser.<sup>1</sup> Nor is this rule affected by the fact that the devisee is also the residuary legatee under the will, and that after the commencement of the action the executor files his account and a decree is made directing him to pay over to the devisee the residue of the personal estate; until the final settlement the executor, and not the devisee, is the proper party to maintain the action.<sup>2</sup>

(2) *Subsequent Purchasers*.—As the easement in the street of light, air, and access, which is appurtenant to property abutting on such street, passes by a conveyance of the land, it follows that, where the elevated railway company has acquired no right to maintain its road in the street, the right to recover for permanent damages occasioned to the property by the existence of the road belongs to the owner of the land, though he may have purchased after the construction of the road;<sup>3</sup> in such case, however, he

1. *Paret v. New York El. R. Co.*, 18 N. Y. Supp. 580; *Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102.

In *Shepard v. Manhattan R. Co.*, 117 N. Y. 442, it appeared that the premises were formerly owned by R and M, the plaintiffs, and by F, as tenants in common. F's widow was joined as plaintiff both as administratrix of the estate of F to recover damages which had accrued to the estate prior to F's decease, and individually with respect to her dower interest. A demurrer to the complaint on the ground of improper joinder of parties was overruled. While the administratrix might have a separate right of action at law for damages, yet as this and the equitable cause of action arose out of the same transaction, they were properly joined. *New York Code of Civ. Proc.*, § 484, par. 9.

*Right of Lessor's Heirs*.—Where, at the time of the owner's death, the premises are leased for a term of years to tenants, the lease having been executed after the construction of the road, the right to damages accruing from the time of his death to the termination of the lease belongs to his heirs who succeed to his title to the land, and not to his personal representative. "As owners of the reversion they are

entitled to the rents accruing from the decedent's death and if they are inadequate, and this is attributable to the wrong of the defendants, it is an injury to the reversion, and the reversioners at the time are the persons entitled to maintain the action." *Kernochan v. New York El. R. Co.*, 130 N. Y. 651; 50 Am. & Eng. R. Cas. 317.

2. *Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102. See also generally *Mitchell v. Metropolitan El. R. Co.*, 56 Hun (N. Y.) 543.

The personal representatives and devisees of a deceased owner of premises affected by the operation of an elevated railway, cannot join in an action for damages caused thereby; since the action by the personal representative is for loss of rent accruing in the decedent's lifetime, while that by the devisee is for permanent injury to the freehold. *Hart v. Metropolitan El. R. Co.*, 15 Daly (N. Y.) 391.

3. *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 260; *Sterry v. New York El. R. Co.*, 129 N. Y. 619; *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355; *Johnson v. Manhattan R. Co.*, 11 N. Y. Supp. 68; *Mitchell v. Metropolitan El. R. Co.*, 56 Hun (N. Y.) 543; *Grover v. Manhattan R. Co.*, 51 N. Y.

may not recover for damages to the rental value accruing prior to the purchase.<sup>1</sup> This right of recovery is not affected by the fact

Super. Ct. 1; *American Bank Note Co. v. New York El. R. Co.*, 59 N. Y. Super. Ct. 175; *Conkling v. Manhattan R. Co.* (Supreme Ct.), 12 N. Y. Supp. 847. See also *Mitchell v. Metropolitan El. R. Co.*, 134 N. Y. 11.

**Apparent Objections to the Rule.**—In *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355, the court, by Larremore, C. J., said: "The remarks of Judge Beach in *Foote v. Manhattan El. R. Co.* (not reported) are impressive of the natural attitude of a judicial officer and a fair-minded man towards actions of this character: 'The case is here presented of a man who goes and buys a piece of property . . . after the elevated road was built, and pays a less price for it because the elevated road is there, and then turns around and sues the elevated road; and, in my opinion, he does not occupy a position very commendable in equity.' It does not appear, however, that the learned judge felt authorized to refuse jurisdiction."

The apparent hardship of this rule of law which gives to the subsequent purchaser the right to recover damages for all future time, while the vendor is confined to past damages which have accrued within the last six years, is thus stated by Mr. Sedgwick: "There cannot be much doubt that this" [rule of law] "has produced much practical injustice. The vendor has really suffered the whole damage, and sells the property reduced by the effect of the construction and operation of the road. The vendee, on the other hand, buying at a reduced price, gets practically the benefit of the whole claim for damages, for he has a right to the injunction, and to compel the railroad to pay him the full value of his easements. In other words, the result is that in case of a sale, the right to the lion's share of the damages is acquired without consideration by one who has suffered no injury, while the previous owner, who really suffered the wrong, loses all his rights." 3 Sedg. Dam. (8th ed.), § 1196. It seems, however, that these last objections are fully answered by the consideration that the grantor may reserve the right to recover permanent damages; and by the further considerations presented by Peckham, J., speaking for the court in *Pappenheim v. Metropolitan El. R.*

*Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 260, where he observes: "But the argument in favor of the vendor, who owned the property when the road was built, and who sold his land in a depreciated market, caused by the wrongful acts of the defendants, is not, to my mind, very strong. In the first place, he had his right of action to recover for all damages caused by the trespass up to the time of the commencement of his action; and the subsequent conveyance of the land would not in any way affect that right. If he desired to restrain its further continuance, or to recover for the permanent damage caused, he could, while owner, commence and maintain his action in equity. In that action he would obtain full relief. If he chose to sell, instead of using the remedies which the law gives him, that was a matter, legally speaking, of his own choice. The defendants did not compel or limit or restrain such sale. Nothing that they did could be said to amount to any compulsion by them." But when the vendee brings such an action, he must rely upon such title as he has at the commencement of the action. A conveyance subsequently executed and delivered to him is not admissible in evidence. *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540. See also *Minton v. New York El. R. Co.*, 130 N. Y. 332.

1. In *Sperb v. Metropolitan El. R. Co.*, 61 Hun (N. Y.) 539, the referee found that all the damages which had been occasioned to the fee value of the premises had occurred prior to the plaintiff's purchase of the property, and that in the conveyance to the plaintiff there was a clause reserving to the grantor the right to recover all such damages as had accrued up to the date of the conveyance. It was held that the referee erred in finding that the plaintiff was entitled to a certain sum on account of the depreciation in the value of the premises.

In *Siefke v. Manhattan R. Co.*, 59 N. Y. Super. Ct. 444, the grantor assigned to his purchaser all right to recover past damages. The court held that in an action by the plaintiff, the purchaser, to restrain the maintenance of the road, he could not recover for past damages, although assigned to him by the grantor. This holding was on the ground

that an executor under a will, afterwards held invalid, had instituted an action and recovered damages.<sup>1</sup> The grantor in the conveyance may, however, reserve the right to recover all damages, both past and prospective, and in such case the purchaser, of course, cannot maintain an action.<sup>2</sup>

A proceeding for an injunction and for the recovery incidentally of all damages is regarded somewhat in the nature of an attempt to compel the railroad company to condemn the land; therefore, the company, after complying with the judgment obtained in such a proceeding, acquires the right to infringe the easements, and one who afterwards purchases the property takes with it knowledge of the rights acquired by the company, and has no right of action for damages to his alleged easement.<sup>3</sup>

(3) *Landlord and Tenant*.—In case of trespass upon leased property, the rule is that the right of action for damages belongs to him who suffers the injury. Where the trespass is of a casual and temporary character, therefore, the right of action is in the lessee;<sup>4</sup> but where, as in the case of the elevated railroads, the nuisance is continuous in its nature, the injury is to the inheritance and causes a permanent diminution in the value of the property, and the right of action is in the owner of the premises.<sup>5</sup> Where the lease is executed after the construction of the road,

that the principle which permits past damages to be assessed in actions of this character was exceptional, and intended to prevent multiplicity of actions, but that it ought not to be so extended as to permit a plaintiff to purchase an outstanding claim of another person, enforceable only at law, and unite to it his own claim for equitable relief and thus deprive the defendant of his right to trial by jury. See *Sommer v. New York El. R. Co.*, 60 Hun (N. Y.) 148.

1. An abutting owner sued for damages to the permanent value of his property caused by the railroad. He died pending the action, which was revived and continued by his executors, who recovered judgment for the full value of the loss. Afterwards the will under which the executors acted was adjudged invalid as a disposition of real estate, the premises were ordered to be sold, and the plaintiff became the purchaser. It was held that the subsequent payment by the railroad company of the judgment recovered by the executors did not affect the plaintiff's right to enjoin the operation of the road, since the executors had no right to maintain the action. *Mitchell v. Metropolitan El. R. Co.*, 56 Hun (N. Y.) 543.

2. *Reservation of Right to Damages by Grantor*.—*Sperb v. Metropolitan El. R. Co.*, 61 Hun (N. Y.) 539; *Hoch v. Manhattan R. Co.*, 59 Hun (N. Y.) 541; *McGean v. Metropolitan El. R. Co.*, 14 N. Y. Supp. 761.

But the grantor cannot reserve a right to restrain an invasion of the easement occurring after the grant. *Foote v. Manhattan R. Co.*, 58 Hun (N. Y.) 478.

3. An injunction against the operation of a road, which the railroad company may avoid by tendering a specified sum for the easement, is binding on persons to whom the plaintiff, after the trial and before judgment, conveys the land; and the refusal of such grantees to convey the easement is not a ground for setting aside or modifying the judgment, since the duty of conveying is by the decree imposed on the plaintiff, and may be made by him notwithstanding his conveyance of the land. *Moss v. New York El. R. Co.*, 17 N. Y. Supp. 586; *New York Code of Civ. Proc.*, § 756.

4. See *TRESPASS*; *Bedingfield v. Onslow*, 3 Lev. 209; *Jesser v. Gifford*, 4 Burr. 2141; *Addison on Torts* 139.

5. *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317.

the parties are presumed to have recognized the fact that the existence of the railroad would continue and to have contracted with reference to it. The lessee has no right of action, because he took the property subject to the trespass, but the lessor may recover damages for the rental value during the time it is occupied by the tenants.<sup>1</sup> Where, however, the lease is executed before the construction of the road, the lessee may maintain an action to recover damages to the extent of the injury done to his interest.<sup>2</sup> The measure of past damages in an action by the lessor is, as in other

Damages to the inheritance may be recovered by the owner in fee of demised premises, notwithstanding the fact that such damages accrued during the existence of the demise. *Conkling v. Manhattan R. Co.* (Supreme Ct.), 12 N. Y. Supp. 847.

1. *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317; *Hine v. New York El. R. Co.*, 128 N. Y. 571; *aff'g*, 13 N. Y. Supp. 510; *Sterry v. New York El. R. Co.*, 129 N. Y. 619; *Johnston v. Manhattan R. Co.* (Supreme Ct.), 14 N. Y. Supp. 897; *Mortimer v. Metropolitan El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 2; *Bischoff v. New York El. R. Co.*, 18 N. Y. Supp. 865; *Mulford v. Metropolitan El. R. Co.*, 12 N. Y. Supp. 929; *Nooney v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 111; *Barrett v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 71; *Sternberger v. Manhattan R. Co.*, 16 N. Y. Supp. 539.

Damages to the rental value may be allowed in an action, notwithstanding the fact that existing leases of the property were executed more than six years before the action. *Kane v. Manhattan R. Co.* (Supreme Ct.), 17 N. Y. Supp. 109; *Conkling v. Manhattan R. Co.* (Supreme Ct.), 12 N. Y. Supp. 846.

In an action by one who purchases property abutting on a street after the erection of the elevated railroad thereon, for damages to the property caused by the existence of the road, a recovery is properly allowed for the loss of rental value during the time covered by an unexpired lease outstanding when the plaintiff purchased the property, the lease having been made after the building of the road. *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355; *Whitlock v. Manhattan R. Co.*, 11 N. Y. Supp. 955; *Johnston v. Manhattan R. Co.*, 11 N. Y. Supp. 68; *Barrett v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 71.

In *Kernochan v. New York El. R.*

*Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317, the court, by Andrews, J., said: "In determining whether the lessee acquired by his lease the right to recover damages for injuries inflicted upon the property by the road during the term, the situation at the time the lease was first executed, the terms of the instrument, and the intention of the parties are to be considered. The first and most obvious consideration is that the lease was of the lot, and that when made the incorporeal and appurtenant easements in the street to the extent that they had been taken or invaded by the railroad, had been practically severed from the abutting property. The part so taken away was not enjoyed in connection with the premises leased when the lease was executed. But still more material is the fact that the rent reserved in the lease was for the use of the lot in its actual situation. This was not stated in terms, but there can be no other reasonable inference. It would be an unnatural and violent presumption that the lessor intended to exact, or that the lessee intended to pay, rent measured by the value of the use of the premises without the railroad on the supposition that it would be removed during the term."

2. *Lease Executed Prior to Construction of Road.*—In *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317, the principle in the text was not involved directly, but the court laid down the rule that, "In a case where the lease was made prior to the construction of the road different considerations would apply. Under such a lease the lessee is the party who would be entitled to maintain the action, for the same reason that we hold that the lessor is entitled in the present case—viz., that he is the one who suffers the injury."

The point was directly involved in *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Super. Ct. 311, and it was held

cases, the difference between the rental value of the premises when free from the effect of the nuisance and that when subject to it.<sup>1</sup> The right of the owner of the fee to enjoin the operation of the road is not affected by the fact that his premises are at the time subject to an outstanding lease.<sup>2</sup>

(4) *Other Parties*.—As a general rule any party who has an interest in the abutting land and the easement appurtenant thereto, which is directly affected by the maintenance and operation of the road, has a right to maintain an action for damages.<sup>3</sup>

that the lessees might recover the depreciation in the rental value of the premises, but damages caused by a falling off of patronage (plaintiff was a physician) were held too remote.

In *Kearney v. Metropolitan El. R. Co.*, 129 N. Y. 76, it appeared that the plaintiff held certain premises as the assignee of a lease which was executed prior to the construction of the railroad; that the lease contained a renewal clause. Before the expiration of the original lease the road was constructed, and at the expiration of said lease it was renewed. The action was brought to restrain the further maintenance and operation of the road and to recover damages to the leasehold. It was held that the plaintiff was entitled to recover damages which accrued both before and after the renewal of the lease, as the new lease was but a continuation of the old one.

But in *Krone v. Kings County El. R. Co.*, 50 Hun (N. Y.) 431, it appeared that the plaintiff had a leasehold interest in the property for a term of three years. A stairway for the ascent of passengers had been constructed in front of the house and it was claimed that the stairway obstructed the light, air, and access to plaintiff's property and thereby injured and damaged the same. She sought equitable relief by injunction and damages for injury to her leasehold. The injunction was refused. The court said: "The elevated road of the defendant has been constructed with the consent of the municipal authorities and of the fee owner of the premises in question, and stands under the full sanction of legal authority. Its construction was intended to subserve a public interest, and, in theory of law, it was for a public purpose to which private interests are always subservient; not that private interests are to be destroyed or disregarded. . . . The damages resulting to private property in such cases may be assessed in

the manner provided by law, or they may be recovered in an action at law. In this case, the damages to ensue to the plaintiff are simple and can be easily found by a jury."

A lessee is not entitled to a perpetual injunction. The injunction, when granted, should continue only during the existence of the lessee's interest. *Welsh v. New York El. R. Co.*, 16 Daly (N. Y.) 515.

Error in granting an injunction in favor of a lessee against an elevated railway company, which should be operative after the expiration of the lease, does not necessarily call for reversal, since the judgment can be modified by limiting the operation of the injunction to the period covered by the lease. *Welsh v. New York El. R. Co.*, 16 Daly (N. Y.) 515; *Odell v. Metropolitan El. R. Co.*, 22 N. Y. Supp. 737.

1. *Conkling v. Manhattan R. Co.* (Supreme Ct.), 12 N. Y. Supp. 847.

2. *Suarez v. Manhattan R. Co.* (Supreme Ct.), 15 N. Y. Supp. 224; *Macy v. Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 804.

3. See *PARTIES TO ACTIONS*, vol. 17, p. 505; *EMINENT DOMAIN*, vol. 6, p. 608; *In re Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 506.

Evidence that the plaintiff is in possession of the abutting land, under a recorded deed, claiming a fee, is sufficient proof of the right to the easements to maintain such action, especially where it appears that the defendant has commenced proceedings to acquire title to such easements by condemnation. *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355; *Johnston v. Manhattan R. Co.*, 11 N. Y. Supp. 68. See also *Senft v. Manhattan R. Co.*, 57 N. Y. Super. Ct. 417, where, after joinder of issue, the plaintiff conveyed the fee of the premises to his wife, and after trial, but before final submission, he also assigned to her all

his causes of action. If the incidental relief by way of past damages affects other persons than the present owners, they may properly be brought in as parties. *Shepard v. Manhattan R. Co.*, 117 N. Y. 442.

**Partners.**—In an action for damages and for injunction, it appeared that although the plaintiff held the legal title to the property, another was partner with him therein. It was held that the holder of the legal title might maintain an action in his own name as the real party in interest; that his recovery would not be limited to an undivided half interest in the damages sustained; but the judgment that on payment of a certain compensation for the easements affected, the railroad company should become entitled to a conveyance thereof, should provide that plaintiff's partner should join in the conveyance. *Korn v. New York El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 514.

**Life-tenant, Remainderman and Reversioner.**—The construction and operation of the elevated road in the street being a continuing nuisance, the owner of the reversion of abutting premises being entitled under *New York Code of Civ. Proc.* § 1665, to "maintain an action founded upon an injury done to the inheritance," notwithstanding the intervening estate, may recover damages accruing within the period of limitation of six years, though the railway was constructed and operated before that period. *Doyle v. Manhattan R. Co.*, 16 Daly (N. Y.) 506; *Hine v. New York R. Co.* (Supreme Ct.), 13 N. Y. Supp. 510; *Ottinger v. New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 18; *Thompson v. Manhattan R. Co.*, 15 Daly (N. Y.) 438; and 16 Daly (N. Y.) 64; *affirmed*, 130 N. Y. 360; *Macy v. Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 804.

In proceedings to condemn land for the purpose of the elevated road, the remainder-man, as well as the life-tenants, must be made parties. *In re Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 506.

The life-tenant cannot maintain a proceeding for an injunction and for damages to her estate in the premises arising from the unlawful occupation of the street by the railroad company, without bringing in as parties those interested in the fee. This rule applies even though the instrument under which the tenant holds provides that

if she marries she shall be entitled to the fee. *Bach v. New York El. R. Co.*, 60 Hun (N. Y.) 128; *Moore v. New York El. R. Co.*, 15 Daly (N. Y.) 510. See also in this connection *Lazarus v. Metropolitan El. R. Co.*, 69 Hun (N. Y.) 190; *McNair v. Rochester, etc., R. Co.* (Supreme Ct.), 14 N. Y. Supp. 39.

The measure of damages to the remainder-man is the difference between the value of the remainder with and that without the railroad, and is to be estimated by taking the damage to the fee and apportioning it between the life-tenant and the remainder-man according to the annuity tables. *Thompson v. Manhattan R. Co.*, 15 Daly (N. Y.) 438.

**Trustees — Trust Property.**—When the plaintiff in an action for injunctive relief against an elevated railroad is a trustee and cannot sell and convey the premises in question without the consent of third parties, it is necessary that the plaintiff's conveyance of title to the easements should be accompanied by the consent of such third parties in order that the railroad company may be compelled to pay the fee damages. *Reed v. Metropolitan El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 811.

Executors who are also trustees may maintain an action for damages resulting from an interference with easements appurtenant to the trust property. *Knox v. Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 848; *Meeks v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 466.

The beneficiaries of a trust cannot maintain an action to recover damages resulting from the operation of an elevated railway, unless the trustees decline to bring the action. *Lindheim v. Manhattan R. Co.*, 68 Hun (N. Y.) 22.

The executors and trustees of the deceased owner of abutting property do not occupy the relation of purchasers from the deceased, but succeed in behalf of the beneficiaries to the rights of the abutter, and may recover damages to the rental value of the land caused by the operation of the road. *Mortimer v. Manhattan R. Co.*, 129 N. Y. 81. And in view of the decision in the case of *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 260, it would make no difference whether they were regarded as subsequent purchasers or not.

**Mortgagor and Mortgagee.**—In *Porter v. Metropolitan El. R. Co.*, 120 N. Y.

*d. EVIDENCE*—(1) *Opinion of Witnesses*.—The opinions of ordinary witnesses as to what would have been a fair value of the property if the railroad had not been built are incompetent as evidence; so also are their opinions as to the causes which produced the decrease in value and as to the amount of damages caused thereby.<sup>1</sup> This rule, however, is subject to various modifications; thus, some of the cases hold that the admission of such evidence

284, it appeared that the plaintiff in the case had given a mortgage upon her property, which in December was foreclosed and the premises sold. The action was commenced in the following March. It was held that the plaintiff's right of action for injuries sustained while she had the title was personal to her, and did not pass with it on the foreclosure sale, nor was she divested thereby of her right of action. The fact that the judgment in this case would be no bar to an action by the purchaser in such sale for damages accruing after the acquired title, did not affect the case. *McFadden v. Johnson*, 72 Pa. St. 335; 13 Am. Rep. 681; *King v. New York*, 102 N. Y. 172. See also *Giordano v. Manhattan R. Co.* (Supreme Ct.), 9 N. Y. Supp. 258; *Woolsey v. New York El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 133.

Where there is a valid mortgage on the premises, the judgment against the railroad company must provide for the release from such mortgage of the rights to be conveyed by the plaintiff to the railroad company upon payment of the fee damages, and a failure to so provide upon request by the defendant is error. *Woolsey v. New York El. R. Co.*, 134 N. Y. 323, *modifying* 9 N. Y. Supp. 133.

**Premises Are Owned and Occupied by a Corporation.**—In *American Bank Note Co. v. New York El. R. Co.*, 59 N. Y. Super. Ct. 175, it appeared that the buildings on the premises were owned and used by a corporation for the manufacture of engravings, etc. In discussing the question of past damages the court, by Freedman, J., said: "This raises the question as to the right rule of past damages in the case of a corporation in possession. In the case of an individual owner, who himself was the occupant of the premises, the true measure of damages is the loss of the rental value, provided it appears that the premises were rendered disagreeable and uncomfortable. This rule is inapplicable to a corporation in possession, because the corporation cannot be

subjected to personal inconvenience and discomfort. Such a corporation, therefore, cannot recover for the loss of rental value, but only for the additional expense incurred. Such a recovery is in lieu of and falls short of the amount recoverable by an individual only, and is sanctioned by the decisions in *Seventh Ward Nat. Bank v. New York El. R. Co.*, 53 N. Y. Super. Ct. 412; *Fifth Nat. Bank v. New York El. R. Co.*, 28 Fed. Rep. 231; *New York Nat. Exch. Bank v. Metropolitan El. R. Co.*, 53 N. Y. Super. Ct. 511."

**Kings County.**—In *Kings County v. Sea View R. Co.*, 23 Hun (N. Y.) 180, the supervisors of the county brought suit to restrain the construction of a road over the Parkway leading to, and the road adjoining the Concourse constructed by the park commissioners of Brooklyn, under *New York Laws* of 1874, ch. 583, as amended by *Laws* of 1875, ch. 489. It was held that by these acts the fee to the street in question was not vested in Kings county, but remained in the former owners; that therefore the county could not maintain the action. Nor could it maintain the action on the ground that the railway would frighten teams and diminish the value of adjoining lots which were to be assessed to reimburse the county for moneys borrowed for the purpose of paying for improvements made under the said acts.

1. *McGean v. Manhattan R. Co.*, 117 N. Y. 219; *Korn v. New York El. R. Co.*, 59 Hun (N. Y.) 505. See also *Thompson v. Manhattan R. Co.*, 16 Daly (N. Y.) 64; *Malcolm v. Metropolitan El. R. Co.*, 13 N. Y. Supp. 283 (question allowed on cross-examination); *Blumenthal v. New York El. R. Co.*, 17 N. Y. Supp. 481; *McGay v. Manhattan El. R. Co.*, 16 N. Y. Supp. 155. Compare *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355; *Ottenot v. New York, etc., R. Co.*, 2 N. Y. Supp. 722; *Mitchell v. Metropolitan El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 130 (criticising the *McGean* case); *Teerpenning v. Corn Exch. Ins.*



is not error prejudicial to the railroad company, where it appears that similar evidence was admitted in its behalf,<sup>1</sup> or where it appears from the small amount awarded that no injustice was done

Co., 43 N. Y. 279; *Marclay v. Shults*, 29 N. Y. 346; *Fremont, etc., R. Co. v. Whalen*, 11 Neb. 585; 5 Am. & Eng. R. Cas. 364.

In the earlier cases, it was doubted whether there is much force in the rule excluding such evidence. In *Thompson v. Manhattan R. Co.*, 16 Daly (N. Y.) 64, *Bookstaver, J.*, in commenting on the case of *McGean v. Manhattan R. Co.*, 117 N. Y. 219, said: "The fact is, that for a long time, in nearly all of these damage cases, such testimony was admitted both as to the rental and fee value, although it must be conceded that it was very unsatisfactory and could aid the court but little in arriving at a conclusion upon the damages to any particular piece of property." And in the case of *Crawford v. Metropolitan El. R. Co.*, 120 N. Y. 624, the tenant of a room on the premises was asked "What would the room you occupy, and for which you said you paid five dollars, have been worth if the elevated railroad had not been opposite the house?" This question was objected to as being incompetent, and because the witness was not an expert. The objection was overruled, however, and the appellate court considered that the overruling was not error. The court said: "While the case of *McGean v. Manhattan R. Co.*, 117 N. Y. 219, may be an authority for the appellant upon the admissibility of the evidence objected to, it is at the same time an adverse authority upon the sufficiency of the objections." See also 3 *Sedgwick on Damages* (8th ed.), § 1208.

Later cases, however, insist strenuously upon the observance of the rule. In *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 50 Am. & Eng. R. Cas. 326, an expert witness was asked to testify what in his judgment "is the value of the property damaged, if at all, by the presence of the structure and the running of the trains." The admission of his answer was held to be a reversible error, since the question asked of the witness was the exact one which it was the jury's province to decide. The court went on to say that the proper method is to prove the value of the property before and after the construction of the elevated road,

from which the court may ascertain the quantum of damage. The opinion of the court by *Peckham, J.*, and the dissenting opinion of *Gray, J.*, with whom concurred *Ruger C., J.*, both discuss the question at great length. The case has been followed in preference to previous rulings in *Wallach v. Manhattan El. R. Co.*, 16 N. Y. Supp. 156; *Delafield v. Manhattan El. R. Co.*, 16 N. Y. Supp. 157.

See also *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Gray v. Manhattan R. Co.*, 128 N. Y. 499; *Blumenthal v. New York El. R. Co.*, 17 N. Y. Supp. 481; *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317 (question not sufficiently raised on appeal).

It was further held in *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 50 Am. & Eng. R. Cas. 326, that the error in admitting such evidence was not rendered harmless by the fact that upon judgment being rendered against it the railroad might submit to an injunction, and in the meantime condemn the easements instead of taking from the plaintiff a deed in fee to them.

The admission of improper evidence is not cured by a finding of the court to the effect that such evidence is disregarded, "except where the opinion is a matter of personal experience and knowledge of the expert, as shown by prior and later testimony." The appellate court has no means of determining how much of such testimony the trial court considered. *American Bank Note Co. v. Metropolitan El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 532.

In an action to recover damages arising from the operation of defendant's elevated railway in front of plaintiff's premises, the court properly permitted a witness to state what effect on plaintiff's light was produced by the railroad structure, such effect being a fact and not an inference. And evidence of the precipitation of cinders and dust from the structure to the sidewalk was properly admitted to show depreciation in the value of the premises. *Stanley v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 931.

1. *Thompson v. Manhattan El. R. Co.*, 16 Daly (N. Y.) 64.

to the company.<sup>1</sup> The testimony of a real estate agent that not one person in twenty would take property in the street occupied by the road, and that the reason assigned for such refusal was that it was "on account of the elevated railroad," is inadmissible as being hearsay.<sup>2</sup>

The principal contention which is made in this connection refers to the admissibility of the opinion of a person in the real estate business who is called as an expert. Many cases in the lower courts held that a real estate agent who has followed the sales and rental values of property in the neighborhood of the premises in question was competent to give his opinion as to the extent of depreciation in the value of the property on account of the elevated road;<sup>3</sup> but the cases in the court of appeals oppose

**1. When Admission of Improper Evidence May be Disregarded.**—*Mitchell v. Metropolitan El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 130; *Kuh v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 138. Thus in *McGean v. Manhattan R. Co.*, 117 N. Y. 219, where there was abundant evidence that the actual rental value of similar property in the same street steadily decreased after the building of the road; that while it was being constructed business on the street began to fall off; that dirt, ashes, smoke, and cinders filled the air, darkened the light, and so embarrassed trade that business left the street, and the verdict was for a less amount than the damages this testimony tended to show, the error in the admission of such evidence was considered not to be a ground for reversal. *Korn v. New York El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 514.

In *Blumenthal v. New York El. R. Co.*, 17 N. Y. Supp. 481, it was held, on the ground that the payment of damages in avoidance of an injunction is a matter of favor, that, where the opinion of a witness as to the value of easements was improperly admitted and damages of a substantial character were shown, the judgment in plaintiff's favor might be so modified as to restrain the operation of the railroad unless the company took steps, within a reasonable time, to condemn the easements. See also *Bolger v. Metropolitan El. R. Co.*, 20 N. Y. Supp. 430.

**2. *Mooney v. New York El. R. Co.***, 16 Daly (N. Y.) 145.

**3. Testimony of Real Estate Agent.**—In *Ottinger v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 912, in the general term of the supreme court of the first department, a real estate

expert was asked, "What is the rental value of the property in question with the free use of all above the surface of the street of light, air, and access to and from the building?" The court held the question competent, saying by O'Brien, J.: "This precise question was passed upon in *Korn v. Metropolitan El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 518, which we are informed was in December, 1891, affirmed by the court of appeals, 129 N. Y. 648 mem. The *Korn* case holds that the question objected to does not conflict with the rule laid down in the *McGean* case, 117 N. Y. 219."

And in *Hine v. New York El. R. Co.*, 36 Hun (N. Y.) 293, a real estate broker familiar with the property in question was called by the railroad company and asked, "What has been the effect, in your opinion, of the elevated railroad upon the value of the property so far as the items of light, air, and access to the premises are concerned?" The plaintiff objected and the question was excluded. This exclusion was held error. Such evidence was also admitted in *Shepard v. New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 175, it appearing that the witness had lived in the neighborhood for twenty-five years, owned property there, and had kept himself informed as to both the fee and the rental value.

There are other cases in which the same or similar questions have been allowed, and most of them have been reversed on appeal. *Johnston v. Manhattan R. Co.* (Supreme Ct.), 14 N. Y. Supp. 897; *Cunningham v. Manhattan R. Co.*, 13 N. Y. Supp. 622; *Benson v. Manhattan R. Co.*, 13 N. Y. Supp. 957; *Livingston v. Metropolitan El. R. Co.*,

this view, and uniformly hold that opinion evidence as to the amount or cause of the damage, must always be excluded, even when given by one who claims to be an expert.<sup>1</sup>

To make available an exception to the admission of testimony of this character, the objection must be specifically taken that the question calls for a fact not provable by opinion.<sup>2</sup>

(2) *Other Evidence*.—Evidence as to damages of a speculative or contingent character is inadmissible; thus, in an action for damages it is prejudicial error to admit evidence as to possible uses which might be made of the plaintiff's property by the erec-

18 N. Y. Supp. 203 (witness allowed to testify as to the "course of rents in general"); *Roosevelt v. New York El. R. Co.*, 57 N. Y. Super. Ct. 438 (witness who knew the premises allowed to say what would be their present value without the railroad); *Jones v. New York El. R. Co.*, 18 N. Y. Supp. 134; *Jefferson v. New York El. R. Co.* (Supreme Ct.), 11 N. Y. Supp. 488; *reversed* 132 N. Y. 483; *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355; *reversed* 134 N. Y. 613; *Johnston v. Manhattan R. Co.*, 11 N. Y. Supp. 68; *reversed* 134 N. Y. 613.

1. In *McGeen v. Manhattan R. Co.*, 117 N. Y. 219, the opinion of a witness was held incompetent, but it did not appear that the witness was an expert.

In *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 50 Am. & Eng. R. Cas. 326; *rev'd* 12 N. Y. Supp. 957, the witness was asked: "To what extent, if at all, in your judgment, is the value of the property damaged, by the presence of the structure and the running of the trains?" It was held that such a question was not competent; that this was the exact question for the determination of the court and jury; that the proper method was to prove the value of the property before and after the construction of the road, from which the *quantum* of damages may be ascertained. This case is followed in *Gray v. Manhattan R. Co.*, 128 N. Y. 499, and *Jefferson v. New York El. R. Co.*, 132 N. Y. 483, where it is held error to permit a witness to testify as to what in his opinion "would be the value of the property were it not for the existence of the road." Such a question is not only objectionable as being an opinion, but as being in regard to a matter of speculation. *Kernochan v. New York El. R. Co.*, 130 N. Y. 651; 50 Am. & Eng. R. Cas. 351; *Suydam v. New York El. R. Co.* (Supreme Ct.), 19 N. Y. Supp. 49, and

cases cited; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *McGay v. Manhattan El. R. Co.*, 16 N. Y. Supp. 155; *Wallach v. Manhattan El. R. Co.*, 16 N. Y. Supp. 156; *Sillcocks v. New York El. R. Co.*, 19 N. Y. Supp. 476; *Avery v. New York Cent., etc., R. Co.*, 121 N. Y. 31. See also *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317.

A real-estate expert cannot be permitted to testify that the physical effects of an elevated railway upon the property of an abutting owner, caused a depreciation of the rental value of the property. Such a fact is not the subject of expert testimony. *Blum v. Manhattan R. Co.*, 20 N. Y. Supp. 722.

In *Peyton v. New York El. R. Co.*, 62 Hun (N. Y.) 536, it was held that the court erred in allowing real estate agents to testify that better tenants of a property affected by the operation of an elevated railway were obtainable before the building of the road than after, and in admitting testimony that property in a neighboring avenue on which there was no elevated road commanded better rent than that abutting on avenues occupied by such roads; the testimony in either case being a mere inference from facts.

2. In *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317, the rule as to the exclusion of such evidence was recognized, but it was held that where an expert is asked to state, in his judgment, the amount of damage suffered, a general objection on the ground of incompetency is insufficient to raise the point that the question involved a fact not provable by opinion.

And in *Carter v. New York El. R. Co.*, 134 N. Y. 168, the objection to the opinion of an expert witness as to the existence of the amount of damages sustained was on the ground that it was "immaterial, incompetent, and

tion of expensive buildings upon it, and as to the amount of income which might be expected to be derived from these improvements.<sup>1</sup>

Evidence as to the amount of depreciation in rental value of the property on account of the construction of the road is admissible against the railroad company, if it is not given in the form of the estimate of a witness, and is not objectionable as being an opinion on a matter which the jury is to decide;<sup>2</sup> and, in a proceeding for an injunction, evidence as to the impairment of the rental value of the premises is not rendered incompetent by the fact that the plaintiff himself was the occupant thereof.<sup>3</sup>

As a general rule, evidence as to the effect of the road on property adjacent to the plaintiff's premises and on the same street is admissible;<sup>4</sup> but this is true only where the character of the plaintiff's property bears such a similarity to the other property, concerning which evidence is admitted, as to make it reasonable

hypothetical, and that the difference in value was not the measure of damages." It was held that this was insufficient to raise the point that the opinion evidence was inadmissible, in view of the fact that both parties asked their expert witnesses this identical question. See also the language used in the case of *McGean v. Manhattan R. Co.*, 117 N. Y. 219.

**1. Evidence of Speculative or Contingent Damages.**—*Sixth Ave. R. Co. v. Metropolitan R. Co.*, 56 Hun (N. Y.) 182; *Mundorf v. New York El. R. Co.*, 62 Hun (N. Y.) 465.

Thus, in an action for damages caused by the construction of an elevated road, evidence of what it would have cost to have erected dwelling houses on the lots, what they would have rented for if they had been built with the road there, and what they would have rented for had the road not been constructed, is inadmissible as being speculative and contingent. The measure of damages is the diminution in the rental and usable value of the lots computed for the time embraced in the action. *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409; *rev'd* 2 N. Y. Supp. 130.

But the testimony of a witness as to the rental or fee value of the premises without the railroad, based partly upon the possibility of the new building being used for offices, cannot be stricken out on motion as being based partly upon conjecture or a possibility, where the substance of the testimony is that the opinion is based upon the

uses to which the building is adapted, among them its use for offices. *Kernochan v. New York El. R. Co.*, 13 N. Y. Supp. 624; *aff'd* 8 N. Y. Supp. 648.

The rule of the text is opposed by *Mr. Sedgwick*, who says: "There seems to be no reason or principle why, in suits for the fee value, such testimony should not be received." 3 *Sedg. on Dam.* (8th ed.), § 1208.

**2. Evidence as to Rental Value.**—*Moore v. New York El. R. Co.*, 59 N. Y. Super. Ct. 32 (particularly where the witness also states the value of the property before and after the railroad is built); *Korn v. Metropolitan El. R. Co.*, 59 Hun (N. Y.) 505; *Bischoff v. New York El. R. Co.*, 18 N. Y. Supp. 865.

Under the constitutional provision compensation must always be made before the taking of the property; therefore, in condemnation proceedings it is proper to reject evidence that the property had not depreciated in value from such taking. *Jewett v. Union El. R. Co.* (Supreme Ct.), 1 N. Y. Supp. 123.

An agreed rent, and a lease showing the agreement, while not conclusive, is admissible as evidence showing the rental value of the premises affected by the railroad, provided the witness shows that the lessors had taken possession thereunder and paid the stipulated rent. *Greenwood v. Manhattan R. Co.*, 19 N. Y. Supp. 702.

**3. Woolsey v. New York El. R. Co.** (Supreme Ct.), 9 N. Y. Supp. 133.

**4.** Thus the testimony of owners of property in the neighborhood of the plaintiff's premises that they had difficulty in renting their flats after the

to presume that the road had a like effect upon each, and it is error to admit evidence as to injuries sustained by other property on the same avenue but in no way connected with or similar to plaintiff's property.<sup>1</sup> Evidence of the diminution of the rental value of other buildings near to that of the plaintiff, but not on the line of the railroad, is also admissible in behalf of the railroad company.<sup>2</sup> Evidence that since the building of the railroad the trade and business of the street has fallen off and the amount of custom greatly diminished in volume and changed in character, is competent and relevant evidence on an issue as to the depreciation of the value of an abutting owner's property.<sup>3</sup>

It is error to admit in evidence an offer made to the plaintiff to purchase the premises in question for the purpose of showing their value prior to the construction of the road.<sup>4</sup>

road was built, is competent as showing the uniform operation of a general cause, and that the plaintiff's loss of rents was not attributable to his own neglect. *Kuh v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 138.

The rule of the text is sustained also in *Sherwood v. Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 852; *Myers v. Metropolitan El. R. Co.*, 10 N. Y. Supp. 223; *Benjamin v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 908 (witness owning adjacent property allowed to state why he changed his building into a hotel); *Galway v. Metropolitan El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 47 (in this case a photograph of a building on a corner directly opposite to the plaintiff's was also admitted in evidence); *Brush v. Manhattan R. Co.*, 17 N. Y. Supp. 541; *Johnston v. Manhattan R. Co.* (Supreme Ct.), 16 N. Y. Supp. 434 (effect of smoke and cinders on plaintiff's property proven by effect of same on adjacent property similarly situated).

Proof of the existence of posts or columns supporting part of the elevated structure which is complained against is admissible, although such columns are not in front of plaintiff's property. *Galway v. Metropolitan El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 47. See also *Steinmetz v. Metropolitan El. R. Co.*, 18 N. Y. Supp. 209.

1. *Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 56 Hun (N. Y.) 182. Compare *Bischoff v. New York El. R. Co.*, 18 N. Y. Supp. 865.

Thus the testimony of a witness as to what rent he paid for premises on an adjacent street not on the line of the road is properly rejected, when it is not shown under what circumstances

he occupied the premises, and why the landlord was induced to receive the rent he did. *Thompson v. Manhattan R. Co.*, 16 Daly (N. Y.) 64.

2. *In re Union El. R. Co.* (Supreme Ct.), 7 N. Y. Supp. 853; *Kane v. New York El. R. Co.*, 125 N. Y. 187; 46 Am. & Eng. R. Cas. 137. In this latter case, however, it was held that the rejection of such evidence would not be ground for reversal, it appearing that in the early part of the trial the parties apparently assented to a rule excluding evidence of this character. See also *Sherwood v. Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 852.

3. *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; *Biggart v. Manhattan R. Co.*, 16 Daly (N. Y.) 508.

But, this effect must be the result of a taking of the easements of the abutting property. A change in the character of the neighborhood, directly or indirectly attributable to the presence of the railroad, cannot be taken into consideration in estimating plaintiff's damages. *Moore v. New York El. R. Co.*, 15 Daly (N. Y.) 510.

4. *Offer to Purchase Property as Evidence.*—*Hine v. Manhattan R. Co.*, 132 N. Y. 477, *rev'd* 13 N. Y. Supp. 510; *Lawrence v. Metropolitan El. R. Co.*, 15 Daly (N. Y.) 502. The court in this last case quoted with approval the language of Follett, J., in delivering the opinion in *Keller v. Paine*, 34 Hun (N. Y.) 177: "It has been intimated in some cases that offers are evidence of value, but it is a class of evidence which it is much safer to reject than to receive. Its value depends upon too many circum-

It will be observed that the improper admission or rejection of evidence is not ground for reversal, where it appears from all the facts in the case that such admission or rejection was harmless.<sup>1</sup>

The rules concerning the admissibility of evidence are not to be applied strictly in proceedings before commissioners of appraisal appointed by the supreme court. As a general rule such commissioners have a wider range and a larger discretion as to the reception of evidence than the courts have, and unless their award is manifestly unjust it will not be disturbed.<sup>2</sup>

stances. If evidence of offers is to be received it will be important to know whether the offer was made in good faith by a man of good judgment acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, or credit, or in exchange; or whether made in reference to the market value of the article, or to supply a particular need, or to gratify a fancy. Private offers can be multiplied to any extent for purposes of a cause, and the bad faith in which they were made will be difficult to prove. The reception of this class of evidence would multiply the issues upon the questions of damages to an extent not to be tolerated by courts aiming practically to administer justice between litigants." See also *Seale v. Metropolitan El. R. Co.* (Supreme Ct.), 16 N. Y. Supp. 419; *Whitney v. Thatcher*, 117 Mass. 523.

But when the *Lawrence* case above mentioned came up a second time, in a proceeding for an injunction, the court regarded the admission of such evidence as inoperative to affect the validity of the judgment, on the ground that the basis of the action was the right to injunctive relief, and that recovery of past damages was merely incidental, and allowable only for purposes of complete justice. *Lawrence v. Metropolitan El. R. Co.*, 16 Daly (N. Y.) 501; and in *Kuh v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 138, it is considered that the error in admitting such evidence was not ground for a reversal, it appearing that the award was a reasonable one. But in *Hine v. Manhattan R. Co.*, 132 N. Y. 477, where the question of the value of the property was sharply contested, it was held reversible error to admit such evidence.

**1. Harmless Errors.**—*Kuh v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 138; *Mitchell v. Metropolitan El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 130; *McGean v. Manhattan R. Co.*, 117 N.

Y. 219; *White v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 396; *In re New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 909; *Ottinger v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 912.

The error, if any, in permitting the plaintiff to prove that his tenant had demanded a decrease in the rent of the premises on account of the presence of the elevated railroad, the amount of decrease not being shown, is cured if the court charges the jury not to consider the abatement of the rent for any purposes. *Mortimer v. New York El. R. Co.*, 57 N. Y. Super. Ct. 244.

**2. In Proceedings Before Commissioners of Appraisal.**—*In re New York El. R. Co.* (Supreme Ct.), 8 N. Y. Supp. 707; 15 N. Y. Supp. 909; *In re New York, etc., R. Co.*, 27 Hun (N. Y.) 122; *Troy, etc., R. Co. v. Lee*, 13 Barb. (N. Y.) 169. In the former of these cases the court, by Van Brunt, P. J., said: "The rule is well settled that commissioners appointed in proceedings such as these are at bar (condemnation proceedings) are not to be governed in the receipt of evidence by the strict rules obtaining in a court. Indeed the statute says they shall not be. They may go and view the premises, and upon the knowledge thus acquired base their award."

The commissioners may disregard the testimony of witnesses as to the damage resulting to the property from the construction of the road, and may base their conclusion on knowledge and information obtained solely from a view of the premises. *In re Kings Co. El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 516.

The ordinary rules of evidence are not applicable in a proceeding before commissioners to ascertain damages to property resulting from the erection and operation of an elevated railway, and their report cannot be rejected

Other miscellaneous cases involve the application of well-known rules as to the admissibility of evidence.<sup>1</sup>

*e. MEASURE OF DAMAGES*—(1) *Generally*.—The recovery by the abutting owner is based upon the ground that the presence of the elevated railroad impairs his easements of light and air, and of access in the street. In actions at law to recover past damages, it is for the jury to determine, under the circumstances, the actual amount of injury sustained;<sup>2</sup> and where the landowner alleges the existence of the road as the cause of the decrease in

because of the admission of testimony which would not be received in a court. Commissioners are usually laymen and not supposed to be acquainted with the technical rules of evidence. *In re Sobel* (Supreme Ct.), 8 N. Y. Supp. 707; *In re New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 909; *In re Kings County El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 516.

1. *Hearsay Evidence*.—See generally *HEARSAY EVIDENCE*, vol. 9, p. 325. Thus, declarations by tenants testified to by the janitor of the house as to the entry of dirt, smoke, etc., from the railroad into their rooms, because of which they were forced to keep their windows closed, but not assigned as a reason for giving up their rooms in the house, are mere hearsay and cannot be admitted in evidence. *Saxton v. New York El. R. Co.*, 18 N. Y. Supp. 188.

In *Barrett v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 71, the landowner, the plaintiff in the case, was called as a witness in his own behalf. The railroad then called a former tenant of the plaintiff's, who testified that he had never complained to plaintiff of the dust, smoke, cinders, etc. Plaintiff being recalled related conversations of the tenant complaining of serious injury to his goods from dust and cinders. It was held that such conversations were not hearsay, but original evidence, for the purpose of impeaching the tenant.

*Motive of Witness in Leaving Premises Incompetent*.—In *Moore v. New York El. R. Co.*, 15 Daly (N. Y.) 510, a witness was not allowed to be asked this question: "Was the reason of your going away from there (*i. e.*, the premises in question), in any way connected with the effects produced by the operation of the road?" It was held that the exclusion of the question was not error. It called for the conclusion of a witness as the reason for doing a certain act, and was clearly in-

competent, since the motive of a witness in performing an act can only be given in evidence when there is no other method of proving it. See *Scott v. Metropolitan El. R. Co.*, 21 N. Y. Supp. 630.

*Evidence of Use of Premises by Owner for Illegal Purposes*.—In *Lawrence v. Metropolitan El. R. Co.*, 126 N. Y. 483; *aff'd* 16 Daly (N. Y.) 501, evidence was given tending to show that before the construction of the road the house on the landowner's premises had been rented by the plaintiff's agent to persons who had used it as a house of prostitution. There was evidence tending to show that the agent had notice that in some cases the house was so used, and that he renewed leases after such notice; but there was no evidence showing that he in any way affirmatively aided, abetted, or countenanced such use, or that the rent was fixed with reference thereto. The counsel for the railroad requested the court to find that the purpose for which the house was used was known to the plaintiff's agent, and that for such purpose the railroad had caused no diminution in the rental value. It was held proper to refuse such requests as irrelevant; and that the particular use of the house had nothing to do with the injury suffered by the plaintiff, but was wholly independent of it. *Ely v. Niagara Co.*, 36 N. Y. 297.

2. *Province of the Jury*.—The question of the amount of damages actually suffered by the landowner is, like all other questions of fact, for the jury. *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96; 46 Am. & Eng. R. Cas. 149.

The jury's province, however, does not go further than the determination of the amount of damages upon the evidence produced at the trial; whether the elevated structure is or is not one which the legislature may lawfully authorize to be constructed in the street, without the landowner's consent, is a

the value of his property, and the company maintains that the decrease is due to other causes, it is for the jury to say to what the decrease is attributable.<sup>1</sup> But, as will be seen, where the proceeding is in equity for an injunction, the whole matter is for the determination of the court, including the measure of past damages; and in all cases the finding of the trial court, whether by the court, by referee, or by jury, will not be disturbed, except where there is a plain case of error.<sup>2</sup> The measure of damages is the same, whether the landowner has the fee of the street or a mere easement therein.<sup>3</sup>

In a common-law action the damages recovered are for the injury to the actual, rental, and usable value of the premises up to the time of the commencement of the action;<sup>4</sup> and this rule applies in determining the measure of past damages in injunction proceedings.<sup>5</sup>

question of law and for the court. *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96; 46 Am. & Eng. R. Cas. 149.

In *Moore v. New York El. R. Co.*, 126 N. Y. 671, the court stated to the jury the amount of annual loss suffered by the plaintiff, as testified to by the defendant's witnesses, caused by the maintenance and operation of the elevated railroad, and charged them that they must find a verdict in gross for not less than that sum with interest. The charge was held error; for while in such actions the jury may in their discretion award damages incapable of liquidation by computation, they are not bound to do so. *Citing* for authority *Walrath v. Redfield*, 18 N. Y. 462; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

1. The plaintiff's evidence in an action showed that shortly after the construction of the road, the rental value of the property depreciated. The evidence on the part of the railroad company showed that the falling off in the rents was due to the removal of the grocery trade which had become centered in the street in question to another locality. It was held that the cause for the difference in the rental value of the property was a question for the jury to decide. *Moore v. New York El. R. Co.*, 15 Daly (N. Y.) 510.

2. That the railroad company cannot demand a trial by jury in an injunction proceeding, although the question as to past damages is involved, is settled by the case of *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; 50 Am. & Eng. R. Cas. 308. See *infra*, this title, *Right to Trial by Jury*.

The amount of compensation

awarded on trial by the court upon a direct conflict of evidence as to the extent of the injury from the elevated structure, will not be held excessive on appeal where it is not inconsistent with the facts shown and does not transcend the fair effect of the evidence. *Galway v. Metropolitan El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 47; *aff'd* 128 N. Y. 432. See also *Barrett v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 71.

3. Measure of Damages Not Affected by Ownership of Fee.—*Sobel v. New York El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 342; *Story v. New York El. R. Co.*, 90 N. Y. 162; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146.

4. *Uline v. New York Cent. St. R. Co.*, 101 N. Y. 109; 23 Am. & Eng. R. Cas. 3; 54 Am. Rep. 661. See *supra*, this title, *Common Law Action*.

It was held in *American Bank Note Co. v. New York El. R. Co.*, 59 N. Y. Super. Ct. 175, that where the abutting owner was a corporation, and itself occupied the premises, it could not recover as for loss of rental value, but might recover for additional expense incurred caused by the construction, maintenance and operation of the road; such as in the case at bar the cost of an electric light plant and running the same, the cost of reflectors, the injury and expense in the use of the property and interest on certain items.

5. *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409.

In equitable actions for interference with easements, damages to rental value may be computed to the time of trial, and interest on the sum awarded



In a proceeding in equity for an injunction, this being in the nature of condemnation proceedings, such prospective damages are awarded as would be assessed in a proceeding to condemn the same property.<sup>1</sup> And the measure of damages is the injury to the fee value—*i. e.*, the permanent depreciation in the value of the property caused by the taking of the easements of light, air, and access; it is the value of the easements at the time of the trial, which may be determined by proof of what the property would then be worth with and without the railroad.<sup>2</sup>

for fee value may be allowed until the time of payment of the award. *Kane v. Manhattan R. Co.* (Supreme Ct.), 17 N. Y. Supp. 109; *Suarez v. Manhattan R. Co.* (Supreme Ct.), 15 N. Y. Supp. 222.

It will be observed that the damages allowed by way of incidental relief include all damages up to the time of the trial and decree, and are not limited to such as accrued prior to the commencement of the action. *Mortimer v. Metropolitan El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 2; *Suarez v. Manhattan R. Co.* (Supreme Ct.), 15 N. Y. Supp. 222.

**1. Measure of Prospective Damages in Injunction Proceedings.**—The doctrine most commonly followed is clearly set out in *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 302, where the court, by Finch, J., says: "There is no doubt in this case, and I think no doubt in any case, that an injunction of the court of equity and its alternative damages are to be deemed a substitute for the ordinary proceedings for condemnation, with the practical difference only that in the one case the company is the moving party and in the other the owner; for this court does not in the least degree assent to the doctrine which has been sometimes advocated, that the alternative damages are wholly in the unlimited discretion of the court and so the elevated railroads entirely at its mercy. We had supposed that every trace of a boundless and arbitrary discretion in a court of equity had wholly disappeared. There is no difficulty in assuming that the alternative damages are awarded to the same extent and for the same elements as the compensation in a special proceeding for the condemnation of land under the law of eminent domain. The form is different, but the result is identical. It follows, therefore, that the alternative damages in equity must be such,

and only such, as would be given in a proceeding for the condemnation of lands for railroad use, due regard being had to the different characteristics of the property to be taken." Compare *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 432, and *Sperb v. Metropolitan El. R. Co.*, 137 N. Y. 155.

The rule first stated is also followed by Peckham, J., who, in delivering the opinion of the court in *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 275, said: "Although these suits are in equity commenced to obtain equitable relief, and to prevent the defendants from operating their road unless they pay to the plaintiffs the damages they will sustain, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases. This rule was last announced by this court in the recent case of *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 292."

**2. Measure of Damages to Fee Value.**—*Hamilton v. Manhattan R. Co.*, 58 N. Y. Super. Ct. 17; *Kenkele v. Manhattan R. Co.*, 55 Hun (N. Y.) 398. See also *Ode v. Manhattan R. Co.*, 56 Hun (N. Y.) 199.

Damages may be recovered in an injunction proceeding for the diminished value of the fee, in view of the permanency of the elevated structure, even though there is no diminution of the rental value. *Sloan v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 769.

In *Willetts v. New York El. R. Co.* (Supreme Ct.), 15 N. Y. Supp. 923, in an application for an injunction, the value of the premises was fixed at thirty thousand dollars in 1872, and it

appeared that it was of the same value at the time of the suit, while the value of the property in the vicinity, but not on the line of the railroad, had advanced from eighteen to twenty per cent. in that period. The court granted the injunction, assessing the damages to the fee at eight thousand dollars. It was held that the damages were excessive, but as the proof necessary to fix their actual amount was before the appellate court, judgment was affirmed on condition that the plaintiff consent to a reduction to five thousand four hundred dollars.

In an action against an elevated railway company to recover damages caused by the operation of the road in front of plaintiff's premises, the depreciation of the value of the servient property caused by the impairment of the easements taken, must be compensated as part of the consequential damages suffered from the taking. *Cunard v. Manhattan R. Co.*, 20 N. Y. Supp. 724.

A referee in an action against an elevated railway company for damages to an abutting owner cannot be required to find the value of the plaintiff's easements in themselves apart from the property affected. Their value lies in the effect of their destruction or impairment of the property, and the measure of their value is the amount of depreciation of the property caused by their severance. *Betjeman v. New York El. R. Co.*, 20 N. Y. Supp. 628.

A very heavy increase in the value of property in the streets adjacent to an elevated railroad, and a very slight increase in the value of premises abutting on the railroad, is sufficient to show that the railroad injuriously affects the abutting property, and to warrant an injunction against the further operation of the road. *Bernheimer v. Manhattan R. Co.*, 13 N. Y. Supp. 913.

#### Excessive or Insufficient Damages.—

Where plaintiff's evidence showed that defendant's elevated railway was about eighteen feet from his premises; that engines were switched in front of the premises; that passing engines sent out steam, smoke, and cinders into his house; that a large percentage of light was cut off from the house; that the road had been so operated for four years; that there was a loss of rentals in consequence, and no peculiar benefit to the premises from the road appeared, and no evidence whatever

was introduced by defendant, a verdict for plaintiff of six cents damages was held contrary to the evidence, and a new trial was granted. *Jones v. Metropolitan El. R. Co.*, 59 N. Y. Super. Ct. 437.

An award against an elevated railway company for damages to abutting property caused by the operation of defendant's road will not, in a case of conflicting evidence, be set aside on the ground that it is excessive. *Sternberger v. Metropolitan El. R. Co.*, 20 N. Y. Supp. 857; *Betjeman v. New York R. Co.*, 20 N. Y. Supp. 628.

**Proximity of Stations.**—In case the company constructs in front of the plaintiff's premises a station, nearly twenty-five feet of which is directly in front of the plaintiff's property, the remainder extending beyond it along the street, the plaintiff may recover compensation, not only for the obstruction of light and air by the part of the structure in front of his land, but also for such injury by the adjacent portion of the structure. *Galway v. Metropolitan El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 47; *aff'd* 128 N. Y. 432. The easement of light is not confined to the part of the street directly in front of the premises, and if the shadows cast by the station impair this easement, damages may be reversed though no part of the station is in front of the premises. *Galway v. Metropolitan El. R. Co.* (Supreme Ct.), 13 N. Y. Supp. 608.

The likelihood of the erection by the railroad company of a station for passengers in front of the plaintiff's premises may be taken into account by the trial court in ascertaining the future damages. *Stirn v. Metropolitan El. R. Co.* (Supreme Ct.), 4 N. Y. Supp. 323.

**Damages Resulting from the Contemplated Building of the Road.**—In *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96; 46 Am. & Eng. R. Cas. 149, damages were claimed only for the six years prior to the commencement of the action, which was in November 1886, and the jury were expressly limited to this time. It appeared that the charter was awarded in 1879, and in that year columns were erected in front of the plaintiff's premises, but the road was not completed until 1885. The court properly refused to charge that no damages were recoverable for any depreciation of the rental value of the property resulting from the con-

The difference between the value of the property before the construction of the road and that at the time of the trial is ordinarily the best indication of the amount of damage to its fee value.<sup>1</sup> But in case the premises have been unfavorably affected by changes in the business character of the street not due to the existence of the elevated road, then it is error to charge the railroad with the entire decrease in value.<sup>2</sup> And, on the other hand, if the property has advanced in value, in spite of and not because of the operation of the road, the railroad is not to be credited with the rise in value, but the damage to the fee must be determined by other considerations.<sup>3</sup>

For injuries occasioned to personal property by the falling of cinders, the exclusion of light, etc., no damages can be recovered in a proceeding for an injunction. In such a proceeding the recovery is confined to the depreciation in value of the real estate caused by an infringement of the easements.<sup>4</sup>

templated building of the road, or from the rumors of such building. It was held also that the court properly submitted to the jury the question as to whether the obstruction of the street during the progress of the work diminished the rental value of the houses on the premises, proof having been furnished to support the plaintiff's contention on that point.

**Loss of Privacy.**—In *Moore v. New York El. R. Co.*, 130 N. Y. 523, on action at law, it was held that it was error, for which the case would be reversed, for the court to direct the jury to exclude from their consideration in the estimation of damages the subject of the loss of privacy in his house by the plaintiff. It appeared that the only rooms affected were those on the second and third stories, but that passengers on the station platform, and while ascending and descending the steps, continually gazed into the windows, destroying the privacy of the rooms, and causing constant annoyance to the occupant. The court held that while it was true that the intrusion of the privacy of the rooms was not caused by the company's servants or agents, still as it had furnished the means and opportunity for its patrons to invade the privacy, it should be held responsible.

So also in *Messenger v. Manhattan R. Co.*, 129 N. Y. 502, where the structure was an illegal one, it was held that evidence of annoyance suffered by interference with the privacy of the premises, and by noise caused by the operation of the road, has a competent

bearing upon the rental value, but not upon the fee value of the premises. See also *Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 418.

**1. Difference in Values.**—See *Hamilton v. Manhattan R. Co.*, 58 N. Y. Super. Ct. 17; *Thompson v. Manhattan R. Co.*, 15 Daly (N. Y.) 438; *Mortimer v. Manhattan R. Co.*, 57 N. Y. Super. Ct. 509.

**2. Mooney v. New York El. R. Co.**, 16 Daly (N. Y.) 145.

**3. Moss v. Manhattan R. Co.** (Supreme Ct.), 13 N. Y. Supp. 42; *Herold v. Metropolitan El. R. Co.*, 13 N. Y. Supp. 610; *infra*, this title, *Deduction on Account of Benefits*, etc.

**4. Injuries to Personal Property.**—In *American Bank Note Co. v. Metropolitan El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 532, an engraving company by an action for an injunction sought to recover damages for injuries to personal property consisting of plates, paper, processes, etc., arising from the exclusion of light and the precipitation of cinders. The court held that there could be no recovery for such injuries in this action. Van Brunt, P. J., said: "This action, as has already been stated, is to restrain the running of the road, unless they pay the value of the easements taken, which value is to be ascertained by determining the depreciation of the plaintiff's premises caused by reason of the erection and operation of the road. As incident to such an action past damages in the shape of diminution in the rental or usable value of the premises occasioned by this continuing trespass

The plaintiff's recovery is confined to actual damages and is not allowed to extend to damages of a speculative or contingent character, nor to such as are merely nominal or do not result naturally from the operation of the railroad.<sup>1</sup>

(2) *Damages from Smoke, Cinders, etc.*—The elevated railroad company is liable for the consequences flowing from the operation of its trains in respect to the distribution in the air of smoke, dust, steam, gas, cinders, ashes, and other deleterious substances from its engines and cars.<sup>2</sup> The rule that the proper exercise of a lawful authority does not afford a ground of recovery<sup>3</sup> cannot

have been allowed, but in no case has the court gone so far as to hold that damages to personal property might be recovered in an action of this description. The action in question is one relating entirely to the realty, and has no reference to any question as to personal property; and if any damages have been sustained by personal property, which the plaintiffs can recover against the defendants, it must be by an action of a different nature."

**1. Speculative or Contingent Damages.**

—For example, such damages as may result from the negligent and unskillful operation of the road, as setting buildings on fire, and evidence of such probable damage is therefore inadmissible. *Mundorf v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 124.

Therefore, evidence is inadmissible of what it would have cost to build dwelling houses on the premises; what they would have rented for had they been built with the road there, and what they would have rented for had the road not been constructed. *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409, *rev'd* 2 N. Y. Supp. 130. See also *Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 56 Hun (N. Y.) 182.

**Plaintiff's Recovery Confined to Actual Damages.**—Thus, the owner of a building abutting on a street occupied by an elevated railway will not be entitled to compensation for injuries to rental value during the time that the building was undergoing alterations, practically making it a new building, or while the building was being pulled down and another erected in its place. *Ottlinger v. New York El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 238; *Martin v. Manhattan R. Co.*, 63 Hun (N. Y.) 350.

A property owner is not entitled to recover for the damages in value of his property, occasioned by the main-

tenance of a freight depot for an elevated railway in a building next but one to his premises, where such depot is not in the street, or on any property subject to his easement, and there is nothing to show that its maintenance is illegal. *Leale v. Metropolitan El. R. Co.* (Supreme Ct.), 16 N. Y. Supp. 418.

Damages are not recoverable for alleged injuries to a building wholly unconnected with the main building, and having its entrance, and receiving its light and air, from another street, where defendant's structure does not exist. *Mooney v. New York El. R. Co.*, 16 Daly (N. Y.) 145. Thus, where property abuts on a street occupied by the elevated road, and extends back to a parallel street, and has a frontage and entrance on both streets, and the basements so connect, that access to either frontage can be had from the other, the owner will be entitled to compensation only for the easements appurtenant to the frontage on the street occupied by the railway. *Ottlinger v. New York El. R. Co.* (Supreme Ct.), 18 N. Y. Supp. 238; *Bischoff v. New York El. R. Co.*, 18 N. Y. Supp. 865.

The plaintiff's legal expenses incurred in prosecuting his suit cannot be recovered; they are not damages that naturally result from the operation of the railroad. *Mattlage v. New York El. R. Co.*, 17 N. Y. Supp. 536.

**2. Smoke, Dust, Cinders, etc.**—*Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 269. Compare *Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 56 Hun (N. Y.) 182, where evidence was held inadmissible which tended to show misconduct on the part of men in the service of the railroad company, and as to other annoyances resulting from the operation of the railroad, not affecting the plaintiff's easements of light, air, and access.

**3. See NUISANCES**, vol. 16, p. 1000;

be invoked in this instance. The smoke, cinders, etc., in so far as they interfere with the easement of the abutting owner, are not consequential damages, but constitute a partial taking of property, which cannot occur except upon compensation being made to parties injured thereby.<sup>1</sup>

(3) *Consequential Damages — Noise, Vibration, etc.* — Injuries occasioned to property from the noise and vibration of moving trains are consequential damages for which no recovery can be

RAILROADS, vol. 19, pp. 862, 923; 1 Wood's Ry. Law, p. 613; Wood on Nuisances, p. 852.

1. *Stevens v. New York El. R. Co.*, 57 N. Y. Super. Ct. 416 (damages from smoke considered in eminent-domain proceedings).

In *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 295, the court by Ruger, C. J., said: "The structure here, and its intended use, cannot be separated and dissected, and it must be regarded in its entirety in considering the effect which it produced upon the property of the abutter. However the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrongdoer liable for the consequences of his acts. The legislature, as we have seen, had no power to authorize the street to be used for an elevated steam railroad, and that want of authority extends to every incident necessary to make the road an operative elevated steam railroad, which occasions injury to the rights of abutters on the street. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15." *Quoted and approved in Kane v. New York El. R. Co.*, 125 N. Y. 186; 46 Am. & Eng. R. Cas. 148 (noise of trains); *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; 46 Am. & Eng. R. Cas. 128; *followed in Duyckinck v. New York El. R. Co.*, 125 N. Y. 710 (damages allowed for dust, etc., though no injury to access was proven); *Sloane v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 769.

In *Cogswell v. New York, etc., R. Co.*, 103 N. Y. 10; 27 Am. & Eng. R. Cas. 376, it appeared that the railroad company erected upon a lot adjoining a dwelling house occupied by the plaintiff, an engine house and coal bins for its road, and used the same in operating it. The smoke, soot, cinders,

and coal dust caused by such use filled the plaintiff's house, rendering the air offensive and unwholesome and the house practically untenable. Whether the legislature could authorize the company to maintain an engine house under such circumstances was left *quære*. But conceding this, it was held that statutory sanction must be clear and explicit; that in the present case the use of its property by the railroad constituted a nuisance, for which the owner of adjacent land might recover damages. The court distinguished the cases of *Radcliff v. Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357, and *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42. See also *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15.

In *Porth v. Manhattan El. R. Co.*, 58 N. Y. Super. Ct. 366, the inconvenience and injury suffered by plaintiff from dirt and dust swept from defendant's station platform and stairway was considered an element of damage for which he was entitled to compensation.

**Smoke, Cinders, etc., Impair the Easements of Light and Air.** — The distribution in the air of gas, smoke, cinders, and other deleterious substances, interfere with and materially impair the easements of light and air which the abutting owner has in the street, and, therefore, constitute a taking of property, so that such elements are to be considered in determining the prospective damages. Thus in *Peyser v. Metropolitan El. R. Co.*, 13 Daly (N. Y.) 122, the court, by Daly, J., said: "All the evidence as to the darkening of the plaintiff's windows by the passage of trains, and the emission of smoke and steam was properly admitted. The elevated structure was built to permit the passage of these trains, and to attempt to distinguish between the obscuration of light caused by the structure exclusively is not to be justified on principle. It is also proper to

had when the occupation of the street by the railroad company is lawful. A proper exercise of the lawful authority affords no ground of recovery, and consequently injuries sustained are *damnum absque injuria*.<sup>1</sup> But so long as such occupation is unlawful the railroad company is a trespasser and liable for all injuries occasioned by the operation of its road, including those resulting from the noise and vibration of moving trains.<sup>2</sup> Such damages, therefore, can only be considered in an action to determine past damages. In estimating prospective damages in a proceeding for an injunction, noise and vibration are not to be considered.<sup>3</sup>

admit evidence of the smoke and stench emitted by the engines which compelled plaintiffs' tenant to keep the windows closed. If the air from the street which the windows were intended to emit was not to be obtained except accompanied by the smell and smoke, and these latter were unbearable, there was as much a deprivation of the air as if a palpable barrier had been erected outside the window." The doctrine of this case is followed in *Smith v. New York El. R. Co.*, 18 N. Y. Supp. 132. See also *Somers v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 271; *Jordan v. Metropolitan El. R. Co.*, 18 N. Y. Supp. 205; *Purdy v. Manhattan El. R. Co.*, 22 N. Y. Supp. 943.

The only case holding a different doctrine is that of *Sperb v. Metropolitan El. R. Co.*, 61 Hun 539, and this has been several times disapproved and was reversed in 137 N. Y. 155.

It is no defense to a claim for damages against an elevated railway company for obstructing plaintiff's light, that the light was required for the display of cut glass, and that artificial light was better for that purpose than natural light. *Scott v. Manhattan R. Co.*, 17 N. Y. Supp. 364.

The testimony of a former tenant of premises affected by the operation of an elevated railway, that he moved away on account of the smoke and obstruction of light resulting from the operation of the road, is competent and material on the question of damages to an abutting owner. *Scott v. Metropolitan El. R. Co.*, 21 N. Y. Supp. 630.

1. **Noise and Vibration as Elements of Damage.**—*American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 293; *Peyser v. Metropolitan El. R. Co.*, 13 Daly (N. Y.) 122; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138 (noisome

odors); *Ode v. Manhattan R. Co.*, 56 Hun (N. Y.) 199. Compare *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472; 30 Am. & Eng. R. Cas. 399, and note.

See the general principle stated in *NUISANCES*, vol. 16, p. 1000; *RAILROADS*, vol. 19, pp. 862, 923.

In *Kane v. New York El. R. Co.*, 125 N. Y. 186; 46 Am. & Eng. R. Cas. 137, where the noise was considered an element of damage, the court was careful to say: "If the defendant had the lawful right to operate its trains in the street, such inconvenience as might result to the plaintiff in the enjoyment of his property from the ordinary and usual operation of the defendant's road would not, in the absence of negligence on its part, furnish a ground of action." In *Drucker v. Manhattan R. Co.*, 106 N. Y. 164; 30 Am. & Eng. R. Cas. 418, the question of damages for noise was mentioned but was left undecided. See also *Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 138 N. Y. 548.

2. *Kane v. New York El. R. Co.*, 125 N. Y. 186; 46 Am. & Eng. R. Cas. 137; *Smith v. New York El. R. Co.*, 18 N. Y. Supp. 132; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433; 43 Am. & Eng. R. Cas. 219.

3. *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 292; *Sperb v. Metropolitan El. R. Co.*, 61 Hun (N. Y.) 539; *Ode v. Manhattan R. Co.*, 56 Hun (N. Y.) 199; *Kiep v. Metropolitan El. R. Co.*, 17 N. Y. Supp. 804.

The noise occasions damage to the rental value, and in estimating damages to such value it is, therefore, to be considered; but it cannot be considered in estimating the value of the fee. *Messenger v. Manhattan R. Co.*, 129 N. Y. 502; *Bischoff v. New York El. R. Co.*, 138 N. Y. 257.

Noise in the operation of an elevated

(4) *Depreciation of Rental Value of Premises.*—Evidence of a decrease in the rental value of the premises is always admissible, and where it can be shown that the construction and maintenance of the elevated road has caused the rental value to depreciate, damages may be recovered to the extent of the injury sustained.<sup>1</sup> And this is true whether the premises are occupied by tenants under a lease executed after the construction of the road<sup>2</sup> or by the owner himself.<sup>3</sup> Such damages include compensation for all past injury occasioned by the interference of the road with the easements of light, air, and access.<sup>4</sup>

railway is an element of past damages, though not of fee damages. *Pryor, J., in Golden v. Metropolitan El. R. Co.*, 20 N. Y. Supp. 630, citing *Kane v. New York El. R. Co.*, 125 N. Y. 165; 46 Am. & Eng. R. Cas. 148; *Messenger v. Manhattan R. Co.*, 129 N. Y. 503; *Moore v. New York El. R. Co.*, 130 N. Y. 523; *Mitchell v. Metropolitan El. R. Co.*, 132 N. Y. 553.

1. *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; *Lawrence v. Metropolitan El. R. Co.*, 126 N. Y. 483; *Woolsey v. New York El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 133; *Moore v. New York El. R. Co.*, 59 N. Y. Super. Ct. 32; *Greenwood v. Manhattan R. Co.*, 19 N. Y. Supp. 702. See also *Bernheimer v. Manhattan R. Co.*, 13 N. Y. Supp. 913, *distinguishing Tallman v. Met. El. R. Co.*, *supra*. See *infra*, this title, *Other Evidence; Landlord and Tenant*.

In an injunction proceeding the incidental damages awarded were over 14 per cent. of the fee damages given. The objection was made that the award of rental damages was inconsistent, because exceeding 10 per cent., the general percentage of the value of property charged as rent in the city. *Held*, untenable, since it did not appear but that the fee damage was too low. *Barratt v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 71.

In estimating prospective damages, the permanent injury to the fee value is the sole consideration, and loss of rent cannot be considered. *Ireland v. Metropolitan El. R. Co.*, 52 N. Y. Super. Ct. 450.

Where plaintiff purchased the premises affected by the operation of an elevated railway, subject to a lease made after construction of the railway, and his action for damages was tried before the lease expired, a finding that

plaintiff had suffered a "loss in the rental value of the premises" was not inconsistent with a finding "that he had lost no rents on account of the railway previous to and including the time of trial of the action;" the true meaning of the finding being that though plaintiff had lost none of the rents under the lease, the rental value of the property had been diminished. *Keller v. Metropolitan El. R. Co.*, 15 N. Y. Supp. 88.

**Evidence.**—The fact that but few trains were run over the road during the day, and that from a certain hour in the night until early in the morning no trains at all were operated, is irrelevant and immaterial on the question of the amount of damages to the fee value of abutting property caused by the operation of the road. *Hughes v. New York El. R. Co.* (Supreme Ct.), 21 N. Y. Supp. 693.

The elevated railway company has no right to show that plaintiff's officers own nearly all the stock of a corporation occupying a portion of plaintiff's building as tenant, on the question whether or not the rental value of the building had been depreciated by the operation of the road. *Metropolitan Sav. Bank v. New York El. R. Co.* (Supreme Ct.), 21 N. Y. Supp. 286.

2. *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 50 Am. & Eng. R. Cas. 317; *supra*, this title, *Landlord and Tenant*; *Kearney v. Metropolitan El. R. Co.*, 13 N. Y. Supp. 608.

3. *Woolsey v. New York El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 133; 134 N. Y. 323.

4. Damages allowed for the depreciation of the rental value include damages for all injuries to the easement of light, and it is error to allow in addition, as damages, cost of extra consumption of gas caused from the obstruction of the light. *Mattlage v. New York El. R. Co.*, 17 N. Y. Supp. 536.

In estimating the amount of injury to the rental value, the condition of the premises during the period embraced in the action must be taken as the basis of such estimate, and the plaintiff cannot be permitted to prove or be allowed to recover damages which he might have sustained had he put his property to other uses or improved it.<sup>1</sup>

(5) *Exemplary Damages.*—To justify a verdict or award for exemplary damages it is always necessary to allege and prove malice, fraud, or "gross negligence" on the part of the defendant in the action. In the absence of such proof, therefore, the jury cannot award exemplary damages in an action by a landowner for an infringement of his easement in the street in which the elevated road is constructed.<sup>2</sup>

(6) *Deduction on Account of Benefits Derived from the Existence of the Road.*—The Rapid-transit act and also the General Railroad act both provide that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties whose property is taken for railway purposes, make any allowance or deduction on account of benefits which the landowner might derive from the existence of the road. These provisions apply simply to the land taken, and require that so much land as is taken shall be paid for at its actual market value, with no deduction whatever, even though the remainder may be greatly enhanced in value by the construction of the road.<sup>3</sup> But in considering the damages occasioned to the remaining land, the com-

1. In *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 119; 43 Am. & Eng. R. Cas. 409, it appeared that up to the commencement of the action part of the premises were used for a carpenter shop and the remainder as a lumber yard; that at one time the owner had made plans for the erection of dwelling houses thereon. It was held error for the trial court to permit him to testify as to what the depreciation in the rental of such dwelling houses would have been on account of the existence of the railroad.

2. In *Powers v. Manhattan R. Co.*, 120 N. Y. 178, it appeared that the elevated road was constructed in 1879 and trains operated from March 1880; the statute authorizing the construction of the road had been declared constitutional, the proceedings of the commissioners approved, and the question of the right of abutting owners to damages was being litigated. It was held error, in the face of these facts, to instruct the jury that "the failure of the defendant to institute condemnation proceedings before taking possession of plaintiff's property and before

the trial of this action, entitled the jury to give exemplary damages, should the jury so desire." See also *EMINENT DOMAIN*, vol. 6, p. 581 (exemplary damages for trespass); *Papenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; 50 Am. & Eng. R. Cas. 269.

The fact that the railroad company in a prior action involving their right to maintain their structure took an appeal to the general term of the common pleas court, and then to the court of appeals, and withdrew the latter appeal when it was about to be reached, is not sufficient evidence of want of good faith to justify the jury in awarding exemplary damages against the company, in this action, for maintaining its road. *Mattlage v. New York El. R. Co.*, 17 N. Y. Supp. 536.

3. *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618; 43 Am. & Eng. R. Cas. 412; *In re Brooklyn El. R. Co.*, 55 Hun (N. Y.) 165; *Gray v. Manhattan El. R. Co.*, 16 Daly (N. Y.) 510; *affirmed* 128 N. Y. 499; *EMINENT DOMAIN*, vol. 6, p. 581; *Lewis on Eminent Domain*, § 471. See also *Rapid Transit act*, Laws of *New York* (1875), ch. 606,



missioners must consider the effect of the road upon the whole of that remainder; its advantages and disadvantages, and if the result is beneficial there is no damage, and nothing can be awarded.<sup>1</sup> While the easement, which the owner of land abutting on a street has therein, is an interest in real estate and constitutes property, yet in itself it has only a nominal value and in estimating its value when taken for railroad purposes it cannot be considered as property separate and distinct from the land to which it is appurtenant, and the right of the owner to compensation is measured not by the value of the easement separate from his land, but by the damages which the land sustains because of the violation of the easement. In estimating damages, therefore, for an interference with such easement, the benefits to the land which the owner derives from the operation of the road, are to be taken into consideration in reduction of the damage caused from the interference with the easement.<sup>2</sup> So that where the increase in the value of the property resulting from the existence of the road is more

§ 20; General Railroad Law, Laws of New York (1850), ch. 140, § 16; Laws of New York (1872), ch. 885, § 3.

1. *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618; 43 Am. & Eng. R. Cas. 412; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; *Odell v. New York El. R. Co.*, 130 N. Y. 690; *Livingston v. Metropolitan El. R. Co.*, 138 N. Y. 76.

2. *Newman v. Metropolitan El. R. Co.*, 118 N. Y. 618; 43 Am. & Eng. R. Cas. 412. In this case the evidence showed that while the upper parts of the building on the premises had been made less desirable for the purposes for which they were used—*i.e.*, as dwellings, by reason of the railroad, and in consequence the rents had fallen, the first floor used as a restaurant had become more desirable for business purposes and was greatly enhanced in rental value. The plaintiff had a leasehold interest in the property. It was held that the trial court erred in charging the jury that they had no right in estimating damages to take into consideration the benefit to the premises derived from the existence of the road. See also as affirming this principle, *Doyle v. Manhattan R. Co.*, 15 Daly (N. Y.) 473 (prejudicial error to exclude evidence bearing on the course of trade, and the increase of business on the premises); *In re Brooklyn El. R. Co.*, 55 Hun (N. Y.) 165; *Brush v. Manhattan R. Co.*, 13 N. Y. Supp. 908 (injunction denied); *Purdy v. Manhattan El. R. Co.*, 13 N. Y. Supp. 295; *Herold v. Metropolitan El. R. Co.*, 13

N. Y. Supp. 610; *Gray v. Manhattan El. R. Co.*, 16 Daly (N. Y.) 510; *Sloane v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 769 (proximity of station considered a permanent benefit); *Sillcocks v. New York El. R. Co.*, 19 N. Y. Supp. 476; *Nette v. New York El. R. Co.*, 20 N. Y. Supp. 627; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 676; 50 Am. & Eng. R. Cas. 271.

But it is not error to refuse to make a finding of the abstract proposition that any benefits accruing to the property were to be set off against the damages sustained to the property. *Werfelman v. Manhattan R. Co.*, 16 Daly (N. Y.) 355; and where the railroad company has objected to evidence bearing on the course of values in the immediate neighborhood, it cannot afterwards introduce similar evidence in its own behalf. *Mooney v. New York El. R. Co.*, 16 Daly (N. Y.) 145.

Where the evidence shows that the fee value of premises affected by the operation of an elevated railroad is greater than at any time before the construction of the road, and there is nothing to show that the presence of the railroad prevented a greater increase in the value of the property, the owner of the premises affected is not entitled to damages. *Mattlage v. New York El. R. Co.*, 20 N. Y. Supp. 624; *Hoffman v. Manhattan El. R. Co.*, 20 N. Y. Supp. 625; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 271; *Becker v. Metropolitan El. R. Co.*, 131 N. Y. 509; *Hug-*

than the damage caused thereby, the owner has no right to an injunction against the railroad, since an injunction can issue only upon a showing of substantial damage.<sup>1</sup>

The general rule may be applied to a case where the plaintiff owns several lots, some of which are injured and others benefited by the existence of the road, so that the benefits may be set off against the injuries.<sup>2</sup> But the fact that the purchase of the property in question has proven a profitable business venture to its owner cannot be taken into consideration in estimating damages. There is nothing in such a fact to show that the property would not be much more valuable if the elevated structure were not in front of it.<sup>3</sup>

The evidence of increased value derived from the existence of the railroad must be confined to the property involved in the case; evidence as to the increase in the value of other lots along

*gins v. Manhattan R. Co.*, 20 N. Y. Supp. 648.

When only the actual value of easements impaired by the operation of an elevated railway is found, and not the consequential damages, the court may refuse to set off against consequential damages, benefits resulting from the proximity of a neighboring station. *Wiener v. New York El. R. Co.* (Supreme Ct.), 16 N. Y. Supp. 913.

In *Roosevelt Hospital v. New York El. R. Co.* (Supreme Ct.), 21 N. Y. Supp. 205, the estimates of the comparative increase in fee value of property in the Bowery and other streets were allowed to be expressed in percentages instead of dollars and cents, and the court held that this was not error; the question as to the values of adjoining property being limited to streets contiguous and adjacent to plaintiff's property.

An owner of premises affected by the erection of an elevated railway, upon seeking to recover damages therefor, cannot be asked whether he considered the presence of the road, at the time he purchased, an injury or a benefit to his property; the issue being the actual value of the property and not what he considered it to be. *Steubing v. New York El. R. Co.* (Supreme Ct.), 19 N. Y. Supp. 313.

1. *Gray v. Manhattan R. Co.*, 128 N. Y. 499; *Rich v. New York El. R. Co.*, 14 N. Y. Supp. 167; *Brush v. Manhattan R. Co.*, 13 N. Y. Supp. 908; *Steinmetz v. Metropolitan El. R. Co.*, 18 N. Y. Supp. 209; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 271; *Sperb v. Metropol-*

*itan El. R. Co.*, 17 N. Y. Supp. 469 (referee's finding reversed); *Brush v. Manhattan R. Co.*, 17 N. Y. Supp. 540.

In *Rich v. New York El. R. Co.*, 14 N. Y. Supp. 167, the evidence showed a decrease in the value of some of the plaintiff's lots and an increase in others, so that no substantial damage was shown which would authorize an injunction. The court held, however, that the complaint would not be dismissed, but that the case would be retained to be submitted to the jury in an action at law. But when a referee is appointed to determine all the issues of the case he is not bound, in refusing an injunction, to award past damages. *Steinmetz v. Metropolitan El. R. Co.*, 18 N. Y. Supp. 209; *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; 50 Am. & Eng. R. Cas. 308.

Where the rental value of premises affected by the erection of an elevated railroad increased 20 per cent. after the erection of the road, and before the addition of improvements to the premises, the court properly refused to attribute to the improvements the increase of rental value after their addition. *Brush v. Manhattan R. Co.*, 17 N. Y. Supp. 540.

2. *Rich v. New York El. R. Co.*, 14 N. Y. Supp. 167.

3. *Sherwood v. Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 852.

Nor in estimating the fee value of property, the rear of which adjoins other property owned by the plaintiff, are the advantages thereto from its connection with adjoining property to be considered, especially where no allowance is made for indirect damage to

the same street is not available to justify a reduction of damages sustained by the premises involved.<sup>1</sup> And the increase in the value must be shown to have resulted from the existence of the road as there can be no deduction if it appears that the increase is due to a general rise in value of property in the vicinity.<sup>2</sup> Whether benefits have actually accrued to the property from the existence of the railroad is a question of fact, and the finding of the trial court in this regard will not be disturbed except in plain case of error.<sup>3</sup>

In a case covering the whole question, the court held that where it appears that the presence of an elevated railway has actually

such adjoining property by the cutting off of light, air, etc., from the property directly in question. *Kane v. Manhattan R. Co.* (Supreme Ct.), 17 N. Y. Supp. 109.

1. *Jefferson v. New York El. R. Co.* (Supreme Ct.), 11 N. Y. Supp. 488. So also where it is shown that the plaintiff's property has actually increased in value on account of the elevated road, the fact that it has not increased to the same extent as other adjacent property, affords no ground for recovery by the plaintiff. *Steinmetz v. Metropolitan El. R. Co.*, 18 N. Y. Supp. 209.

2. *Moss v. Manhattan R. Co.* (Supreme Ct.), 13 N. Y. Supp. 46.

Thus in *Herold v. Metropolitan El. R. Co.*, 13 N. Y. Supp. 610, it is said that the increased benefits must be proven to follow from the existence of the road; the fact that there has been no diminution in the rental value of the premises, but instead a steady increase, does not show that the lessening of air and light and convenience of access did not have a hurtful effect upon the rental value.

3. **Proof of Benefits Derived from the Road—Proximity of Station.**—In *Storck v. Metropolitan El. R. Co.*, 14 N. Y. Supp. 311; *aff'd* 131 N. Y. 514, the allegation by the railroad company, as to benefits to the property, was supported only by the opinion of a witness, while the plaintiff testified positively that the value of his property was not increased. It was held that the proof did not establish the existence of any benefit to the property. So where the only evidence of benefit was the unsupported opinion of experts, the referee may properly refuse to find that the premises derived any actual benefit. *Jones v. New York El. R. Co.*, 18 N. Y. Supp. 134. And, in general, a finding by the referee that

no benefit accrued to the premises from the existence of the road will not be reversed, unless the evidence clearly establishes the facts the other way. *Slater v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 531; *Bischoff v. New York El. R. Co.*, 18 N. Y. Supp. 865. Thus, in *Benjamin v. New York El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 908, the referee found that the railway station brought a great number of people into the street opposite plaintiff's premises and increased the traffic there, but refused to find that those facts were of special benefit to the plaintiff. It was held that this finding was not error, since the referee is not bound to find inferences from his findings of facts.

In *Sperb v. Metropolitan El. R. Co.* (Supreme Ct.), 17 N. Y. Supp. 469, a referee's finding of past damage to the fee of \$800 was reversed. It appeared that the value of property had increased more rapidly on the block occupied by the premises since the construction of the road than the corresponding block on the adjacent avenue, and that the operation of the road had made the street more desirable for business purposes.

In *Sixth Ave. R. Co. v. Manhattan R. Co.* (Supreme Ct.), 14 N. Y. Supp. 97, it was shown that property near the terminus of a surface road had increased in value, after the construction of an elevated road and the erection of its station in that vicinity, by being applied to different uses than formerly. It was held that this was not sufficient to warrant a finding that the property of a surface road at that point had also increased in value, since it could not be devoted to any other uses with profit to the owners.

The fact that the number of persons passing by stores on a street occupied by an elevated railway is largely in-

caused an increase in the value of the plaintiff's property, he has no right to an injunction, or to future damages, although it may appear that other abutting owners have received greater benefit than he;<sup>1</sup> but this case has been distinguished from several others. Thus, to offer evidence that the value of the land on the street on which the plaintiff's property abuts has not increased in the same proportion as land on the side streets is admissible, and may be considered with other evidence as to whether the premises in question have increased in value to the same extent that they would have done but for the presence of the road.<sup>2</sup> It is also laid down in another case that the court may properly refuse to find that there has been a general rise in the value of the real estate situated upon the avenue occupied by the elevated railroad, and that this increase is largely attributable to the existence of the railroad, on the ground that such facts are immaterial where there is sufficient evidence in the case to warrant a finding that the abutting owner's property has been damaged by the construction and maintenance of the road.<sup>3</sup>

(7) *Where Plaintiff's Property Fronts on Two Streets.*—Several cases have arisen in which the land of the abutting owner to which the easements are appurtenant fronted on two streets, only one of which was occupied by the elevated railroad. In such cases whether the lot is to be regarded as an entirety and damages awarded accordingly is a question of fact depending upon the cir-

creased by the presence of the railway and station, does not necessarily show that the presence of the station is an advantage to the proprietors of such stores. *Betjeman v. New York El. R. Co.*, 20 N. Y. Supp. 628. See also *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173.

The nature and operation of elevated railroads are so notorious that courts may take judicial notice of the fact that they increase the traffic and business on the streets on which they are operated. *Bookman v. New York El. R. Co.*, 137 N. Y. 302.

1. *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, 50 Am. & Eng. R. Cas. 271. In this case Earl, J., speaking for the court, delivered an elaborate opinion discussing this feature of the subject exhaustively.

2. In *Becker v. Metropolitan El. R. Co.*, 131 N. Y. 509; *affirming* 14 N. Y. Supp. 312, the court distinguished the case of *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 271, saying by Peckham, J.: "In other words, we held that an owner had no ground of complaint because the road had not increased the value of his property as much in proportion

as it did that of some one else; that in order to prove damage he was compelled to show that his property had either decreased in value by reason of the road, or else that its value had not increased to the same extent it would have done but for the road. We were then deciding in regard to the correctness of the rule of damages followed by the trial court, and there was no intention in what we said to hold evidence of value in the side streets to be inadmissible. We intend fully to adhere to the rule of damages as laid down in the *Bohm* case."

3. In *Storck v. Metropolitan El. R. Co.*, 131 N. Y. 514; 50 Am. & Eng. R. Cas. 287, *affirming* 14 N. Y. Supp. 311, the *Bohm* case was again distinguished. Gray, J., said of it: "A careful consideration of the elaborate opinion delivered in that case will show that it was not intended to deprive a complainant of his right to compensation when he could give any competent evidence of injury satisfactory to the trial tribunal, nor in the slightest degree to interfere with the jurisdiction of that tribunal to determine the amount of the injury from the evidence given."

cumstances of the case. If the lot is occupied by a single building, whose light, air, and access are derived wholly from the street occupied by the railroad, it seems that damages may be recovered for the injury to the whole lot; but it is otherwise if the lot is occupied by two separate and distinct buildings, each of which derives its light, air, and access from a different street.<sup>1</sup>

*f.* STATUTE OF LIMITATIONS—ADVERSE POSSESSION—IMPLIED ACQUIESCENCE.—In common-law actions to recover past damages, the Statute of Limitations precludes recovery of all damages except those which have accrued within the six years immediately preceding the commencement of the action.<sup>2</sup> In a leading case the effect of the Statute of Limitations upon the right of equitable relief was considered, and the conclusion derived that no delay by the landowner, less than a period sufficient for the railroad company to acquire a right to the easements by adverse possession, would bar his right to such relief. The trespass by the railroad company continues, and successive causes of action arise from day to day so long as the trespass is continued, and the owner does not lose his right to relief in equity, unless his delay has been so long that the company has been enabled to acquire right by prescription.<sup>3</sup>

1. In *Stevens v. New York El. R. Co.*, 130 N. Y. 95, *aff'g* 57 N. Y. Super. Ct. 416, it appeared that the plaintiff's land extended from one street to another; it was occupied by a four-story brick building, having a single roof, no transverse partition, and only one flight of stairs between the first and second stories. For seventy-six years prior to 1825 the land had consisted of two lots, one fronting on each street, and had had separate owners; but since that time it had been owned, used, described, and conveyed as a single lot fronting on both streets. In the action against the elevated road, which occupied one of the streets, it was described as one lot, and plaintiff claimed damages for injuries done to it as an entirety. It was held that the judgment of the trial court in favor of the plaintiff would not be disturbed on the ground that the land had consisted of two lots, or that damages had been improperly awarded for injuries to both.

In *Mooney v. New York El. R. Co.*, 16 Daly (N. Y.) 145, *rev'g* 8 N. Y. Supp. 956, it appeared that the plaintiff's lot, which was one hundred feet deep, fronted on two streets, one of which was occupied by the elevated railroad. The lot was covered by two buildings wholly unconnected with each other, one of which received its light, air, and access from the street unoccupied by the

railroad. It was held that the trial court erred in failing to distinguish between the two buildings, and in admitting, upon the trial, evidence of the rents received from the building fronting on the open street.

In *Greenwood v. Metropolitan El. R. Co.*, 58 N. Y. Super. Ct. 482, the land in question had been for a time two distinct lots, which had passed from the original owner of both to the plaintiff by different mesne conveyances in such a manner that one lot which adjoined the street occupied by the railroad became his property before the other. It was held that the easement of light over the first lot, conveyed in favor of the other, was cut off by the conveyance of the first lot to G, and that the fact that G acquired the second lot did not revive the easement in its favor, and, therefore, G could not recover for injuries to his alleged easement of light appurtenant to the second lot. See this case disapproved in *Stevens v. New York El. R. Co.*, 130 N. Y. 95, *aff'g* 57 N. Y. Super. Ct. 415.

2. See *New York Code of Civ. Proc.*, § 382, par. 3; *Martin v. Manhattan R. Co.*, 63 Hun (N. Y.) 350; *Cornell v. New York R. Co.* (Supreme Ct.), 13 N. Y. Supp. 511.

3. *Effect of Statute of Limitations on Right to Equitable Relief.*—*Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132.

In another case the right of the abutting owner to recover damages was contested by the railroad company, on the ground that it had acquired the right to interfere with his easements by an uninterrupted and adverse possession for more than twenty years. The principle that the company might acquire such a right by adverse possession was recognized;<sup>1</sup> but it was held that it had acquired no such right in this case, because the substitution of steam engines as a motive power instead of a cable, and the reconstruction and alteration of the track constituted such material and substantial changes in the original user as to interrupt the adverse possession.<sup>2</sup>

In this case the court, by Ruger, C. J., in indicating the general theory upon which has proceeded the determination of this and similar questions, quoted from the opinion of Earl, J., in *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 123; 43 Am. & Eng. R. Cas. 410: "When the defendant began to construct its railway in front of the plaintiff's lots, he could have commenced an action in equity against it, and restrained it until it had made compensation to him for rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way, he would, at least, in the theory of the law, have been indemnified for all the damages he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterwards during his ownership of the lots with the same result. He was not, however, confined to his remedy by such action; he could suffer the railway to be constructed and then bring successive actions to recover damages to his lots, caused by the construction and operation of the railway." In answer to the contention that an injunction proceeding was substantially an action to recover permanent damages, and that therefore the Statute of Limitations should commence to run at the time when any cause of action arose, the court said: "The action here is neither in practice nor in theory an action of such a character, and by its fundamental rules as well as the constitutional requirement that compensation for such property shall be assessed by a jury or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone."

The operation of an elevated railway to the injury of an adjacent proprietor,

is a separate and distinct trespass each day and gives rise to separate and distinct causes of action, and successive actions may be commenced and maintained to recover damages sustained by such trespass. With respect to the Statute of Limitations, the wrong done is a continuing trespass, so that the statute begins to run from the last of the trespasses committed. But where the evidence showed that the injuries to plaintiff, which consisted of the loss of health arising from the noise of the train, occurred more than six years before the commencement of the action, it was held that the principle above stated did not apply and that the action was barred by the Statute of Limitations. *Taylor v. Manhattan R. Co.*, 53 Hun (N. Y.) 305. See also *Doyle v. Manhattan R. Co.*, 16 Daly (N. Y.) 506.

**1. Right to Acquire Title to Easements by Adverse Possession.**—*American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 292. The fact that the charter of the company contained a provision for compensation for private property used or acquired, did not make the company's possession necessarily subordinate to the street rights of the abutting owners.

**2. American Bank Note Co. v. New York El. R. Co.**, 129 N. Y. 252; 50 Am. & Eng. R. Cas. 292. In this case it appeared that the original entry of the elevated railroad company was merely experimental, and was made when both the company and the abutting property owners were ignorant of the fact that the maintenance of the road interfered with the rights of the abutting owners; that during the twenty years' possession by the company the road was changed from a cable road to a steam railroad; that after the expiration of the twenty years, the com-

A delay of five years by the landowner before bringing his action for damages, during which time he was frequently a fare-paying passenger, does not amount to an acquiescence in the construction of the road which will bar his right to recovery, where it appears that when the road was first constructed he objected and threatened litigation;<sup>1</sup> nor is an abutting owner deprived of his right to redress by erecting an awning, extending from his buildings to the elevated structure, especially where the railroad materially interferes with the light and the air of the stories above the awning.<sup>2</sup>

**g. RIGHT TO TRIAL BY JURY IN INJUNCTION PROCEEDINGS.**—In an action for an injunction against the maintenance and operation of an elevated railroad, neither party is entitled as a matter of right to a jury trial on any of the issues involved, notwithstanding the prayer for relief includes a demand for past damages which would be recoverable in an action at law. The court in the exercise of its equitable jurisdiction may determine the amount of damages both past and prospective to be paid by the company in avoidance of an injunction.<sup>3</sup> But it is

pany instituted proceedings to condemn the lot owner's right to the easements of light, air, and access; and that during the period of possession the track was reconstructed by removing the columns from the curb line to sixteen inches within the sidewalk. The court held that these facts showed that the company had acquired no title to the easements by prescription. Moreover the institution of condemnation proceedings by the company was necessarily a solemn and formal admission of record of title in the objection to the easement in question. See also *Hughes v. Metropolitan El. R. Co.*, 130 N. Y. 14, *aff'd* 57 N. Y. Super. Ct. 379.

1. **Delay in Bringing Suit.**—*Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; 46 Am. & Eng. R. Cas. 128; *Mattlage v. New York El. R. Co.* (Supreme Ct.), 11 N. Y. Supp. 482; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 432.

2. **Erection of Awning.**—The erection of such an awning is no abandonment of his easements, and at most entitles the company to nothing more than the value of the support afforded by its structure to the awning. *Mattlage v. New York El. R. Co.* (Supreme Ct.), 11 N. Y. Supp. 482.

3. In the trial courts there was for a time considerable confusion on this point. In *Johnson v. Manhattan R. Co.* (Supreme Ct.), 16 N. Y. Supp.

434; *Renwick v. New York El. R. Co.*, 15 N. Y. Supp. 149, and *Bach v. New York El. R. Co.*, 60 Hun (N. Y.) 128, it was held that such an action for injunctive relief and for incidental damages was equitable, and that the parties were not entitled to a jury trial. But in *Libmann v. Manhattan R. Co.*, 59 Hun (N. Y.) 428; *Barrett v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 71, it was held that where the allegations of the complaint were sufficient to sustain either an action to restrain the railroad company from the further commission of a continuing trespass or one to abate a nuisance, the plaintiff might be compelled to elect under which form of action he would proceed, and that if the action were for the abatement of a nuisance the defendant was entitled to a jury trial as a matter of right.

In *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; 50 Am. & Eng. R. Cas. 308, the question came before the court of appeals. It was insisted on the part of the defendant that the issue as to past damages was cognizable in a court of law and should be tried by a jury in obedience to the constitutional provision that "the trial by jury in all cases in which it has heretofore been used shall remain inviolable forever," and to § 970 of the Code of Civil Procedure, which provides that "where a party is entitled by the constitution or by express provision of law to a trial by jury

within the discretion of the trial court sitting in equity to submit the question of past damages to the determination of the jury.<sup>1</sup>

**4. Liability for Personal Injuries and Other Torts.**—If the railroad company makes use of contrivances which are skillfully made and

of one or more issues of fact . . . he may apply, upon notice to the court, for an order directing all the questions arising upon that issue to be distinctly and plainly stated for trial accordingly." It was held that the trial of this issue by a jury was not a matter of right. The court said: "Undoubtedly the claim for past damages sustained by plaintiff in his property, arising from the defendant's acts, could have been made the subject of an action at law, but that was not the cause of action which the plaintiff elected to assert in his complaint and to bring to trial. What he attempted by instituting his action was to restrain the continuance of acts which were constantly injuring and would, to all appearances, constantly in the future continue to injure him in ways and in a manner which he described in his complaint. This was a form of relief demandable and cognizable only on the equity side of the court. . . . It has always been a well settled and familiar rule that when a court of equity gains jurisdiction of a case before it for one purpose it may retain it generally. To do complete justice between the parties a court of equity will further retain the cause for the purpose of ascertaining and awarding the apparent damages as something which is incidental to the main relief sought. While this is done on the ground that the remedy for the damage done is deemed to be incidental to the relief of injunction, the principle is in perfect harmony with the theory of the jurisdiction of a court of equity. Its power is invoked, and it interferes to restrain the trespass which is continuous in its nature in order to prevent a multiplicity of suits, and taking jurisdiction of the cause for such a purpose it may retain it to the end and close up all matters of legal dispute between the parties by assessing the loss sustained for the acts which it has restrained."

Section 970 of the Code of Civ. Proc., was amended by Laws 1891, ch. 208, so as to embrace all actions "where one or more questions arise on the pleadings as to the value of property or as to the damages which a party may be entitled to recover." Under this

section as amended, it was held in the trial courts that the question of fee damages did not arise on the pleadings and was not within the meaning of the act. *Underhill v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 43. But it was held that the question as to past damages was within the amendment, and, on motion to that effect, should be tried by a jury. *Underhill v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 43; *Eggers v. Manhattan R. Co.*, 18 N. Y. Supp. 181.

In *Shepard v. Manhattan R. Co.*, 131 N. Y. 215, the question again came before the Court of Appeals upon the construction of the amendment of 1891. It appeared that the court below had granted an order reciting that the defendant was entitled as a matter of right to a jury trial on the question of past or rental damages. This was held to be reversible error. Gray, J., said: "I think that this section never did apply to actions of a purely equitable nature as are these, and that the amendment did not make it applicable. . . . I do not think that any of the powers vested in courts under the constitution should be taken away by implication, yet such would be the result if we affirm the orders below. We should have to imply a legislative intention from the interpolation of the words in the section to take away some of the equitable powers heretofore possessed by the court. The amendment does not convey such an intention *ex proprio vigore* and to attach to it a meaning which would deprive the court of a power so important and which courts of equity jurisdiction have so long possessed, would be contrary to sound principles of statutory construction." After a review of the authorities, he continued: "I think, therefore, we must conclude that it was error for the court below to hold that the defendants were entitled as matter of right upon their application under section 970 to an order stating the questions of past damages for trial by a jury; and that the granting of such an order still rests in the sole discretion of the trial court sitting in equity."

1. *Shepard v. Manhattan R. Co.*, 131 N. Y. 215.



the best known at the time in order to prevent the escape of sparks from its locomotive, it is not liable to a traveler on the street who is injured by a spark falling on him. The company has a right to operate its trains on the elevated structure, and unless the injured party can establish negligence on its part he cannot recover.<sup>1</sup> And the rule, that, in order to recover, the

1. **Injuries from Falling Sparks.**—*Searles v. Manhattan R. Co.*, 101 N. Y. 661; 25 Am. & Eng. R. Cas. 358, *rev'd* 49 N. Y. Super. Ct. 425.

In an action the plaintiff testified that she was struck by a single small coal falling from the engine. There was no evidence that more than this one coal was thrown from the locomotive on this occasion, or that sparks were emitted from it or other locomotives on other occasions. *Held*, that the evidence was not sufficient to warrant an inference by the jury that the defendant was guilty of negligence. *Wiedmer v. New York El. R. Co.*, 114 N. Y. 462; 38 Am. & Eng. R. Cas. 481.

In such cases it is not error for the court to instruct the jury that it was the duty of the company to so construct the ash pans, etc., of its engines as to reduce the danger of accident "to the least possible practical minimum point." *McNaier v. Manhattan R. Co.*, 51 Hun (N. Y.) 644; 46 Hun (N. Y.) 502 (non-suit).

An elevated railway company is required to use the best known devices in order to avoid throwing sparks, ashes or cinders, and to use them carefully and prudently; but they are not bound to use any supposed improved device, or one which theoretically might be supposed to be better than the one used. *Burke v. Manhattan R. Co.*, 13 Daly (N. Y.) 75.

In *Lowery v. Manhattan R. Co.*, 99 N. Y. 158; 23 Am. & Eng. R. Cas. 276; 52 Am. Rep. 12, by the unlawful act of the railroad company fire was thrown upon a horse passing under the structure so as to make him unmanageable, and by the same act the driver was so injured that, smarting under the injury, he did not exercise judgment and skill in guiding the horse, and the plaintiff walking in the street was run over by the horse and wagon. It was held that the railroad company was liable to the plaintiff; that the damage was not so remote as to preclude recovery, since the chain of causation was not broken; that the mistake of judgment on the part of the driver being caused by the

defendant's unlawful act could not be set up as an intervening cause. See *NEGLIGENCE*, vol. 16, p. 428.

A complaint alleging that the defendant negligently allowed sparks of fire to escape from its locomotive and enter plaintiff's house, setting fire to his curtains, furniture, etc., and that in attempting to extinguish the fire, plaintiff's hand was burned without negligence on his part, is bad; the injury alleged being too remote, no damages to property being claimed and there being no allegation that at the time he made the effort to extinguish the fire, it was spreading to other property than that actually burned, or that there was an appearance of the fire endangering life and property; or that the effort was made for the purpose of preventing such injuries. *Hinchy v. Manhattan R. Co.*, 49 N. Y. Super. Ct. 406.

In an action against an elevated railway to recover damages caused by a fire, originating from sparks emitted from defendant's engine, the court erred in refusing to admit the testimony of a member of defendant's board of examiners showing the qualifications of the man in charge of the engine. *Flynn v. Manhattan R. Co.*, 20 N. Y. Supp. 652.

Evidence that the locomotive of an elevated railway emitted sparks so large and brilliant as to attract the attention of a witness who had frequent opportunities for observation was sufficient to establish a *prima facie* case of negligence on the part of defendant in an action to recover damages caused by a fire resulting from the sparks. *Ruppel v. Manhattan R. Co.*, 13 Daly (N. Y.) 11.

In *Sugarman v. Manhattan El. R. Co.*, 16 N. Y. Supp. 533, it appeared that the plaintiff's awning was destroyed by fire alleged to have originated in a coal dropped from defendant's engine; that the engine was equipped with the best devices to prevent the escape of fire, but that a coal so large could not have escaped had the engine been in proper condition; and that there were openings in the ash pan from which the coal might

injured party must show a want of due care in the construction or operation of its road has been applied in other cases of injury.<sup>1</sup>

In cases of expulsion of passengers, the same rules apply as in cases of other carriers by railroad.<sup>2</sup> If a person is arrested or caused to be arrested by the company's servants in charge of a station, under circumstances which make such arrest false imprisonment, the company is liable therefor.<sup>3</sup>

have fallen. There was no other evidence as to the actual condition of the engine. Judgment for plaintiff was sustained.

1. See *Manson v. Manhattan R. Co.*, 55 N. Y. Super. Ct. 18 (party injured by falling of iron filings which had been allowed to accumulate along the track); *Volkmar v. Manhattan R. Co.*, 58 N. Y. Super. Ct. 125 (person injured by falling of an iron plate from the elevated structure); *Morsemann v. Manhattan R. Co.*, 16 Daly (N. Y.) 249 (person injured by crow-bar falling from the hands of employé on the track).

The company is guilty of a want of ordinary care in shoveling the contents of its drip-pans from an elevation of 15 feet into carts standing near a cross-walk of a street, without warning to pedestrians, especially where the refuse might have been lowered in baskets. *Treanor v. Manhattan R. Co.*, 16 N. Y. Supp. 536. See also *Pallett v. Kings Co. El. R. Co.* (Supreme Ct.), 10 N. Y. Supp. 691. In *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372, *aff'd* 127 N. Y. 669, the plaintiff was a passenger on the elevated road. The train was compelled to stop a few feet from the station, but there was a platform thirty inches wide running to the station which the company had provided for its employés. The train was filled with laboring men and the conductor called out to all who feared being late at their work to get out and walk to the station. After a number had started to walk on the platform or on the track ahead of the train, the train, without warning, started. Those on the track or near it pressed toward the outer edge of the platform, a panic ensued, and eleven men, including the plaintiff, fell to the pavement and were killed or injured. There was no reason why all should not have reached the station safely but for the sudden starting of the train. It was held that the evidence established negligence on the part of the company; that the plaintiff was not negligent in leaving the car

because he was invited to do so, and because the injury did not occur until after he had left the car safely. See also *Lyle v. Manhattan R. Co.*, 6 N. Y. Supp. 325.

Where a panic at an elevated railway station was caused by the negligence of the employés of the elevated railway company in starting a train, in consequence of which plaintiff was pushed over the elevated railway structure by persons seeking to avoid the train, and injured by a fall to the street below, the negligence of the company was held the proximate cause of the injury, and a verdict and judgment for plaintiff was rendered. *McCabe v. Manhattan R. Co.*, 6 N. Y. Supp. 418.

An agreement by a contractor for the construction of an elevated railway station platform "to assume all liability for and to indemnify the company against all loss, costs, or damages . . . arising from injuries sustained by mechanics, laborers, or other persons by reason of accidents or otherwise," will not include a case where a laborer, while in the employment of the contractor, was struck by one of the engines of the railway company and killed, in consequence of which damages were recovered from the company. *Manhattan R. Co. v. Cornell*, 54 Hun (N. Y.) 202.

In *Burmeister v. New York El. R. Co.*, 47 N. Y. Super. Ct. 264, in which the plaintiff was injured by the fall of an iron chain from defendant's structure, in process of erection by a contractor, it was held that the right of defendant to put an end to the contract with the contractor in case the latter did not "prosecute the work with due diligence and expedition," did not confer upon the defendant such a right of selection of the contractor's servants as would make him responsible for their negligence.

2. See *MASTER AND SERVANT*, vol. 14, p. 740; *RAILROADS*, vol. 19, p. 903; *TICKETS AND FARES*; *supra*, this title, *Expulsion of Passengers*.

3. In *Lynch v. Metropolitan El. R.*

The company is liable for the willful and malicious acts of its agents and servants if such acts are within the scope of their employment.<sup>1</sup> But it has been held that it is not liable in punitive damages for such acts unless it authorizes or ratifies them.<sup>2</sup>

The company is liable for damages caused to persons on the street by the falling of heavy substances from its trains or elevated structure.<sup>3</sup>

Co., 90 N. Y. 77; 12 Am. & Eng. R. Cas. 119, *affirming* 24 Hun (N. Y.) 506, the plaintiff bought a ticket and entered one of the cars; before reaching his destination he lost his ticket, and while attempting to pass through the gate from the station platform, he was stopped by the gate keeper, and told that he could not pass, until he produced a ticket or paid his fare. He stated that he had bought a ticket, but had lost it, and insisted on passing out, but was prevented by the gate keeper, who sent for a policeman and had him arrested. He remained in the police station all night, and when taken before a magistrate the next morning was discharged. It appeared that the gate keeper had orders not to let passengers pass out until they either paid fare or showed their tickets. In an action for false imprisonment, it was held that the detention was unlawful; that the company was responsible for the acts of the gate keeper, and the plaintiff was therefore entitled to recover. See also *Shea v. Manhattan R. Co.*, 15 Daly (N. Y.) 528; *Oppenheimer v. Manhattan R. Co.* (Supreme Ct.), 18 N. Y. Supp. 411.

In *Palmeri v. Manhattan R. Co.* (Supreme Ct.), 14 N. Y. Supp. 468, it appeared that the plaintiff purchased a ticket and paid for it with a coin which the agent contended was counterfeit. She refused to take back the coin, and the agent denounced her as a counterfeiter and a common prostitute and compelled her to remain in the station more than half an hour in order that she might be arrested by an officer. It was held that the railroad company was liable for both the false imprisonment and the abusive language of the agent.

1. In *Cagney v. Manhattan R. Co.*, 2 N. Y. Supp. 410, the plaintiff purchased a ticket at the elevated station and deposited it in the cancelling-box. The gateman not seeing the ticket deposited, refused to allow him to get aboard the train, although the ticket agent, the gateman's superior in authority,

said he had sold him a ticket, and told the gateman to let him ride. Unable to secure the train without repayment the plaintiff walked home. There were many people present at the occurrence, and the plaintiff was mortified at the imputation of attempting to ride without payment. It was held that the railroad company was liable for both actual and exemplary damages, although caused by the gateman's malicious conduct, and that the verdict of \$500 in such a case was not excessive. The rule was recognized that a carrier is liable for the malicious acts of its agents when committed within the line of their duty. *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588; 12 Am. & Eng. R. Cas. 127; 43 Am. Rep. 185; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

In the case of *Mellwitz v. Manhattan R. Co.* (Supreme Ct.), 17 N. Y. Supp. 112, plaintiff testified that she was pushed over by the guard for refusal to place a ticket in the ticket-box after she had already deposited one there. Her evidence was entirely uncorroborated and was contradicted by that of disinterested witnesses, who stated that she fell while attempting to get on the train after the gates were shut and the train had started. A verdict for the plaintiff was set aside and a new trial ordered.

2. An elevated railway company is not liable in punitive damages for an assault committed by one of its employes, if the evidence shows that the employe acted in supposed discharge of his duty and not with malicious intent. Nor is it liable in punitive damages for such an assault unless it authorizes or ratifies the acts of the employe or wrongfully retains him. The mere retention of the employe is not sufficient evidence of ratification without proof of actual knowledge of the employe's conduct on the part of the company. *Donivan v. Manhattan R. Co.*, 21 N. Y. Supp. 457.

3. Plaintiff while standing under an elevated railway structure in front of

Trains on an elevated railway should not be started without warning; if they are so started the company will be liable for any injuries thus caused.<sup>1</sup>

No dangerous open spaces should be left in the pathway of passengers, and if the curvature of the track renders such a space between the station platform and the car unavoidable, it is the duty of the company to see that it is properly guarded and well

his premises was struck on the head by a descending bar of iron. There was no other structure at that point over the street, and the bar of iron which fell on plaintiff was seen to fall from a passing train, and its flight was observed from the time it began to descend until it struck the plaintiff. It was held that plaintiff was entitled to recover for the injuries received without further evidence to show that the piece of iron fell from defendant's train or structure, or was dropped by some one in defendant's employ. *Maier v. Manhattan R. Co.*, 53 Hun (N. Y.) 506.

In *Anderson v. Manhattan R. Co.*, 21 N. Y. Supp. 1, defendants were distributing heavy timbers along the elevated railway track, letting them fall on the edge of the platform, and in so doing a piece of timber, so rotten that it could be broken with the hand and the condition of which was apparent by ordinary inspection, was broken off and fell on plaintiff's head below. It was held that the evidence was sufficient to carry the case to the jury.

In *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, it appeared that the plaintiff while in the street under the defendant's road was struck by a portion of a broken bolt to which an iron plate was attached which fell from the defendant's structure. It was held that the fact that the bolt was broken and part of it fell, raised a presumption that in that particular the defendant's structure was out of repair and dangerous, which presumption was not rebutted by proof of the proper construction of the road and the careful inspection of the same by the defendant's track walker and inspector.

**1. Passenger Injured by Sudden Starting or Stoppage of Train.**—In *Ferry v. Manhattan R. Co.*, 118 N. Y. 497; 44 Am. & Eng. R. Cas. 331, it appeared that the plaintiff while attempting to alight from the train, and as she was about stepping from the front platform of the fourth and last car, the train suddenly started so that she was thrown down and injured. Between

the third and fourth cars a brakeman was stationed, whose duty it was to open the gates to permit the ingress and egress of passengers, and then to close them and to give a signal by pulling on the bell rope extending from the bell on the engine to where he was stationed. This signal was communicated to the next forward brakeman, whose duty it was to so hold the rope as not to permit the signal to pass him, and when he closed the gates under his control to transmit the signal by two pulls of the rope, and so on until the signal reached the engineer, whose duty it was then to start the train. In this case, the signal to start was given by the brakeman between the second and third cars, he having received a signal which he supposed was given by the rear brakeman, but which was, in fact, given by a passenger who caught hold of the bell-rope to steady himself. The court charged that if the jury found that the train was started by the passenger, the defendant was not negligent, but if otherwise, then it was negligent. Defendant then requested the court to charge "that there was no proof that there was any vice in the system of communicating signals, and the jury are not to consider the question;" this was refused, except as already charged. It was held no error, and the jury having found a verdict for the plaintiff the case was affirmed.

In the case of *McQuade v. Manhattan R. Co.*, 53 N. Y. Super. Ct. 91, it appeared that plaintiff while in the act of putting his foot on the platform to enter an elevated railway car, following close upon others and holding the railing in his hand, was prevented from making his footing good by the conductor, who partly closed the gate upon his foot and dragged him with the train, which then started to move, on which plaintiff was pulled to the platform by the conductor and passengers and fell, sustaining severe injuries. No bell had been rung nor signal given that the train was about to move, or

lighted.<sup>1</sup> The station platform should be guarded by rails to prevent passengers falling therefrom,<sup>2</sup> and should not be permitted to become slippery from accumulations of ice and snow.<sup>3</sup>

An elevated railroad company must exercise ordinary care to keep the stairways and approaches to its stations in a safe condition. But in this regard it is not bound to the high degree of care which is required concerning the roadbed, machinery, and other appliances in which a defect would be likely to result in

that the proper time for boarding it had passed. It was held that the plaintiff was entitled to damages.

**1. Injury at Station Platform—Space Between Cars and Platform Caused by Curve in the Road.**—In *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 41 Am. & Eng. R. Cas. 111; *aff'd* 54 N. Y. Super. Ct. 286, the plaintiff, in leaving the train, stepped into an unguarded hole between the cars and the station, thereby sustaining injury. It appeared that she had never landed there before; that the space was unguarded, and no warning or assistance was given her by persons in charge of the train; that the night was dark, and there was but a single light at the station, which was quite remote from the point where the accident occurred. Recovery was allowed, and it was held that the injury having been due to the existence of the hole and the insufficient lighting of the station, it was not error to exclude evidence in the defendant's behalf that the space between the station and the cars into which the plaintiff fell was necessitated by the form of the road—*e. g.*, a sharp curve—the true question being as to the safety of the means of exit provided by the defendant. See also *Hanrahan v. Manhattan R. Co.*, 53 Hun (N. Y.) 420.

In *Ryan v. Manhattan R. Co.*, 121 N. Y. 126; 44 Am. & Eng. R. Cas. 426, *rev'd* 1 N. Y. Supp. 899, the injury was caused by the plaintiff stepping into a similar open space between the platform and the cars, the space being caused as before by the curve of the road. It appeared that although many thousands of passengers got off and on at this station no accident had ever occurred, and that the plaintiff had prior to the accident taken the cars at this station a hundred times or more without injury. The space between the cars and platform was less than eight inches, the cars being as close to the platform as was safe or prudent. It was held that the defendant, as a

matter of law, was not negligent in having such space, and that it was error to submit the question to the jury. The court distinguished the case from that of *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 41 Am. & Eng. R. Cas. 111, just referred to, where no negligence was imputed to the company for the existence of the opening, but for leaving it unguarded and unlighted.

In *Brady v. Manhattan R. Co.*, 6 N. Y. Supp. 533, plaintiff was injured by stepping into an open space between the car and the station platform, and evidence was admitted of similar accidents which occurred at other stations on defendant's road from the same cause.

**Space Between Cars.**—In *Clune v. Brooklyn El. R. Co.* (Supreme Ct.), 1 N. Y. Supp. 239, it appeared that the accident was caused by the plaintiff's stepping, as the car started, into the space between the platforms of the cars, which space was closed when the train was standing still; that the conductor, who was on the platform, was attending to his duties and did not know that the plaintiff was attempting to pass. It was held that the conductor was not negligent in failing to notify the plaintiff of the opening.

**2.** In *Jarvis v. Brooklyn El. R. Co.*, 16 N. Y. Supp. 96, the plaintiff recovered damages for personal injuries sustained by him from a fall occasioned by the negligence of defendant in leaving the end of the elevated station platform unguarded by a rail, and insufficiently lighted.

**3.** In *Timpson v. Manhattan El. R. Co.*, 52 Hun (N. Y.) 489, it appeared that plaintiff had slipped and fallen on snow and ice which had collected on the defendant's platform, and that no sand or ashes had been placed upon the platform to render it safe. Judgment for damages in favor of plaintiff was sustained. See also *Weston v. New York El. R. Co.*, 73 N. Y. 595,

great danger or loss of life.<sup>1</sup> So, also, the company is bound to exercise only reasonable care to prevent the injury of one passenger by another.<sup>2</sup>

**XVI. ORDINARY RAILROADS IN STREETS AND HIGHWAYS.**<sup>3</sup>—The occu-

mem.; *McMahon v. New York El. R. Co.*, 50 N. Y. Super. Ct. 507; *Belcher v. Manhattan El. R. Co.* (Supreme Ct.), 1 N. Y. Supp. 349.

1. **Injuries While Ascending or Descending Stairs at Stations.**—In *Kelly v. Manhattan R. Co.*, 112 N. Y. 443; 37 Am. & Eng. R. Cas. 60, a person while ascending the stairway of a station, fell and was injured. The accident happened about half past five o'clock A. M. There had been a storm of sleet and snow during the night, commencing at midnight and continuing until just before the accident. It appeared the stairway was covered, the roof projecting a foot on each side; it was provided with hand rails, and upon each step were pieces of rubber to prevent slipping. The trial court denied the motion for non-suit, and charged the jury that it was the duty of the company to use all human care, caution, and skill, to make the ingress and egress to its station safe; that it must use all the skill, diligence, and care which a very cautious human being would use if he were looking after his own life and health; so that if they should find that the steps were slippery at the time, and that means might have been taken to prevent their being so, the railroad company was chargeable with negligence. This charge was held error, because so far as regards the approaches to its cars, a less degree of care is required than in regard to the structure and operation of its road. The motion for a non-suit should have been granted. For a similar case see *Ainley v. Manhattan R. Co.*, 47 Hun (N. Y.) 206.

In an action against an elevated railway company to recover damages for a fall occasioned by the alleged negligence of the company in the erection of the stairs in one of its stations, testimony as to other injuries resulting from the same cause occurring after that in question, cannot be admitted; and evidence of such accidents occurring prior to that in question may be admitted only for the purpose of showing defendant's knowledge of the insufficiency of the structure. *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.) 111.

In *Flagg v. Manhattan R. Co.*, 49 N. Y. Super. Ct. 251, the plaintiff, while descending a flight of steps leading from the station, which at the time was very dark, when within a few steps of the ground, thinking that she was at the bottom, stepped out and was thrown down. She complained that the railroad company was negligent in failing to keep its stairway lighted. It was held that the question of the plaintiff's contributory negligence was for the jury, and that a verdict for her having been found, should be sustained. See also *McMahon v. New York El. R. Co.*, 50 N. Y. Super. Ct. 507, where a passenger going up the stairs to the elevated station, fell and was killed; no recovery was allowed because the plaintiff failed to establish the negligence of the railroad company.

2. In *Buck v. Manhattan R. Co.*, 15 Daly (N. Y.) 550, *aff'd* 134 N. Y. 589, a passenger in leaving the elevated car was thrown down and injured by other passengers entering the car from the station platform. It was held that while the carrier was bound to use reasonable care to prevent injury from other passengers, and to exercise the utmost care and caution as far as its own servants and appliances were concerned, the present case did not show that the injury was due to its negligence, and that no recovery could be had. See also same case reported in 15 Daly (N. Y.) 48; 276.

For other cases in which the ordinary rules of law respecting the liability of carriers of passengers have been applied to elevated railroads, see *Dlabola v. Manhattan R. Co.*, 15 Daly (N. Y.) 470, *aff'd* 134 N. Y. 585 (injury occurring during an extraordinary storm); *Marvin v. Manhattan R. Co.*, 53 N. Y. Super. Ct. 528 (excessive damages); *Lee v. Manhattan R. Co.*, 53 N. Y. Super. Ct. 260; *Merwin v. Manhattan R. Co.*, 48 Hun (N. Y.) 608 (passenger not negligent in riding on platform); *Dillon v. Manhattan R. Co.* (Supreme Ct.), 1 N. Y. Supp. 679 (plaintiff injured by sudden starting of the train).

3. While this subject is not usually included in the treatment of the law of street railways, it is deemed advisable

pation of a street or highway by a railroad company without authority of law is a nuisance; equity will restrain it as such, and damages may be recovered for injuries resulting from such occupation.<sup>1</sup> Where the street was laid out by dedication, or under condemnation proceedings, and the original owner retained the fee, he may, on the ground that there is an invasion of his property, bring trespass or ejectment against a railway company unlawfully seeking to occupy the street.<sup>2</sup> Under a general grant to a railroad company to locate its road and take land therefor, it may cross a highway, but may not occupy a street longitudinally or to a greater extent than is necessary for an ordinary crossing.<sup>3</sup> To authorize such unusual occupation the authority must be spe-

to discuss it here because of its intimate connection with a branch of street railway law, particularly with the law as recently developed in the elevated railway cases.

1. *Columbus, etc., R. Co. v. With-erow*, 82 Ala. 190; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; *Morris, etc., R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 384; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514; *Com. v. Nashua, etc., R. Co.*, 2 Gray (Mass.) 54; *Com. v. Vermont, etc., R. Corp.*, 4 Gray (Mass.) 25; *Com. v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 93; *Stearns County v. St. Cloud, etc., R. Co.*, 36 Minn. 425; *Troy v. Cheshire R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793; 36 Am. & Eng. R. Cas. 20; 12 Am. St. Rep. 286; *Platt v. Chicago, etc., R. Co.*, 74 Iowa 127; *Adams v. Hastings, etc., R. Co.*, 18 Minn. 260; *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; 80 Am. Dec. 791, 794, note; *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601. Compare *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351; 36 Am. & Eng. R. Cas. 180; *Davis v. New York*, 14 N. Y. 506; *Angell, Highways* (3d ed.), § 33.

Such unlawful occupation by a railroad is a nuisance *per se* which equity will enjoin upon an information by the attorney general without a preliminary trial at law. *Atty. Gen'l v. Lombard, etc., R. Co.*, 10 Phila. (Pa.) 352.

A railroad for private use may not be laid in a street even with the consent of the city; any owner of abutting land whose property is or may be injured thereby may have a perpetual injunction against the construction of the road. *Mikesell v. Durkee*, 34 Kan. 509; *Macon v. Harris*, 73 Ga. 428. See

also *Carli v. Stillwater St. R. Co.*, 28 Minn. 373; 3 Am. & Eng. R. Cas. 226; 41 Am. Rep. 290.

In *Massachusetts*, a railroad so constructed over a highway as to obstruct public travel, without statutory authority, is liable to indictment as a nuisance. *Com. v. Nashua, etc., R. Co.*, 2 Gray (Mass.) 54; *Com. v. Vermont, etc., R. Corp.*, 4 Gray (Mass.) 22. And the confirmation by statute of such illegal construction is no ground for arresting judgment on an indictment for the nuisance caused thereby. *Com. v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 93.

2. *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 627; *Terre Haute, etc., R. Co. v. Roddey*, 89 Ind. 128; 10 Am. & Eng. R. Cas. 284; 46 Am. Rep. 164; *Houston, etc., R. Co. v. Odum*, 53 Tex. 343; 2 Am. & Eng. R. Cas. 503; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *rev'd* 18 Barb. (N. Y.) 222; *Wager v. Troy Union R. Co.*, 25 N. Y. 532; *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491; 38 Am. & Eng. R. Cas. 453; *First Cong. Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158; 43 Am. & Eng. R. Cas. 182; *Alabama, Midland R. Co. v. Williams*, 92 Ala. 277; *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908 (erection of telegraph poles in highways); *EMINENT DOMAIN*, vol. 6, p. 553; *HIGHWAY*, vol. 9, p. 408 *et seq.*

3. *Starr v. Camden, etc., R. Co.*, 24 N. J. L. 592; *State v. Montclair R. Co.*, 35 N. J. L. 330; *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 362; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 71. See also *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. L. 33; see *infra*, this title, *When Company Has Such Right.*

cifically conferred in clear and express terms, or by unavoidable implication.<sup>1</sup>

**1. Right to Occupy Streets and Highways**—*a.* **POWER OF LEGISLATURE TO GRANT.**—In the absence of express constitutional provisions to the contrary, the legislature has complete control of all highways in the state, and may authorize the occupation of one or more of them by a railway company without the consent of the local authorities.<sup>2</sup> This power may be directly exercised, or it may be delegated to a municipality.<sup>3</sup>

**What Is a Highway in This Connection.**—A road that has never been regularly laid out or opened by the proper authorities, and which is in fact unused and unfit for travel and is closed against the public, is not a "highway" within the meaning of a statute requiring compensation to landowners whose lots abut on the street or highway occupied by a railroad. *Flint, etc., R. Co. v. Willey*, 47 Mich. 88; 5 Am. & Eng. R. Cas. 305.

1. *Ruttles v. Covington* (Ky. 1889), 38 Am. & Eng. R. Cas. 408; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793; 36 Am. & Eng. R. Cas. 20; 12 Am. St. Rep. 286; *Chicago, etc., R. Co. v. Chicago*, 121 Ill. 176. See *infra*, this title, *When Company Has Such Right*.

In *State v. Montclair R. Co.*, 35 N. J. L. 330, it was held that the doctrine that "a railroad company with only general powers to locate its road and take land for it may cross a public highway" is not applicable to the taking of a highway longitudinally. The court added: "No case has occurred in the courts where such a necessity has arisen. It may, however, be conceded that it may arise where, in applying the route to the territory through which it is to pass, it could be located in no other practical way than upon a highway, but that it should not be a mere question of expediency or of comparative expense but a practical necessity in order to give effect to franchises granted. The presumption is in favor of the public and against the necessity of taking the highway longitudinally by a private corporation, although for a public purpose, such as a railroad. To authorize it, the legislature should either so indicate it in the language of the act by express words or necessary construction, or it should result as a necessity in order to accomplish the object intended in the grant of the franchises."

**Country Highways.**—The legislature does not usually allow the occupation

of country highways longitudinally, because a right of way is easily obtainable by the railroad elsewhere. In some jurisdictions, as in *Pennsylvania*, there is a statutory requirement that a railroad company which uses a highway for a road-bed must supply a new highway at its own expense. Such a requirement does not necessarily divest the owner of adjacent land of his right to recover for injuries to property resulting from such occupation. *Phillips v. Dunkirk, etc., R. Co.*, 78 Pa. St. 177; *Snow v. Deerfield Tp.*, 78 Pa. St. 181; *Post v. West Shore R. Co.*, 123 N. Y. 580; 47 Am. & Eng. R. Cas. 322; *Snyder v. Pennsylvania R. Co.*, 55 Pa. St. 340. See also *Bangor, etc., R. Co. v. Smith*, 47 Me. 34; *Stearns County v. St. Cloud, etc., R. Co.*, 36 Minn. 425 (construction of railroad in highway enjoined).

2. *Clinton v. Cedar Rapids, etc., R. Co.*, 24 Iowa 455; *Chicago, etc., R. Co. v. Newton*, 36 Iowa 299; *Hine v. Keokuk, etc., R. Co.*, 42 Iowa 636; *State v. Davenport, etc., R. Co.*, 47 Iowa 507; *Savannah, etc., R. Co. v. Savannah*, 45 Ga. 602; *Harrison v. New Orleans Pac. R. Co.*, 34 La. Ann. 462; 44 Am. Rep. 438; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614; *Dubach v. Hannibal, etc., R. Co.*, 89 Mo. 483; 29 Am. & Eng. R. Cas. 609; *Portland, etc., R. Co. v. Portland*, 14 Oregon 188; 27 Am. & Eng. R. Cas. 353; 58 Am. Rep. 299; *Mercer v. Pittsburgh, etc., R. Co.*, 36 Pa. St. 99; *Tennessee, etc., R. Co. v. Adams*, 3 Head (Tenn.) 596; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; 28 Am. Rep. 745; *Lawrence R. Co. v. Williams*, 35 Ohio St. 172; *Werges v. St. Louis, etc. R. Co.*, 35 La. Ann. 641; *New Orleans, etc. Co. v. New Orleans*, 26 La. Ann. 517 (power of legislature to authorize use of levee for a road-bed for a railway company); *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1; 40 Am. & Eng. R. Cas. 284.

3. *Mercer v. Pittsburgh, etc., R. Co.*,



*b. POWER OF MUNICIPAL CORPORATIONS.*—By virtue merely of its usual and ordinary powers over streets within its limits, a municipal corporation cannot authorize the construction and operation of a railroad thereon.<sup>1</sup> For a municipality to possess such power the grant thereof by the legislature must be clear and explicit; it cannot be created by implication or construction.<sup>2</sup> In a number of jurisdictions the authority is given to all municipalities by general law, subject to certain conditions, to exercise complete and exclusive control over streets, and this embraces the right to authorize the construction of a railroad thereon.<sup>3</sup>

36 Pa. St. 99; Chicago, etc., R. Co. v. People, 91 Ill. 215; Moses v. Pittsburgh, etc., R. Co., 21 Ill. 516; Tennessee, etc., R. Co. v. Adams, 3 Head (Tenn.) 596; New Orleans, etc., R. Co. v. Second Municipality, 1 La. Ann. 128; Harrison v. New Orleans Pac. R. Co., 34 La. Ann. 462; 44 Am. Rep. 438. See also *infra*, this title, *Power of Municipal Corporations*; 2 Dillon Mun. Corp. (3d ed.), § 705 (558); Pacific R. Co. v. Leavenworth City, 1 Dill. (U. S.) 393; Slatten v. Des Moines, etc., R. Co., 29 Iowa 148; 4 Am. Rep. 205; Gieger v. Filor, 8 Fla. 325; Hoyle v. New Orleans City R. Co., 23 La. Ann. 535; Wolfe v. Covington, etc., R. Co., 15 B. Mon. (Ky.) 404.

**Constitutional Provisions Against Special Legislation.**—In many states the constitution forbids grants by the legislature of railway franchises except by general laws, and this, of course, includes the right to occupy streets. See Const. of *New York*, art. 3, § 18, par. 11; Const. of *Mississippi* (1890), § 902; Const. of *Colorado* (1876), art. 15, § 2; Const. of *Illinois* (1870), art. 4, § 22; Const. of *Missouri* (1875), art. 4, § 53; 2 Dillon Mun. Corp. (4th ed.), § 701a; Chicago City R. Co. v. People, 73 Ill. 541; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 489; Stange v. Dubuque, 62 Iowa 303; 14 Am. & Eng. R. Cas. 108.

1. Perry v. New Orleans, etc., R. Co., 55 Ala. 413; 28 Am. Rep. 740; Stange v. Dubuque, 62 Iowa 303; 14 Am. & Eng. R. Cas. 107; Savannah, etc., R. Co. v. Shiels, 33 Ga. 601 (in this case the construction of the road necessitated making embankments and cuts); Savannah, etc., R. Co. v. Savannah, 45 Ga. 602; Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Carpenter v. Oswego, etc., R. Co., 24 N. Y. 655; Terre Haute, etc., R. Co. v. Scott, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208; Indianapolis, etc., R. Co. v. State, 37 Ind. 489; Denver Circle R.

Co. v. Nestor, 10 Colo. 403 (city of Denver has no power to authorize the occupation of streets longitudinally); Lackland v. North Missouri R. Co., 31 Mo. 180; Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 63; State v. Trenton, 36 N. J. L. 79. See also Pierce on Railroads, p. 246; 2 Dillon Mun. Corp. (4th ed.), § 705 (558); Cooley's Const. Lim. (5th ed.) \*545-6. A different rule prevails where it is sought to construct a horse railway in the street. See *supra*, this title, *Right to Use Streets*.

"A municipal corporation cannot by virtue of its ordinary powers confer a franchise on individuals or a private corporation to lay railroad tracks on highways, and to run cars upon them and receive fares from passengers; but it may derive the power by grant from the legislature, or its unauthorized exercise of the power may be ratified by statute." Pierce on Railroads, p. 247; Dubach v. Hannibal, etc., R. Co., 89 Mo. 483; 29 Am. & Eng. R. Cas. 609; Clarke v. Blackmar, 47 N. Y. 150. Compare Lexington, etc., R. Co. v. Applegate, 8 Dana (Ky.) 289; 33 Am. Dec. 497. See also Donnaher v. State, 8 Smed. & M. (Miss.) 649; Cosby v. Owensboro, etc., R. Co., 10 Bush (Ky.) 288; Polack v. San Francisco Orphan Asylum, 48 Cal. 490.

In Reichert v. St. Louis, etc., R. Co., 51 Ark. 491; 38 Am. & Eng. R. Cas. 453, it was held that a city could not grant a right of way to a railroad over its streets, and that no validity could be imparted to a city ordinance making such grant by an act of the legislature conferring it.

2. Galbreath v. Armour, 4 Bell. App. Cas. 374; Reg. v. London Gas. Co., 2 El. & El. 651; 105 E. C. L. 650; Reg. v. Charlesworth, 16 Q. B. 1012; Denver Circle R. Co. v. Nestor, 10 Colo. 403; State v. Hoboken, 35 N. J. L. 205.

3. For cases in which the city's char-

A city by authorizing a railroad company to use the street for the construction of its road does not become liable to the owners of abutting property for injuries resulting from such occupation, even though the grant to the company was made without authority. The company cannot be regarded as the agent of the city in the wrongdoing, and the grant must be presumed to have been made on condition that the company should assume responsibility

ter or statutory powers have been held sufficient to authorize such a grant, see *Kistner v. Indianapolis*, 100 Ind. 210; *Slatten v. Des Moines, etc.*, R. Co., 29 Iowa 148; 4 Am. Rep. 205; *Chicago Dock, etc.*, Co. v. *Garrity*, 115 Ill. 155; *Chicago, etc.*, R. Co. v. *People*, 91 Ill. 251; *Quincy v. Chicago, etc.*, R. Co., 92 Ill. 21; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Yates v. West Grafton*, 34 W. Va. 783; *Terre Haute, etc.*, R. Co. v. *Bissell*, 108 Ind. 113.

Power given by its charter to a city to "open, alter, abolish, grade, or otherwise improve or keep in repair streets" does not authorize the city authorities to grant a railroad company the right to obstruct the street by permanent structures inconsistent with its uses as a street. *Lackland v. North Missouri R. Co.*, 31 Mo. 180; 34 Mo. 259. See also *Porter v. North Mo. R. Co.*, 33 Mo. 128.

In *Kansas* the fee of the streets is in the county in trust for the public, but the authority to permit and to regulate the construction of railways thereon is in the municipality. *Atchison, etc.*, R. Co. v. *Garside*, 10 Kan. 552.

In *Kentucky* the rule is that a municipal corporation may authorize the construction of railways upon its streets, but it cannot by contract divest itself of its power to alter the grade and the character of the track where subsequent changes are necessary owing to a change of pavement, or other cause. *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.) 415; *Lexington, etc.*, R. Co. v. *Applegate*, 8 Dana (Ky.) 289; 33 Am. Dec. 497; *Louisville, etc.*, R. Co. v. *Brown*, 17 B. Mon. (Ky.) 763.

Where the municipality has authority to make the grant, it may be made by resolution or vote duly recorded; an ordinance is not essential. *Merchants' Union Barb Wire Co., v. Chicago, etc.*, R. Co., 70 Iowa 105; 43 Am. & Eng. R. Cas. 121.

In *Missouri* it seems that the power of municipal corporations is limited to authorizing the construction of railroads which do not affect the grade of the street. *Cross v. St. Louis, etc.*, R.

Co., 77 Mo. 318; 14 Am. & Eng. R. Cas. 123; *Tate v. Missouri, etc.*, R. Co., 64 Mo. 158.

Power given to the city authorities to vacate streets and alleys in the city does not empower the city to grant to a railroad company permission to construct its road, along and upon a street; such a grant would not be a vacation of the street but a joint occupation of it by the company and the public. *McAboy's Appeal*, 107 Pa. St. 548; 20 Am. & Eng. R. Cas. 313.

**City's Control Over Streets.**—In *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243, the court, in speaking of the duty of the city in regard to streets, says: "Holding them in trust for the public and having no authority to convey or divert them for other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for public use to meet the public necessities; for it is obvious that if such rights may be granted, then the practical use of the streets may become so burdened with private rights as to place it beyond the pecuniary ability of the city to discharge its duty to the public without reference to them. It is inconsistent to say that the city owes a duty to the public and yet that it may voluntarily place it beyond its power to discharge that duty. . . . The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage which is its chief and primary, but by no means sole use;" citing 2 Dillon Mun. Corp., § 541. Quoted and approved in *St. Louis, etc.*, R. Co. v. *Belleville*, 20 Ill. App. 585; 122 Ill. 376; 32 Am. & Eng. R. Cas. 378. See also **STREETS; MUNICIPAL CORPORATIONS**, vol. 15, p. 1039.

A city has no power to authorize such a use of a street dedicated to public use, as will practically destroy it as a thoroughfare for the use of the public. *Dubach v. Hannibal, etc.*, R. Co., 89 Mo. 483; 29 Am. & Eng. R. Cas. 609.

for all damage caused by its occupation and use of the street.<sup>1</sup> The city does not become liable in any case unless it can be shown that the tortious acts were done by its procurement and direction.<sup>2</sup> And it has been held that where the city owns the fee of the streets, it is entitled to compensation for the use thereof by a railroad company.<sup>3</sup>

**1. Liability of City Granting Right to Occupy Streets.**—2 Dillon Mun. Corp. (3d ed.), § 710 [563]; *Denver v. Boyer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465; *Green v. Portland*, 32 Me. 431; *Roll v. Augusta*, 34 Ga. 326; *Davenport v. Stevenson*, 34 Iowa 225; *Frith v. Dubuque*, etc., R. Co., 45 Iowa 406; *Burkam v. Ohio*, etc., R. Co., 122 Ind. 344; 43 Am. & Eng. R. Cas. 153; *Port of Mobile v. Louisville*, etc., R. Co., 84 Ala. 115; 36 Am. & Eng. R. Cas. 171; 5 Am. St. Rep. 342; *Burritt v. New Haven*, 42 Conn. 174. Even if the city had power to grant such authority to a railroad company "that power would not authorize it to make itself responsible for the acts of others, from which neither it nor its citizens derived any benefit, and which were not done for the accommodation of public travel or business." *Green v. Portland*, 32 Me. 431. See also *Chicago*, etc., R. Co. v. *Joliet*, 79 Ill. 25.

In *Murphy v. Chicago*, 29 Ill. 286; 81 Am. Dec. 307, the court, by Caton, J., say: "It is the settled law of this court, as well as in most of the other states of the Union that it is a legitimate use of a street or highway to allow under legislative authority a railroad track to be laid down in it, and for so doing the city is not liable for any damages which may accrue to individuals." Compare, however, *Pekin v. Brereton*, 67 Ill. 480; 16 Am. Rep. 631. While it is believed that the text states the true doctrine, it must be conceded that there is strong authority for a much modified view. In *Pekin v. Brereton*, 67 Ill. 477; 16 Am. Rep. 629, it appeared that the city authorized the construction of a railroad on a street upon which the plaintiff's lots abutted; the grade of the street had never been established by the city. In constructing its road the company made a deep cut in the street and sidewalks, making the land of the plaintiff liable to cave in, and very materially lessening the value of the lots because of the difficulty of access. In an action by the plaintiff against the city it was held that he might recover of the city the amount of damage suf-

fered. In this case, *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392, was relied on as authority, and *Murphy v. Chicago*, 29 Ill. 286; 81 Am. Dec. 307, and *Moses v. Pittsburgh*, etc., R. Co., 21 Ill. 516, were declared to be of little or no value as authority, having been decided prior to the adoption of the present constitution and much weakened by the subsequent cases of *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392, and *Indianapolis*, etc., R. Co. v. *Hartley*, 67 Ill. 439; 16 Am. Rep. 624. The ruling of the court seems to be based upon the theory that in changing the grade of the street the railroad company acted as the agent and in behalf of the city, so that the case came within the rule that the city becomes liable for tortious acts done by its procurement and direction. The court, by Breese, J., said: reviewing *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392, "Although a city has power and authority to elevate or depress the grade of its streets, as it may deem proper, yet if in so doing, it inflicts an injury upon a lot owner, peculiar to him alone, it cannot be exempted from liability; and should it become necessary for the interests of the public, in the process of grading the streets, or, we may add, laying down a railroad track thereon, the lot of an individual shall be rendered unfit for occupancy, the public must pay for it to the extent to which it deprives the owner of its legitimate use." In *Mayor*, etc., of *Macon v. Harris*, 73 Ga. 428, where the city unlawfully permitted a railroad company to run cars through a public street for a private manufacturing concern, it was held that the owner of property injured could maintain a suit in equity to enjoin the operation of the road, and for damages, making the city, the railroad company, and the manufacturing concern co-defendants.

2. *Pekin v. Brereton*, 67 Ill. 477; 16 Am. Rep. 629; *Thayer v. Boston*, 19 Pick. (Mass.) 511; 31 Am. Dec. 157; 2 Dillon Mun. Corp. (3d ed.), § 710 [563].

3. **Compensation to City.**—This point was directly involved in *Donnager v. State*, 8 Smed. & M. (Miss.) 660, and it was held that the city could no more

The city, when empowered to authorize the construction of a railroad on its streets, may make its consent conditional upon the performance of certain requirements, as, for example, that the company shall conform to the regulations of the city authorities as to the manner of constructing the track, of operating the trains thereon, etc.<sup>1</sup> But if the company has authority from the legislature to occupy the city streets independently of the consent of the city, the municipal authorities may not impose such conditions or place additional obligations upon the company.<sup>2</sup>

c. WHEN COMPANY HAS SUCH RIGHT.—A railroad in a public street or highway is a source of great inconvenience, annoyance, and danger to the public, and nothing less than a plain and express grant can authorize its construction there.<sup>3</sup> Statutes granting

be deprived of its property without compensation than could any other corporation or a private individual. The court quoted with approval the following language of Tucker, P., in *Tuckahoe Canal Co. v. Tuckahoe, etc.*, R. Co., 11 Leigh (Va.) 42; 36 Am. Dec. 374: "It is not perceived that the property of a corporation is less liable to the exercise of the *jus publicum* than is the property of a private individual. In both cases the private right must yield to the necessities of the public, and in both the public must make compensation for the loss." The correctness of this view, however, may be questioned. Mr. Dillon, in referring to *Donnaher v. State*, 8 Smed. & M. (Miss.) 660, says: "But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous." 2 Dillon Mun. Corp. (3d ed.), § 701 (555), note. Compare *Harrison v. New Orleans Pac. R. Co.*, 34 La. Ann. 462; 44 Am. Rep. 438.

**Streets of Washington.**—The fee to the streets in Washington city is in the *United States* and not in the city or in abutting owners; any right to occupy them with a railroad must therefore come from Congress. *Edmunds v. Baltimore, etc.*, R. Co., 114 U. S. 460; 20 Am. & Eng. R. Cas. 38; *Potomac Steamboat Co. v. Upper Potomac Co.*, 109 U. S. 672.

1. Thus in *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93, the company was authorized by the legislature to construct its road within the city provided the assent of the city could be obtained. The city authorities passed an ordinance giving their assent, but regulating the manner of laying such road, and the way in which it should be used. It was held that the railroad company

must conform to such regulations, as the city government possessed the power to prescribe the terms upon which its assent should be given.

See also as to the general control of railroads by the city, *Allen v. Jersey City*, 53 N. J. L. 522; 49 Am. & Eng. R. Cas. 289; *State v. New Orleans, etc.*, R. Co., 42 La. Ann. 138; 43 Am. & Eng. R. Cas. 258 (*mandamus* to compel company to perform its obligations in regard to streets).

The power of the city, however, to control the speed of trains and to declare any excess of such speed to be a nuisance is limited to the streets of the city and its public grounds. *State v. Jersey City*, 29 N. J. L. 170.

2. *Council Bluffs v. Kansas City, etc.*, R. Co., 45 Iowa 338; 24 Am. Rep. 773; *Chicago, etc.*, R. Co. v. *Dunbar*, 100 Ill. 110; 5 Am. & Eng. R. Cas. 253.

A city ordinance which prohibits the digging up of the surface of any street, unless the consent of the board of aldermen has been obtained, as applied to a railroad company laying its tracks across a street within its located right of way, is not a reasonable exercise of the city's right to regulate railroads within its corporate limits. Such an ordinance in effect declares that a right conferred by the legislature shall not be exercised except upon the obtainment of the consent of the city, and in that respect is therefore illegal and void. *Allen v. Jersey City*, 53 N. J. L. 522; 49 Am. & Eng. R. Cas. 289. See also *State v. Jersey City*, 47 N. J. L. 286; 26 Am. & Eng. R. Cas. 400; *State v. Hoboken*, 41 N. J. L. 71; *Chicago, etc.*, R. Co. v. *Dunbar*, 100 Ill. 110; 5 Am. & Eng. R. Cas. 253.

3. *Ruttles v. Covington* (Ky. 1889), 38 Am. & Eng. R. Cas. 408; *Baltimore*,

such a right must be strictly construed,<sup>1</sup> and authority to construct a railway longitudinally in a public highway cannot be

etc., *R. Co. v. Reaney*, 42 Md. 117; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793; 36 Am. & Eng. R. Cas. 20; 12 Am. St. Rep. 286; *Chicago, etc., R. Co. v. Chicago*, 121 Ill. 176; *St. Louis, etc., R. Co. v. Haller*, 82 Ill. 208 (charter power to run through a city not a grant of authority to use the streets of such city); *Edmonds v. Baltimore, etc., R. Co.*, 114 U. S. 453; 20 Am. & Eng. R. Cas. 38; *Atty. Gen'l v. Morris, etc., R. Co.*, 19 N. J. Eq. 386; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; 34 Mo. 259; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; 3 Am. & Eng. R. Cas. 507; *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337; 80 Am. Dec. 526; *California Southern R. Co. v. Kimball*, 61 Cal. 90; *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271; 32 Am. & Eng. R. Cas. 267. See also *St. Louis, etc., R. Co. v. St. Louis*, 92 Mo. 160 (authority of county court); *People's Rapid Transit R. Co. v. Dash*, 125 N. Y. 93; 46 Am. & Eng. R. Cas. 114.

A city ordinance, after a careful specification of what streets might be used for laying a railway track, contained a general clause giving authority also to lay all such tracks "as may be necessary to the convenient use of any depot grounds such company may hereafter acquire in the vicinity of or adjoining such road," without specific mention of any streets. It was held that this general authority conferred no additional right to occupy any streets other than those specifically mentioned. *Chicago, etc., R. Co. v. Chicago*, 121 Ill. 176. See also *Farrand v. Chicago, etc., R. Co.*, 21 Wis. 435; *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 110; 5 Am. & Eng. R. Cas. 253. Compare *New Orleans, etc., R. Co. v. Second Municipality*, 1 La. Ann. 128.

In *Texas* the right to occupy the public streets of any town or city which may be on the line of the route when necessary was conferred by a general statute upon every railroad chartered by the state. *Pasch. Dig. (Tex.)*, art. 4941; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 83. See also *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566.

While the road cannot be constructed in the street without an express grant from the legislature, it seems that it is

not necessary that such grant shall first be obtained in order to maintain a proceeding to condemn the rights of owners of abutting property. *California Southern R. Co. v. Kimball*, 61 Cal. 90.

"Public highways ought not to be destroyed, even in part, under pretense of legislative authority, unless it be in express words or by necessary implication. If the words are ambiguous, the construction ought to be in favor of the common right of highways, not against it." *Warren R. Co. v. State*, 29 N. J. L. 353. See also *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 362; *Greenwich v. Easton, etc., R. Co.*, 24 N. J. Eq. 217; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; 23 Am. & Eng. R. Cas. 138.

In *Taylor v. Dunn*, 80 Tex. 652, a company had contracted to build a state capitol, and claimed the right to construct a railroad along the street for the purpose of transporting the ponderous building material to be used, on the ground that the railroad was a necessity. It was held, however, that such a right could not arise by implication, and that the consent of the city must be first obtained. Moreover, the company would be liable in damages to owners of abutting property for injuries resulting therefrom.

1. *Warren R. Co. v. State*, 29 N. J. L. 353; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; 23 Am. & Eng. R. Cas. 138; *Pittsburgh, etc., R. Co. v. Reich*, 101 Ill. 157; *St. Louis, etc., R. Co. v. Belleville*, 122 Ill. 376; 32 Am. & Eng. R. Cas. 278; *Edmonds v. Baltimore, etc., R. Co.*, 114 U. S. 453; 20 Am. & Eng. R. Cas. 38.

Thus a provision in a railway company's charter that if the company find it necessary to change the location of any portion of a public road they are authorized to do so and to occupy such portions as they may deem expedient, does not make them the sole judges of the necessity, etc., but empowers them to change the location only when the necessity actually exists. *Easton, etc., R. Co. v. Greenwich*, 25 N. J. Eq. 565.

A grant of the right to construct a railroad along a street does not carry with it the right to use such street as a place for making up trains, nor as a depot for cars, or for receiving and discharging freight. *Owensborough, etc.,*

implied from a general power to condemn land for a right of way,<sup>1</sup> or from a specific power to construct the road to certain points within city limits.<sup>2</sup>

In general, after the company has acquired the right to construct its road in the street, it has complete discretion as to the arrangement of matters of detail, as, for example, the exact location of the track, the gauge to be used and similar particulars, and the exercise of this discretion will not be interfered with except in plain cases of abuse.<sup>3</sup>

**2. Right of Owners of Abutting Property to Compensation—*a.* IN GENERAL.**—The grant by the legislature to a railroad corporation of the right to occupy highways is always subject to the constitu-

R. Co. v. Sutton (Ky. 1890), 13 S. W. Rep. 1086.

**Right to Lay Additional Tracks in Street.**—In Chicago, etc., R. Co. v. Eisert, 127 Ind. 156, it was held that an ordinance granting a company a right of way along a street and condemnation proceedings whereby owners of abutting property were compensated, gives the company full authority to use so much of the street as its business requires, and the company has the right to construct one or more tracks in addition to those originally constructed if there is sufficient room to do so. The court said: "The ordinance did not limit its (the company's) right to construct but one track and the damages assessed under the appropriation proceedings covered all damages growing out of the necessary and legitimate use of such portion of the street for railroad purposes whether it be occupied with one or more tracks." See also Philadelphia v. River Front R. Co., 133 Pa. St. 134; 43 Am. & Eng. R. Cas. 167; Kemble v. Philadelphia, etc., R. Co., 140 Pa. St. 14; Jackson v. Ackroyd, 15 Colo. 583.

In Chicago, etc., R. Co. v. Porter, 43 Minn. 527; 43 Am. & Eng. R. Cas. 170, the right of the company to construct an additional track to connect with a manufacturing establishment was upheld, because authority to do so had been specifically conferred in the original grant.

1. New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. L. 33; Albany Northern R. Co. v. Brownell, 24 N. Y. 351; Ingraham v. Chicago, etc., R. Co., 34 Iowa 249; State v. Montclair R. Co., 35 N. J. L. 330; Morris, etc., R. Co. v. Newark, 10 N. J. Eq. 352.

A statute which authorized a railroad company to take lands for the construction of a railroad, with no other provi-

sions as to public highways, except a requirement compelling it to make and keep in repair good and sufficient passages at the crossings of the highway, will not authorize the occupation of a public road longitudinally. Pennsylvania R. Co. v. Mish (Pa. 1886), 4 Cent. Rep. 276. For a similar case, see Chicago, etc., R. Co. v. Chicago, 121 Ill. 176; Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110; 5 Am. & Eng. R. Cas. 253.

2. The Georgia Code specifically provides (§ 719) that public highways shall not be appropriated for railway purposes in the absence of an express charter power. The charter of a company which authorizes it to construct its road between two given cities and to connect with any other roads built into such cities, does not, by necessary implication, authorize the company to construct and operate its railroad longitudinally on the streets of such cities. Davis v. East Tennessee, etc., R. Co., 87 Ga. 605; 50 Am. & Eng. R. Cas. 137. See, however, the language of Shaw, C. J., in Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 71.

**3. Exact Location of Track.**—The company having by its charter the right to occupy streets, may place the track on any part of the street where in its opinion its best interests demand. Campbell v. Metropolitan St. R. Co., 82 Ga. 320.

And the courts will not enjoin a particular construction or location of the track at the instance of an owner of abutting property in the absence of proof that it would result in unnecessary additional impairment of the street. Indianapolis, etc., R. Co. v. Calvert, 110 Ind. 555; 32 Am. & Eng. R. Cas. 170.

Where a statute commits to cities and villages the control of railroads in streets, a court of chancery will not, upon a petition of the people, interfere as

tional provisions protecting private property, and cannot of itself be relied on as affording to the company immunity from liability to abutting property holders for injuries caused by such occupation.<sup>1</sup> But the earlier cases in this country laid down the rule that a railroad in the streets of a municipality was a legitimate and ordinary use of the highway, and that, like a street railway, it was merely an improved means of transportation and travel contemplated when the street was originally laid out; hence, no compensation was allowed to the owners of abutting property for injuries caused by the construction of a railroad in the street.<sup>2</sup> But this rule is almost obsolete, and the later and better doctrine as adopted in most states seems to be that a steam railroad is an additional

to the manner in which the track is laid, or in which the business of the road is operated thereon. *Cairo, etc., R. Co. v. People*, 92 Ill. 170; *Illinois Act 1872*, art. 5, § 62.

**Right of Owner of Abutting Property to Enjoin a Change of Gauge.**—An owner of abutting property cannot maintain an action to enjoin the company from changing its track in a street from a narrow to a broad gauge, where he has for a valuable consideration released such company from all claims for damages by reason of the maintenance of its track in such street. *Denver, etc., R. Co. v. Toohey*, 15 Colo. 297; *Denver, etc., R. Co. v. Barsaloux*, 15 Colo. 290; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1; 46 Am. & Eng. R. Cas. 219.

**Fencing Track in Street.**—Under the general statutes relative to the fencing of their tracks, railroad companies are not bound, nor, in the absence of special circumstances, allowed, to fence that part of their track which occupies a public highway. *Rippe v. Chicago, etc., R. Co.*, 42 Minn. 34; 40 Am. & Eng. R. Cas. 235; *Omaha, etc., R. Co. v. Severin*, 30 Neb. 318; 45 Am. & Eng. R. Cas. 122.

**Making Ditches.**—So also a general statute requiring all railroad companies to construct and maintain suitable ditches and drains along each side of their road-beds is not applicable to that part of a railroad constructed along a public street or highway, and if a company without the consent of the local authorities construct such ditches in the street it becomes liable to owners of abutting property for all damages caused thereby. *Jackson v. Chicago, etc., R. Co.*, 41 Fed. Rep. 656; 43 Am. & Eng. R. Cas. 145.

**Gates at Crossings.**—Constructing gates under authority from the city at a

point where the street occupied by the railroad crosses another street is not imposing an additional burden on the fee of the streets. *First Cong. Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158; 43 Am. & Eng. R. Cas. 182.

1. *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *In re East River Bridge, etc., R. Co.*, 26 Hun (N. Y.) 490; *People v. Law*, 34 Barb. (N. Y.) 494; *Gulf, etc., R. Co. v. Fuller*, 63 Tex. 407; 22 Am. & Eng. R. Cas. 154; *Gulf, etc., R. Co. v. Eddins*, 60 Tex. 656; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Omaha, etc., R. Co. v. Rogers*, 16 Neb. 117; 20 Am. & Eng. R. Cas. 79.

2. *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 427; 28 Am. Rep. 745; *Moses v. Pittsburgh, etc., R. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *State v. Ohio, etc., R. Co.*, 7 Ind. 479; *Dwenger v. Chicago, etc., R. Co.*, 98 Ind. 153; 20 Am. & Eng. R. Cas. 26; *Milburn v. Cedar Rapids*, 12 Iowa 246; *Slatten v. Des Moines, etc., R. Co.*, 29 Iowa 148; 4 Am. Rep. 205; *Davenport v. Stevenson*, 34 Iowa 225; *Atchison, etc., R. Co. v. Garside*, 10 Kan. 552; *Kansas, etc., Co. v. Cuykendall*, 42 Kan. 234; 16 Am. St. Rep. 476; *Louisville, etc., R. Co. v. Brown*, 17 B. Mon. (Ky.) 763; *Peddycord v. Baltimore, etc., R. Co.*, 34 Md. 463; *Porter v. North Missouri R. Co.*, 33 Mo. 128 (holding that where a street was occupied by a railroad, damage to abutting property resulting therefrom was *damnum absque injuria*); *Tate v. Missouri, etc., R. Co.*, 64 Mo. 149 (holding the rule applicable only to a railroad constructed on the grade of a street where the only obstruction was the passage of trains); *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352; *Drake*

burden on the highway and that its occupation of a street amounts *pro tanto* to a taking of the property of the owner of the fee thereof.<sup>1</sup> And where a company has acquired and paid for the right to lay one track along a street, the laying of another will

*v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508; *Chapman v. Albany, etc., R. Co.*, 10 Barb. (N. Y.) 360; *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 624; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Rep. 84; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. St. 282; *Hanlin v. Chicago, etc., R. Co.*, 61 Wis. 515; 20 Am. & Eng. R. Cas. 70.

1. *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491; 38 Am. & Eng. R. Cas. 453; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; 68 Am. Dec. 392; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Cox v. Louisville R. Co.*, 48 Ind. 178; *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; 32 Am. & Eng. R. Cas. 220; 59 Am. Rep. 225; *Kucheman v. C. C., etc., R. Co.*, 46 Iowa 366; *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 627; *Phipps v. Western Maryland R. Co.*, 66 Md. 319; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 71; *Grand Rapids, etc., R. Co. v. Hensel*, 47 Mich. 393; 10 Am. & Eng. R. Cas. 260; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Hastings, etc., R. Co. v. Ingalls*, 15 Neb. 123; 20 Am. & Eng. R. Cas. 60; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Wager v. Troy Union R. Co.*, 25 N. Y. 533; *Fanning v. Osborn*, 34 Hun (N. Y.) 121; *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Fort Worth, etc., R. Co. v. Jennings*, 76 Tex. 373; 46 Am. & Eng. R. Cas. 574; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625; *Buchner v. Chicago, etc., R. Co.*, 60 Wis. 264; 14 Am. & Eng. R. Cas. 447. See also dissenting opinion of McGrath, J., in *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608. Compare *Adams v. Hastings, etc., R. Co.*, 18 Minn. 263; *Pierce on Railroads*, p. 234.

In *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 627, the court by Scott, J., observes: "A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an

improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road-bed, and the carriages propelled thereon are owned by private individuals and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, though, at the same time, they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance, without paying tolls or fares. The uses are totally different and even inconsistent. The one is exclusively in favor of private interests; the other is open and free to all."

The difference between street railways and ordinary railroads in this connection is plainly discernible. As said in *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465: "An ordinary railroad is not a local convenience; the city is but one of its termini; its cars do not stop at the beck of any one who may wish to ride, and do not commonly transport passengers from one point to another within the city; its ties and rails, as generally laid, are a permanent interference with the use of the street for ordinary vehicles; the smoke and dust, interruption and noise produced by operating its trains are a perpetual annoyance, and the danger a constant menace in the occupation and enjoyment thereof for the usual purposes." See also *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 79; *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320.

In *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 78, the chancellor said: "The principle as applied to ordinary railroad companies which are authorized to excavate the soil, to raise embankments and construct tunnels and to use locomotive power running at high rates of speed seems clear of difficulty." He then quotes with approval the following language of Shaw, C. J., in *Springfield v. Connecticut River R.*



constitute an additional burden on the street for which further compensation must be made.<sup>1</sup>

A company purchasing a railway along a street acquires no rights beyond those possessed by the original company and becomes liable for damages to abutting property arising from the unlawful occupation of the street.<sup>2</sup>

**b. DISTINCTION DEPENDENT UPON OWNERSHIP OF FEE AND CHARACTER OF HIGHWAY—**(1) *General Doctrine.*—The earlier authorities, almost without exception, make a distinction in this connection between cases where the landowner retains the fee of the street, and where the fee is in the public or in the municipality in trust for the public use, allowing a recovery for the occupation of the street by a railroad company only in the former class of

Co., 4 Cush. (Mass.) 63: "The two uses, viz., that of railroad and ordinary highway, are almost if not wholly inconsistent with each other, so that the taking of a highway for a railroad will nearly supersede the former use to which it has been legally appropriated."

1. It seems to be a conceded correct principle that the building of another railroad on a portion of the unused right of way of a railroad company which it has acquired by condemnation creates an additional servitude upon the easement for which the consent of the owner of the fee must be had or compensation made to him. *Fort Worth etc., R. Co. v. Jennings*, 76 Tex. 373; 46 Am. & Eng. R. Cas. 574. It would seem, then, to be undoubted that a company has no right to construct additional tracks on a street which it has already partially occupied, without express authority and without making additional compensation to owners of abutting property. *Pittsburgh, etc., R. Co. v. Reich*, 101 Ill. 157; *Taylor v. Bay City St. R. Co.*, 80 Mich. 77; 43 Am. & Eng. R. Cas. 335; *Gulf, etc., R. Co. v. Necco* (Tex. 1891), 15 S. W. Rep. 1102; *Drady v. Des Moines, etc., R. Co.*, 57 Iowa 393; 14 Am. & Eng. R. Cas. 131; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; 14 Am. & Eng. R. Cas. 142; 43 Am. Rep. 661; *Savannah, etc., R. Co. v. Woodruff*, 86 Ga. 94.

**2. Liability of Company Purchasing Road in Street.**—In *Harbach v. Des Moines, etc., R. Co.*, 80 Iowa 593; 43 Am. & Eng. R. Cas. 115, a company laid its track in a street without authority, and the plaintiff thereafter obtained in a proceeding at law a judgment against it for \$1,500 for damages caused to his property, which judgment re-

mained unpaid. Before the commencement of the proceeding at law in which the judgment was obtained, a foreclosure suit was commenced in the federal court, which resulted in a decree and sale of the road. In a suit by the plaintiff to enjoin the purchasing company from occupying the street until the payment of damages, it was held, first: that the foreclosure proceedings did not preclude the abutting owner from enjoining the purchasing company, such company being entitled only to such rights as were acquired by the original company; second: that the judgment for damages obtained against the original company merged any defense it might have had, and the purchasing company, having no greater rights, could not plead in defense that the original occupation of the street was by the consent of property owners. *Drady v. Des Moines, etc., R. Co.*, 57 Iowa 393; 14 Am. & Eng. R. Cas. 130; *Fort Scott, etc., R. Co. v. Fox*, 42 Kan. 490; 40 Am. & Eng. R. Cas. 331; *Taylor v. Dunn*, 80 Tex. 652.

In *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496; 14 Am. & Eng. R. Cas. 126, one company having constructed its road on the street, raised the grade and built additional tracks thereon, and the second company having leased the road for ninety-nine years with a privilege of renewal, and thus continued the trespass, it was held that the abutting owner might make the two companies joint defendants, since they were both liable for the permanent injury to the property of the plaintiff and also for the temporary injuries arising after the lease was made. See *RAILROADS*, vol. 19, p. 899.

cases.<sup>1</sup> Hence the owner of abutting property, whose title extends only to the middle of the street, has no cause of action against the company when its road is wholly on the opposite side.<sup>2</sup> This distinction is still recognized and continued in several jurisdictions.<sup>3</sup> But principle as well as the decided weight of later authority seem to repudiate such a distinction as unsound, and the interest of an owner of abutting property in the street is protected against appropriation by railroad companies without regard to whether he owns the fee or not.<sup>4</sup> Even where the fee is in the public, whether represented by the city, state, or county, it is merely held in trust for public use as a street and for no other purpose, and if it is diverted to any other use whereby the land-

1. For numerous cases, see *HIGHWAYS*, vol. 9, p. 408; *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128; 10 Am. & Eng. R. Cas. 284; 46 Am. Rep. 164; *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467; 68 Am. Dec. 650; *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; 32 Am. & Eng. R. Cas. 220; 59 Am. Rep. 225; *Houston, etc., R. Co. v. Odum*, 53 Tex. 343; 2 Am. & Eng. R. Cas. 503.

2. Thus, in *First Cong. Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158; 43 Am. & Eng. R. Cas. 182, it was held that where a railroad was constructed ten feet east of the center line of the street, the owner of land on the west side of the street had no cause of action. See also *Heiss v. Milwaukee, etc., R. Co.*, 69 Wis. 555; *O'Connor v. St. Louis, etc., R. Co.*, 56 Iowa 735; 5 Am. & Eng. R. Cas. 325; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; 32 Am. & Eng. R. Cas. 225; 59 Am. Rep. 225 (embankment constructed entirely on one side of middle line); *Rinard v. Burlington, etc., R. Co.*, 66 Iowa 440; *Terre Haute, etc., R. Co. v. Bissell*, 108 Ind. 113.

3. See *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137; *infra*, this title, *Doctrine in New York*; *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128; 10 Am. & Eng. R. Cas. 284; 46 Am. Rep. 164; *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208.

4. The diversity between the early and later authorities is well seen in the cases in *Mississippi*. In *Donnaher v. State*, 8 Smed. & M. (Miss.) 661, decided in 1847, the court expressed its views thus: "We are strongly inclined to the belief that the owners of lots adjacent to the track of the railroad will

have no claim to compensation. They have no right of soil in the streets and the charter of the railroad company restricts the use to such bounds as will not interfere with the passage of the streets." This language was merely a *dictum*, but was clearly the prevailing opinion at the time. While in *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 288; 38 Am. & Eng. R. Cas. 465; 14 Am. St. Rep. 564; 40 Alb. L. J. 335, it was said by Arnold, C. J.: "The right of the owner of abutting property to use the street as a street is as much property as the street itself, and neither the public, nor a corporation, nor an individual, can lawfully deprive him of it, against his will, without compensation. If the street is needed for the purposes of a railroad, or for any other purpose inconsistent with the ordinary uses of a public street, the rights and interests of the owner of abutting property must be obtained, with his consent, or by the exercise of the right of eminent domain, as in other cases of taking private property for public use. . . . The weight of judicial authority undoubtedly is, that where the public have only an easement in the street, and the fee of the soil of the street is retained in the owner of abutting property, under the constitutional guaranty of private property, a steam railroad cannot be lawfully constructed and operated thereon, against his will, and without compensation." As to the distinction dependent on the ownership of the fee, the court added: "We perceive no well-founded difference in principle in such a distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public,

owner is deprived of his right of access over the street, there is a violation of the constitutional provision against the taking of private property without compensation.<sup>1</sup> So it has been held that where the city owns the fee of the streets its consent to their use

free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the owner of abutting property has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights. 1 Hare on Const. Law 370, 375; Lewis on Em. Dom., §§ 114, 115. This language is quoted with approval in 2 Dillon Mun. Corp. (4th ed.), § 704.

In *Pierce on Railroads*, p. 232, it is said: "It seems, on principle, immaterial in determining the proper uses of a highway whether the adjacent owner retains the fee in the street. If he retains it, the easement granted to the public should be deemed broad enough for all modes of travel consistent with the primary and general one; and even if the public has acquired the fee, he has still an interest in the street for access and passage which is entitled to protection."

And the doctrine of the text is sustained by other authority both of text-writers and decided cases. 2 Dillon Mun. Corp. (4th ed.), § 704; Cooley Const. Lim. (4th ed.), p. 556; Mills on Em. Dom. (3d ed.), § 206; Barney v. Keokuk, 94 U. S. 340 (ownership of fee of no consequence so far as the rights of the public are concerned); Cincinnati, etc., St. R. Co. v. Cummins-ville, 14 Ohio St. 523; Scioto Valley R. Co. v. Lawrence, 38 Ohio St. 41; 7 Am. & Eng. R. Cas. 93; 43 Am. Rep. 419; Omaha, etc., R. Co. v. Rogers, 16 Neb. 117; 20 Am. & Eng. R. Cas. 79; Burlington, etc., R. Co. v. Reinhackle, 15 Neb. 279; 14 Am. & Eng. R. Cas. 172; 48 Am. Rep. 342; Virginia, etc., R. Co. v. Lynch, 13 Nev. 92; Spencer v. Point Pleasant, etc., R. Co., 23 W. Va. 407; 20 Am. & Eng. R. Cas. 125; Mollandin v. Union Pac. R. Co., 14 Fed. Rep. 394; Denver v. Bayer, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 467; Fulton v. Short-Route R. Transfer Co., 85 Ky. 640; 32 Am. & Eng. R. Cas. 259; 7 Am. St. Rep. 619 (this case repudiates the distinction in refusing recovery in either case); Detroit City R. Co. v. Mills, 85 Mich. 634; 46 Am. & Eng. R.

Cas. 608. See also *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146.

In *Pumpelly v. Green Bay, etc., Canal Co.*, 13 Wall. (U. S.) 166, Miller, J., said: "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed under it so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution" [of Wisconsin]; adding that "this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

For a review of the doctrines held by the different states, see *infra*, this title, *Doctrine in New York*, and *In Other Jurisdictions*.

1. *Lewis on Em. Dom.*, § 114; *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 497; 38 Am. & Eng. R. Cas. 453; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202; *In re Gilbert El. R. Co.*, 38 Hun (N. Y.) 448; *Gebhardt v. Reeves*, 75 Ill. 301; *Schurmeier v. St. Paul, etc., R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; 7 Wall. (U. S.) 272; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; 68 Am. Dec. 392; *Cook v. Burlington*, 30 Iowa 94; 36 Iowa 357; 6 Am. Rep. 649; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243.

"Although it may be assumed that the municipality by proceedings to open a street acquires the fee to the land taken, it is yet a qualified fee held in trust under the statute for a certain use, and that use cannot be departed from without violating an essential condition of the contract under which the land was obtained. The right which the municipality acquires is limited by the public necessity and cannot extend beyond its use for street purposes." *Rüger, Ch. J.*, in *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 291.

The contention generally made is that where the street was originally established by condemnation of private property, the owner of adjacent property was compensated for all time by the award of damages in the condemnation proceedings. But this claim is

by a railway company operates merely to free the company from liability for a public nuisance; and the company remains liable to the owners of abutting property for injuries caused by the construction of the railway.<sup>1</sup>

Another, and it seems a preferable, basis of the right of the owner of abutting property to demand compensation of the railroad company, is that in all streets, regardless of the ownership of the fee, the owners of property abutting thereon have an ease-

unfounded unless the benefits for which the adjacent owner is assessed are invariably secured to him by such proceedings. *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 290; *Cooley Const. Lim.* (4th ed.), § 552; *Imlay v. Union Branch R. Co.*, 26 Conn. 257; 68 Am. Dec. 392. See for numerous cases on the question of the ownership of the fee, *HIGHWAY*, vol. 9, p. 409.

1. 2 *Dillon Mun. Corp.* (3d ed.), § 711 (564); *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; 46 Am. & Eng. R. Cas. 42; *Fletcher v. Auburn, etc., R. Co.*, 25 Wend. (N. Y.) 462; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Danville, etc., R. Co. v. Com.*, 73 Pa. St. 38; *Virginia, etc., R. Co. v. Lynch*, 13 Nev. 92.

**Fee in Owner.**—In *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 627, the court, by Scott, J., said: "The doctrine most in consonance with our sense of justice is that where the fee of the street remains in the owner of abutting land, the corporation may grant the right to a railway company to lay its track along or across any street, but the company avails itself of its privileges at its peril. If in laying its track it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained."

In *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 624, the road and its embankments were built under authority from the city, and the work was approved by the city engineer. It was held that the owners of abutting property might nevertheless recover for the injuries suffered in relation to their property.

In *St. Paul, etc., R. Co. v. Schurmeier*, 7 Wall. (U. S.) 289, the court held that where a street was dedicated to the public, and the entire title vested in fee in the state, this was no defense to a suit against a railway company for injuries resulting to abutting property from the company's

occupation of the street, since "the municipal corporation took the title in trust impliedly if not expressly designated by the acts of the party in making the dedication. They could not, nor could the state, convey to the respondents any right to disregard the trust or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant," affirming *Schurmeier v. St. Paul, etc., R. Co.*, 10 Minn. 82; 88 Am. Dec. 59.

In 1 Am. Law Reg. N. S. 192, an article by Judge Redfield, written in 1862, the law as regards railroads and streets is thus summed up: "For a long time the railway was regarded as only an 'improved highway' and no additional compensation was given to the landowner. But this doctrine has been abandoned, and it is now held that a railway is an additional servitude and the owner of the soil is entitled to additional compensation. This was always the English rule. There one cannot tunnel the highway without additional compensation to the owner of the soil." In this article the writer reviews the following cases: *Presbyterian Soc. v. Auburn, etc., R. Co.*, 3 Hill (N. Y.) 567; *Fletcher v. Auburn, etc., R. Co.*, 25 Wend. (N. Y.) 462; *Henry v. Pittsburgh, etc., Bridge Co.*, 8 W. & S. (Pa.) 85; *In re Philadelphia, etc., R. Co.*, 6 Whart. (Pa.) 25; 36 Am. Dec. 202; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Salisbury v. Great Northern R. Co.*, 5 C. B. N. S. 174; 94 E. C. L. 173, and other cases; *Ramsden v. Manchester, etc., R. Co.*, 1 Exch. 723; *Thompson v. East Somerset R. Co.*, 29 L. T. 7.

**Right of City Councilmen Voting for the Grant of Authority.**—A member of the city council in voting in favor of the grant to a railroad company of the right to occupy the street with its road is presumed to refer only to the public easement, and is not estopped by his vote to maintain an action against the

ment of light, air, and access over the street as appurtenant to their property, for the infringement of which by the construction and operation of a railroad in the street, damages may be recovered.<sup>1</sup> This doctrine has the sanction of the decided weight of

company for damages which his property suffered in consequence of the existence of the railroad. *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; 46 Am. & Eng. R. Cas. 42.

**No Distinction Between Streets in Cities and Ordinary Highways.**—There are some authorities which suggest that there may be a difference between streets in cities and highways in the country. See *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289; 33 Am. Dec. 497 (where the distinction is strongly insisted upon); *Barney v. Keokuk*, 94 U. S. 340 ("the streets of a town are fairly subject to many purposes to which a highway in the country would not be"); *Haight v. Keokuk*, 4 Iowa 199; *Milhau v. Sharp*, 15 Barb. (N. Y.) 193; *Chapman v. Albany, etc., R. Co.*, 10 Barb. (N. Y.) 360; *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.) 246.

"But as both the highway and the street are appropriated for the same general purpose and a highway in a district sparsely inhabited at one time may by the growth of population become a street in a city, this distinction does not appear to rest on a sound basis." *Pierce on Railroads*, p. 232; *People v. Law*, 34 Barb. (N. Y.) 501; *Morris, etc., R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 388; 1 Am. Law Reg. N. S. 193 (article by Judge Redfield).

**No Distinction Dependent Upon Manner of Establishing Highway.**—There is no distinction as to the rights of owners of abutting property between cases where the highway was dedicated by the landowner and where it was established by condemnation proceedings; in either case the rights of the landowner are the same, except where a fee is condemned, and even this exception does not generally prevail. See *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 269; *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; *Kane v. New York El. R. Co.*, 125 N. Y. 164; 46 Am. & Eng. R. Cas. 137.

1. *Adams v. Chicago, etc., R. Co.*, 39 Minn. 296; 36 Am. & Eng. R. Cas. 7; 12 Am. St. Rep. 644 (in this case the opinion of Gilfillan, J., reviews the whole subject at length); *Imlay v.*

*Union Branch R. Co.*, 26 Conn. 258; 68 Am. Dec. 392; *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465; *Griffin v. Shreveport, etc., R. Co.*, 41 La. Ann. 808; 40 Am. & Eng. R. Cas. 295; *Starr v. Camden, etc., R. Co.*, 24 N. J. L. 592; *Omaha, etc., R. Co. v. Rogers*, 16 Neb. 117; 20 Am. & Eng. R. Cas. 79; *Burlington, etc., R. Co. v. Reinhackle*, 15 Neb. 279; 14 Am. & Eng. R. Cas. 169; 48 Am. Rep. 342; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; 32 Am. & Eng. R. Cas. 223; 59 Am. Rep. 225; *Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574; 32 Am. & Eng. R. Cas. 233; 4 Am. St. Rep. 396; *Dixon v. Baltimore, etc., R. Co.*, 1 Mackey (D. C.) 78; 3 Am. & Eng. R. Cas. 201. See as to the character of such property, *Crawford v. Delaware*, 7 Ohio St. 469; *Cincinnati, etc., St. R. Co. v. Cumminsville*, 14 Ohio St. 541.

In *Crawford v. Delaware*, 7 Ohio St. 469, it is said: "The latter (owners of abutting property) have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contracts and by law and without which their property is of comparatively little value. This easement appendant to the lots, unlike the right of one lot owner in the lot of another, is as much property as the lot itself." *Quoted in Cooley's Const. Lim.* (5th ed.), \*556, note.

In *Cincinnati, etc., St. R. Co. v. Cumminsville*, 14 Ohio St. 523, the rights of owners of abutting property are thus set out: "There exists in the owners of adjoining lots a private right to free access to their lands and buildings from the street, as the same was and would have continued to be according to the mode of its original use and appropriation by the public, and there can be no change of such mode and adaptation of the street to new vehicles and methods of carriage and transportation, which shall materially impair or destroy such right, unless by the consent of the owners or upon the payment of due compensation to them." The su-

authority, particularly of the more recent cases, and seems to be the one more consistent with the general theory of the rights of property holders.<sup>1</sup>

The correct rule seems to be that, whether or not an owner of abutting property has the fee of the street, he nevertheless has the right to insist that he be not deprived of his easements of light, air, and access over the street, or materially injured in his use of them; that since a railroad constructed along the street is an additional burden thereon, and a new use thereof, and by its constant operation of fast and heavy trains with their annoying accompaniments of smoke, cinders, and gases, together with the impediment to free access caused by the track, each owner has a right to recover of the railroad company damages for injuries caused by such construction of the railroad.<sup>2</sup> Such owner may, of course, assign his rights in the streets to the railroad company, or waive them expressly or impliedly, and in such cases he has

preme court of *Wisconsin* in a leading case, after quoting this language, approves it as follows: "It is a doctrine which imposes no unreasonable restriction upon the rights of the public in the use of its streets and highways, and which at the same time affords that protection to private or individual rights which the spirit and principles of our constitution and form of government require." *Hobart v. Milwaukee City R. Co.*, 27 Wis. 200; 9 Am. Rep. 461. This language has met with frequent approval. See *Cooley's Const. Lim.* (5th ed.), p. 688 (556), note.

1. Cases denying recovery in any event or which limit the right to recover to owners of the fee of the street are nearly always the earlier cases which have in many instances been overruled, or the effect of which has been annulled by statute. See 2 *Dillon Mun. Corp.* (4th ed.), § 704; *infra*, this title, *Doctrine in New York*; *Grafton v. Baltimore, etc.*, R. Co., 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200; *Iowa Code* (1883) 424.

2. The whole question is exhaustively examined in the opinion of the court, by Gilfillan, C. J., in *Adams v. Chicago, etc.*, R. Co., 39 Minn. 286; 36 Am. & Eng. R. Cas. 8; 12 Am. St. Rep. 644. It is there said: "The conclusions arrived at are: That the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street for admission of light and air to his lot, which easement is subordinate only to the public

right. That depriving him of, or interfering with his enjoyment of, the easement for any public use not a proper street use is a taking of his property within the meaning of the constitution. That appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. That where without his consent, and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street." Followed in *Lamm v. Chicago, etc.*, R. Co., 45 Minn. 71; 46 Am. & Eng. R. Cas. 47. This view has the sanction of other high authority. See *St. Paul, etc.*, R. Co. v. *Schurmeier*, 7 Wall. (U. S.) 272; *Chicago v. Taylor*, 125 U. S. 161; 22 Am. & Eng. Corp. Cas. 384; *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432; 43 Am. & Eng. R. Cas. 403; *Hot Spring R. Co. v. Williamson*, 136 U. S. 121; 46 Am. & Eng. R. Cas. 59; 45 Ark. 429; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75; *Mollandin v. Union Pac. R. Co.*, 14 Fed. Rep. 394; *Frankle v. Jackson*, 30 Fed. Rep. 398; *Reichert v. St. Louis, etc.*, R. Co., 51 Ark. 491; 38 Am. & Eng. R. Cas. 453; *Ford v. Santa Cruz R. Co.*, 59 Cal. 290; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 203; *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp.

Cas. 465; Denver, etc., R. Co. v. Bourne, 11 Colo. 59; 32 Am. & Eng. R. Cas. 227; Nicholson v. New York, etc., R. Co., 22 Conn. 85; 56 Am. Dec. 390; Imlay v. Union Branch R. Co., 26 Conn. 258; 68 Am. Dec. 392; South Carolina R. Co. v. Steiner, 44 Ga. 546; Pittsburgh, etc., R. Co. v. Reich, 101 Ill. 167; Cox v. Louisville, etc., R. Co., 48 Ind. 179; Central Branch, etc., R. Co. v. Twine, 23 Kan. 585; 33 Am. Rep. 203; Central Branch, etc., R. Co. v. Andrews, 26 Kan. 702; 5 Am. & Eng. R. Cas. 370; Fort Scott, etc., R. Co. v. Fox, 42 Kan. 490; 40 Am. & Eng. R. Cas. 331; Griffin v. Shreveport, etc., R. Co., 41 La. Ann. 808; 40 Am. & Eng. R. Cas. 206; Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 71; Grand Rapids, etc., R. Co. v. Heisel, 38 Mich. 62; 31 Am. Rep. 306; Ward v. Detroit, etc., R. Co., 62 Mich. 46; Riedinger v. Marquette, etc., R. Co., 62 Mich. 29; 29 Am. & Eng. R. Cas. 611; Schurmeier v. St. Paul, etc., R. Co., 10 Minn. 82; 88 Am. Dec. 59; 7 Wall. (U. S.) 272; Gray v. First Div. St. Paul, etc., R. Co., 13 Minn. 315; Adams v. Hastings, etc., R. Co., 18 Minn. 260; Brisbane v. St. Paul, etc., R. Co., 23 Minn. 115 (in this case, as in the three cases immediately preceding, the landowner had the fee of the street); Theobald v. Louisville, etc., R. Co., 66 Miss. 287; 38 Am. & Eng. R. Cas. 465; 14 Am. St. Rep. 564; 40 Alb. L. J. 335; Lackland v. North Missouri R. Co., 31 Mo. 180; Gottschalk v. Chicago, etc., R. Co., 14 Neb. 550; 14 Am. & Eng. R. Cas. 157; Hastings, etc., R. Co. v. Ingalls, 15 Neb. 123; 20 Am. & Eng. R. Cas. 60; Omaha, etc., R. Co. v. Rogers, 16 Neb. 117; 20 Am. & Eng. R. Cas. 79; Virginia, etc., R. Co. v. Lynch, 13 Nev. 92; Higbee v. Camden, etc., R. Co., 19 N. J. Eq. 276; Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Columbus, etc., R. Co. v. Gardner, 45 Ohio St. 309; 32 Am. & Eng. R. Cas. 246; McQuaid v. Portland, etc., R. Co., 18 Oregon 237; 40 Am. & Eng. R. Cas. 308; Pittsburgh Junction R. Co. v. McCutchenn (Pa. 1886), 7 Atl. Rep. 146; Smith v. East End St. R. Co., 87 Tenn. 626; 38 Am. & Eng. R. Cas. 470; Gulf, etc., R. Co. v. Eddins, 60 Tex. 656; Gulf, etc., R. Co. v. Fuller, 63 Tex. 467; 22 Am. & Eng. R. Cas. 154; Fort Worth, etc., R. Co. v. Jennings, 76 Tex. 373; 46 Am. & Eng. R. Cas. 576; Ford v. Chicago, etc., R. Co., 14 Wis. 609; 80 Am. Dec. 791; Andrews v. Farmers'

L. & T. Co., 22 Wis. 288; Blesch v. Chicago, etc., R. Co., 43 Wis. 183; Carl v. Sheboygan, etc., R. Co., 46 Wis. 625; Hanlin v. Chicago, etc., R. Co., 61 Wis. 515; 20 Am. & Eng. R. Cas. 70; Quillinan v. Canada Southern R. Co., 6 Ont. Rep. 567; 20 Am. & Eng. R. Cas. 31; 2 Dillon Mun. Corp. (4th ed.), § 704; Lewis on Em. Dom., §§ 113, 115; Cooley's Const. Lim. (5th ed.) \*557. Compare Pierce on Railroads, p. 233; Wood's Ry. Law, p. 722-3. See also Carson v. Central R. Co., 35 Cal. 325; Southern Pac. R. Co. v. Reed, 41 Cal. 256; Brainard v. Missisquoi R. Co., 48 Vt. 107; Peddicord v. Baltimore, etc., R. Co., 34 Md. 463; Whittier v. Portland, etc., R. Co., 38 Me. 26; Palatka, etc., R. Co. v. State, 23 Fla. 546; 32 Am. & Eng. R. Cas. 191; 11 Am. St. Rep. 395.

In Lahr v. Metropolitan El. R. Co., 104 N. Y. 291, the court observes that if the right of the owner of abutting property in the street may be taken from him without his consent and without compensation to him, "a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property."

**Where Right to Occupy Street Is Reserved When Town Was Laid Out.**—In Riedinger v. Marquette, etc., R. Co., 62 Mich. 29; 29 Am. & Eng. R. Cas. 611, a mining company, on laying out a town and dedicating streets in it, reserved the right to construct a railroad through a certain street. Subsequently it assigned all its rights to a railroad company which proceeded to build four tracks down this street, after having gained the city's permission to do so. An owner of property abutting on the street obtained an injunction against the company, and on appeal it was held that the company had no right to blockade the streets with its tracks without compensating the owners of abutting property; that the reservation mentioned did not confer the right to destroy the usefulness and value of private property. Such reservation was as against the city and could not affect property holders.

**Right to Enjoin Occupation of Street.**—Where the construction of a steam railroad through a city street will injure the property abutting on the street, the construction will be enjoined at the instance of the owners of such abutting property, until the right to construct the road has been acquired by proceedings against such owners, conducted as re-

no cause of action except where the company is guilty of an unlawful or negligent exercise of its authority.<sup>1</sup>

While the ownership of the fee is immaterial in determining the proper and legitimate uses of the street or highway and the general right of abutting owners to compensation, yet it seems that the distinction above referred to is very properly made in determining the amount of damages. In the one case the abutter suffers no legal injury except the interference with his easements of light, air, and access; in the other he suffers the added injury of the imposition of an additional burden upon his fee.<sup>2</sup>

(2) *Doctrine in New York.*—The *New York* courts have adhered steadily to the doctrine that where the fee of the street is in the

quired by law for the appropriation of private property; and it is immaterial that the fee of the street is in the city. *Scioto Valley R. Co. v. Lawrence*, 38 Ohio St. 41; 7 Am. & Eng. R. Cas. 93; 43 Am. Rep. 419. See also *Morris, etc., R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 384.

*Compare* *Roelker v. St. Louis, etc., R. Co.*, 50 Ind. 127 (injunction denied).

**Railroad Partly on Street and Partly on Private Property.**—When proceedings are taken to condemn a portion of a city lot for a right of way for the railroad and the lot is part of a homestead lying on both sides of an alley, the award of damages cannot be confined to the land actually taken, but must cover such actual injury as is done to the entire homestead, including the easement in the alley. *Port Huron, etc., R. Co. v. Voorheis*, 50 Mich. 506; 14 Am. & Eng. R. Cas. 227. See also *Alabama Midland R. Co. v. Williams*, 92 Ala. 277.

1. *Burkam v. Ohio, etc. R. Co.*, 122 Ind. 344; 43 Am. & Eng. R. Cas. 153; *Marble v. Whitney*, 28 N. Y. 297.

A suit was brought to recover damages to a lot by the construction and operation of a railroad in the street, under the *Iowa* statute which prohibits the laying of railroad tracks in the street without compensation to owners of abutting lots. It appeared that at the time when the railroad was constructed, a petition was circulated among the lot-owners consenting to the laying down of the track; that while neither of the persons jointly owning plaintiff's lot at that time signed the petition, yet that one of the joint tenants was present when the track was staked out by the railroad engineer, and that he assented to its construction. No complaint or claim was made for eight years and a half. Prior to the construction of the

road, the whole street was used for railway purposes, and travel by ordinary vehicles along the street was impracticable except at the outer edges. The main line of the road ran the length of the street and a passenger depot was located nearly opposite the plaintiff's lot. It was held that the evidence sufficiently established a waiver of their claim to damages by the former proprietors, and that the plaintiff had no cause of action—the fact that the consent of one of the two joint tenants was not secured did not affect the waiver. Nor was such consent of the owners affected by the fact that a tax title was outstanding where such title was subsequently assigned to them; the subsequent acquiescence in the use of the street having the same effect as a new parcel license. *Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa 105. *Compare*, as to evidence of assent, *Kansas City, etc., R. Co. v. Hicks*, 30 Kan. 288; 14 Am. & Eng. R. Cas. 100. See also as to effect of delay in bringing action, *infra*, this title, *Remedies, Character of the Action, etc.*; *Murdock v. Prospect Park, etc., R. Co.*, 10 Hun (N. Y.) 598; *Pratt v. Des Moines, etc., R. Co.*, 72 Iowa 249; 32 Am. & Eng. R. Cas. 236.

2. **Distinction Material in Determining the Amount of Damage.**—Thus where the railroad is constructed entirely on the side of the center line of the street and farthest from the plaintiff's abutting property, his recovery must be limited to the injury suffered from the infringement of his easements, and damages cannot be allowed for noise, vibration, etc., because such damages do not amount to an interference with the easements, and can be recovered only by the owner of the fee. They are a proximate result of the imposition of an additional burden on the fee, but



public, the legislature may authorize the construction of an ordinary railroad thereon, and the owner of land abutting on such street has no right of recovery for damages which result from a proper exercise of this lawful authority.<sup>1</sup> Where the fee of the street is in the owner of abutting land the occupation of the street by the railroad is considered a taking of property for which such owner may recover as in cases where other real property is taken.<sup>2</sup> But after the adoption of the constitutional amendment of 1874 (art. 3, § 18), forbidding the passage of laws authorizing "the construction or operation of a street railroad except upon condition

only a remote consequence of the interference with the easements. *Lamm v. Chicago, etc., R. Co.,* 45 Minn. 71; 46 Am. & Eng. R. Cas. 42.

1. *Corey v. Buffalo, etc., R. Co.,* 23 Barb. (N. Y.) 482; *Drake v. Hudson River R. Co.,* 7 Barb. (N. Y.) 508; *People v. Kerr,* 27 N. Y. 188, *affirming* 37 Barb. (N. Y.) 357; *Sweet v. Buffalo, etc., R. Co.,* 13 Hun (N. Y.) 644; *Mazetti v. New York, etc., R. Co.,* 3 E. D. Smith (N. Y.) 98; *Mahady v. Bushwick R. Co.,* 91 N. Y. 148; 14 Am. & Eng. R. Cas. 143; 43 Am. Rep. 661; *Fobes v. Rome, etc., R. Co.,* 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137.

The right to recover was denied in *Chapman v. Albany, etc., R. Co.,* 10 Barb. (N. Y.) 360, though the company in constructing its road raised the grade of the street. See also *Gould v. Hudson River R. Co.,* 6 N. Y. 522, upholding the right of the legislature to authorize the construction of a railroad between the high and low water mark of a river without the consent of, or compensation to, abutting landowners. *Radcliffe v. Brooklyn,* 4 N. Y. 195; 53 Am. Dec. 357.

Compare *Falker v. New York, etc., R. Co.,* 17 Abb. N. Cas. (N. Y.) 279; *Robinson v. New York, etc., R. Co.,* 27 Barb. (N. Y.) 512, the latter case holding that a legislative grant of the right to construct a railroad can give no authority to invade any private rights without just compensation. It confers a franchise merely, and the title and rights of a private corporation, but no exemption for wrongs to private property. *Presbyterian Soc. v. Auburn, etc., R. Co.,* 3 Hill (N. Y.) 567; *Williams v. New York Cent. R. Co.,* 16 N. Y. 97, 108; *Wager v. Troy Union R. Co.,* 25 N. Y. 533, though a number of cases between 1841 and 1857 held the opposite. *Drake v. Hudson River R. Co.,* 7 Barb. (N. Y.) 508; *Plant v. Long Island R. Co.,* 10 Barb. (N. Y.)

26; *Chapman v. Albany, etc., R. Co.,* 10 Barb. (N. Y.) 360; *Adams v. Saratoga, etc., R. Co.,* 11 Barb. (N. Y.) 414; *Hentz v. Long Island R. Co.,* 13 Barb. (N. Y.) 646; *Milbau v. Sharp,* 15 Barb. (N. Y.) 193; *Williams v. New York Cent. R. Co.,* 18 Barb. (N. Y.) 222; 69 Am. Dec. 651; *Corey v. Buffalo, etc., R. Co.,* 23 Barb. (N. Y.) 482.

2. *Washington Cemetery v. Prospect Park, etc., R. Co.,* 7 Hun (N. Y.) 655; *In re Prospect Park, etc., R. Co.,* 13 Hun (N. Y.) 345; *Hussner v. Brooklyn City R. Co.,* 30 Hun (N. Y.) 409; *People v. Law,* 22 How. Pr. (N. Y.) 109; *Wager v. Troy Union R. Co.,* 25 N. Y. 526; *Carpenter v. Oswego, etc., R. Co.,* 24 N. Y. 655; *Craig v. Rochester City, etc., R. Co.,* 39 N. Y. 404; *Henderson v. New York Cent. R. Co.,* 17 Hun (N. Y.) 344; 78 N. Y. 423.

In *Williams v. New York Cent. R. Co.,* 16 N. Y. 97; 69 Am. Dec. 651, *rev'g* 18 Barb. (N. Y.) 222, it was held that where the landowner owned the fee of the street, neither the state nor the municipal authorities, nor both, could give to a railroad company the right to construct its road upon a street without the consent of the owner of the fee subject to the public easement, or without making him compensation, and that if the railroad company encroached in any degree upon the proprietary rights of the individual in the streets, the constitutional inhibition against the taking of private property for public use without compensation applied. See also *Murphy v. Prospect Park, etc., R. Co.,* 73 N. Y. 579; *Washington Cemetery v. Prospect Park, etc., R. Co.,* 68 N. Y. 59, *aff'g* 7 Hun (N. Y.) 655; *Fobes v. Rome, etc., R. Co.,* 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137.

In *Mahon v. New York Cent. R. Co.,* 24 N. Y. 658, land taken under legislative authority for the purpose of a turnpike was transferred to a railroad company to be used for the construction

that the consent of the owners of one-half in value of the property bounded on the portion of the street or highway on which the railway is to be constructed or operated" be first obtained, this rule has been greatly modified.<sup>1</sup>

No distinction is made between street railroads and ordinary steam railroads. The sole inquiry is whether the construction and operation of the road actually causes damage to the easements of the owners of abutting property in the street.<sup>2</sup> The doctrine

of a railway thereon without compensation to owners of abutting property. It was held that such owners were entitled to damages for the additional burden.

In *People v. Law*, 34 Barb. (N. Y.) 494, it is said that in all cases where parties appeal to the legislature for a grant of the right to construct a railway in a street a new assessment of damages is necessary.

In *Wager v. Troy Union R. Co.*, 25 N. Y. 532, the court said: "It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With a single track, and particularly if the cars used upon it were propelled by horse power the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property or of the increase of burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement and would not affect the principle that the use of a street for the purposes of the railroad imposed upon it a new burden."

**Obligation to Construct New Highway.**

—In *Post v. West Shore R. Co.*, 123 N. Y. 580; 47 Am. & R. Cas. 322, the company's right to occupy the highway rested upon a statute which required that if the road was laid in the highway a new one must be constructed by the company. A landowner gave the company a deed to the fee of the highway and to adjacent land and the company in return covenanted to reconstruct the highway on other land. It was held that this contract was not void as being against public policy; and the railroad company having committed a breach of it the landowner was allowed to recover damages in the sum of \$2,500. The award was held not to be excessive, it appearing that the landowner was compelled to travel one and a quarter miles

further in transporting his products on account of the failure of the company to comply with its agreement.

1. The necessity for a modification of former holdings after experience had shown the effects of the elevated road, is adverted to by Peckham, J., speaking for the court in *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; 50 Am. & Eng. R. Cas. 271: "When under legislative authority and municipal authority the elevated railroad structure was built, it was supposed by many there was no liability to owners of abutting property because no land of theirs was taken, and any damage they sustained was indirect only and *damnum absque injuria*. When the courts acquired possession of the question and it was seen that abutting land which before the erection of the road was worth, for instance, \$10,000 might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work." He then proceeds to a detail of the reasoning pursued by the courts in adopting the rule relating to recovery of damages in such cases. See the subject treated *supra*, this title, *Elevated Railroads: Right of Owners of Abutting Property to Recover*. See also *Falker v. New York, etc. R. Co.*, 17 Abb. N. Cas. (N. Y.) 279.

2. In *Craig v. Rochester City, etc., R. Co.*, 39 N. Y. 404; *aff'd* 39 Barb. (N. Y.) 494, where the landowner had the fee of the street he was allowed to recover damages for the occupation of the street by a horse railway; while in *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137, where the fee of the street was in the public, the landowner was not allowed to recover for the occupation of the street by an ordinary steam railroad. See also *Kellinger v. Forty-second, etc., St. R. Co.*, 50

of the elevated railway cases has been often approved and followed in other jurisdictions. The refusal of the *New York* courts to apply the same doctrine to surface roads has been the subject of adverse comment.<sup>1</sup>

(3) *In Other Jurisdictions.*—While the general doctrine previously set out prevails in most of the states of the Union it is not universally accepted. In several jurisdictions a modified form of it is adopted; some of the cases confining the right of recovery on the part of the owner of abutting property to cases where he has the ownership of the fee; others to cases where the grade of the street is changed, or where the railroad company is guilty of an excessive or unlawful use of its authority.<sup>2</sup>

*N. Y. 206; supra, this title, Distinction Dependent Upon Ownership of Fee and Character of Highway.*

1. The doctrine of the elevated railway cases is declared to be not applicable to surface railroads. *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137.

In *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; 46 Am. & Eng. R. Cas. 47, it is said: "We cited the elevated railway cases because of what we deemed the inherent force and soundness of the reasoning of the opinion of the court, although we were then, and still are, unable to see how it was consistent with the doctrine of that court, announced in other cases, that the legislature had the right to authorize the construction of a railroad on a street without requiring the railway company to pay compensation to the owners of abutting lands, provided they did not own the fee in the street. For if the owner of abutting property independently of the ownership of the fee of the street has an easement in the street in front of his lot to the full width of it for the purposes of access, light, and air, which is property and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away or its enjoyment interfered with by a railroad constructed and operated on the surface of the ground or at an elevation above it." See also the opinion of the dissenting judges in the case of *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146.

In *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137, the various rulings of the court upon the question are reviewed and distinguished.

2. *In California*, compensation is allowed though the fee be in the public. *Southern Pac. R. Co. v. Reed*, 41 Cal. 256, overruling *Carson v. Central R. Co.*, 35 Cal. 325; but the plaintiff must show special damage to his property not common to the public at large. *Schulte v. North Pac. Transp. Co.*, 50 Cal. 592; *Ford v. Santa Cruz R. Co.*, 59 Cal. 290.

In *Colorado*, the constitution provides that "private property shall not be taken and damaged for public or private use without just compensation." In *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465, it was held that for any injury or annoyance occasioned by the construction of an ordinary railway in a street, peculiar to an owner of abutting property and not shared by the general public, such owner should be compensated therefor though the city hold the fee and grant the right of way.

See also *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Jackson v. Kiel*, 13 Colo. 378; 40 Am. & Eng. R. Cas. 299; 16 Am. St. Rep. 207; *Denver, etc., R. Co. v. Bourne*, 11 Colo. 59; 32 Am. & Eng. R. Cas. 227.

*In Connecticut.*—In *Imlay v. Union Branch R. Co.*, 26 Conn. 259; 68 Am. Dec. 392 (the only case to be found in which the question is directly in issue), *Storrs, C. J.*, in delivering the opinion of the court, said: "We are of the opinion as was distinctly intimated by this court in a former case (*Nicholson v. New York, etc., R. Co.*, 22 Conn. 85; 56 Am. Dec. 390), that to subject the owner of the soil of the highway to a further appropriation of his land to railway uses is the imposition of a new servitude upon his estate and is an act demanding the compensation which the law awards when land is taken for public purposes."

*In Arkansas.*—In *Hot Springs R. Co. v. Williamson*, 136 U. S. 121, affirming 45 Ark. 429, it was held that under the constitution of 1874 providing that "private property shall not be taken, appropriated or damaged without just compensation," the owner of property abutting on a street may recover damages resulting from the construction of a railroad in the streets in such a manner as to obstruct access to his premises though the fee be not his and even though the road be properly built.

In *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491; 38 Am. & Eng. R. Cas. 453, it was decided that the fee of the street is in the owner of the adjacent land; that any use of the street not contemplated by its original dedication is an infringement of the reserved rights of such owner for which he may invoke the ordinary legal remedies; and that the construction and operation of a steam railway on a street is such use.

*In District of Columbia.*—In *Nottingham v. Baltimore, etc., R. Co.*, 3 MacArthur (D. C.) 517, the railroad constructed according to law upon the established grade of the street, rendered the abutting lots inaccessible and useless for purposes of business or residence; the land was further damaged by the neglect of the railroad company to provide means for carrying off water which collected in consequence of an embankment. The court held that these facts afforded no right of action to the owner of such abutting property. But in another case in the same jurisdiction it is held that a railroad company unlawfully using a public avenue for freight delivery is liable for damages to the land of abutting owners growing out of such use. *Trook v. Baltimore, etc., R. Co.*, 3 MacArthur (D. C.) 392. Compare *Dickson v. Baltimore, etc., R. Co.*, 3 MacArthur (D. C.) 362 where an act of Congress provided that compensation must be made to owners of abutting property.

*In Florida.*—In *Florida Southern R. Co. v. Brown*, 23 Fla. 119, it was held "that where an adjacent owner of real estate on a street of a town or city is not the owner of the fee to the center of the street, though he is not entitled, as against the company laying a railroad along said street by proper authority, to recover damages for the appropriation of the soil of the street, or for any incidental injury to his property from noise or smoke or like annoy-

ances, yet he is entitled to the use of the street and may recover damages for any special injury he may sustain, if by reason of the improper laying of said track or its improper use his right to use it is unreasonably abridged or impeded. But in an action grounded on such injury the diminution of the value of the estate of plaintiff is not a ground of damage."

*In Georgia.*—Although the fee is in the public, compensation will be allowed the owner of abutting property. *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

*In Illinois.*—The rule in this State under the constitution of 1870 (art. 2 § 13) is stated in *East St. Louis v. O'Flynn*, 19 Ill. App. 67, where the court, by Pillsbury, P. J., say: "The damages therefore that an individual may recover for injury to his property, need not necessarily be caused by acts amounting to a trespass to his real estate, but if his property be depreciated in value by his being deprived of some right of user or enjoyment, growing out of and appurtenant to his estate in the lands, as the direct consequence of the construction and use of any public improvement, his right of action is complete, and he may recover to the extent of the injury thus sustained." In *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 512; 14 Am. & Eng. R. 152, similar language is used. See also *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157; and also *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Chicago, etc., R. Co. v. Joliet*, 71 Ill. 25. Compare *Chicago, etc., R. Co. v. Berg*, 10 Ill. App. 607; *Chicago, etc., R. Co. v. McGinnis*, 79 Ill. 269.

Prior to the constitution of 1870, which requires compensation whenever private property is taken, damaged, or injured for a public use, a different rule prevailed. It was declared in a number of cases that if any damages at all were recovered of the railroad company, they were to be confined to the direct physical injury done to the property by the operation of the road, and it was error to allow plaintiff to prove what was the fee or the rental value of the property with the road and what it would be without it. *Chicago, etc., R. Co. v. McGinnis*, 79 Ill. 269; *Stone v. Fairbury, etc., R. Co.*, 68 Ill. 394; 18 Am. Rep. 556; *Moses v. Pittsburgh, etc., R. Co.*, 21 Ill. 516; *Chicago, etc., R. Co. v. Joliet*, 79 Ill. 25; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307.

See also as to the *Illinois* doctrine, *Gottschalk v. Chicago*, etc., R. Co., 14 Neb. 550; 14 Am. & Eng. R. Cas. 157, where numerous cases are examined.

*In Indiana.*—The *Indiana* courts seem to base the right to recover upon the ground that the fee of the street is in the owner of abutting property. According to the case of *Terre Haute*, etc., R. Co. v. Scott, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208, the fee of all streets and highways in the state with a few exceptions, is in such owners; so that practically the general doctrine prevails here. The rule is laid down in *Terre Haute*, etc., R. Co. v. Bissell, 108 Ind. 113, where it is said by Hawk, J., "Thus in *Cox v. Louisville*, etc., R. Co., 48 Ind. 178, it is said: 'So far as the highway, street, or easement is concerned, as the municipality has complete control thereof, it may, we presume, make or authorize any use of the street which will not essentially change and divert it from its intended use as a public highway. But this power of the common council cannot, of course, affect the rights of the individual owner of the fee of the soil over which the highway or street passes. This right of the individual, according to the case of *Protzman v. Indianapolis*, etc., R. Co., 9 Ind. 467; 68 Am. Dec. 650, is as much property as the lot itself. As was said in *Indianapolis v. Croas*, 7 Ind. 9, it is a right distinct from the claim of the public which even the legislature could not take away unless to appropriate to a public use; in which case, of course, compensation must be made. *Loganport v. Shirk*, 88 Ind. 563; *Baltimore*, etc., R. Co. v. North, 103 Ind. 486; 23 Am. & Eng. R. Cas. 36.'" Recovery in this (the Bissell) case was denied because the railroad was laid on that half of the street not adjacent to plaintiff's property.

See also *Terre Haute*, etc., R. Co. v. Rodel, 89 Ind. 128; 10 Am. & Eng. R. Cas. 284; 46 Am. Rep. 164; *Dwenger v. Chicago*, etc., R. Co., 98 Ind. 153; 20 Am. & Eng. R. Cas. 56.

"In case the structure imposes no additional burden upon his soil, the right of the lot owner to maintain a common law action for an injury depends upon whether or not the occupation of the streets results in damage peculiar to his property and different in kind from that which is suffered by the community in general." Mitchell, J., in *Indiana*, etc., R. Co. v. Eberle, 110 Ind. 542; 32 Am. & Eng. R. Cas. 224; 59 Am. Rep. 225.

In this case it appeared that the company had constructed an embankment wholly on the side of the center line of the street farthest from plaintiff's lot. It was held that he could not recover in the absence of proof of special damage.

*In Iowa.*—The doctrine in this state is that an owner of abutting land in a city has, ordinarily, no such interest in the adjacent street as will entitle him to recover damages to his lot consequent upon the use of the street by the railroad having authority from the city to occupy its streets. *Davenport v. Stevenson*, 34 Iowa 225; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 148; 4 Am. Rep. 205 (bridge approaches erected in street); *Cadle v. Muscatine Western R. Co.*, 44 Iowa 11; *O'Connor v. St. Louis*, etc., R. Co., 56 Iowa 735; 5 Am. & Eng. R. Cas. 324. In *Kucheman v. Chicago*, etc., R. Co., 46 Iowa 366, it was held, however, that where the fee of the street is in the adjacent proprietor, he is entitled to recover for injuries suffered to his property in consequence of such occupation on the grounds that: first, the use of the land for a highway and its use for a railway have a different effect upon the property of the owner, the former enhancing and the latter diminishing its value; second, when the land is appropriated for a street, the owner is compensated only for that and for no other use; third, the construction of a track and operation of a railway on a street are an additional servitude on the owner of the fee. His recovery is not limited to the actual value of the land taken, but may extend to all damages which result proximately from the use for which it was taken. *Kucheman v. Chicago*, etc., R. Co., 46 Iowa 366. See *Rinard v. Burlington*, etc., R. Co., 66 Iowa 440. But by section 464 of the *Iowa* code (1873) owners of abutting property are given the right to recover for the occupation of the street. See *Pratt v. Des Moines*, etc., R. Co., 72 Iowa 249; 32 Am. & Eng. R. Cas. 236; *infra*, this title, *Statutory Provisions Giving Right to Recover*.

*In Kansas.*—To entitle a person owning lots abutting on a city street, along which a railroad company has constructed and is operating its line, by authority of the city council, to recover damages, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress to, and egress from, them. *Kansas*,

etc., *R. Co. v. Cuykendall*, 42 Kan. 234; 16 Am. St. Rep. 479. In this case it was further said: "But where the location of the track is such that space enough is left in the street in front of the lots of the abutting owner so that he can pass between the sidewalk and track, and the railroad is operated in a legal and proper manner, the lot owner cannot recover because the space within which he has heretofore passed from and to his lots is restricted." This is the settled doctrine of the court. *Ottawa, etc., R. Co. v. Larsen*, 36 Am. & Eng. R. Cas. 163; *Wichita, etc., R. Co. v. Smith*, 45 Kan. 264; 46 Am. & Eng. R. Cas. 53; *Atchison, etc., R. Co. v. Lyon*, 24 Kan. 743; *Central Branch, etc., R. Co. v. Andrews*, 30 Kan. 593; 14 Am. & Eng. R. Cas. 248; *Fort Scott, etc., R. Co. v. Fox*, 42 Kan. 490; 40 Am. & Eng. R. Cas. 331; *Kansas, etc., R. Co. v. Mahler*, 45 Kan. 565.

The fee of all streets which have been dedicated to the use of the public by property holders, is, under the statutes of the state, vested in the county in which such streets are situate and not in owners of abutting property. The county, however, holds it in trust for the public, and each city has entire control over the streets within its limits. *Atchison, etc., R. Co. v. Garside*, 10 Kan. 552; *Atchison, etc., R. Co. v. Patch*, 28 Kan. 473; *Central Branch, etc., R. Co. v. Twine*, 23 Kan. 585; 33 Am. Rep. 203. See also *Kansas, etc., R. Co. v. Hicks*, 30 Kan. 288; 14 Am. & Eng. R. Cas. 100; **EMINENT DOMAIN**, vol. 6, p. 597, n. 2.

The landowner always has a cause of action, however, when he can show a wrongful or excessive exercise of the authority granted. *Atchison, etc., R. Co. v. Lyon*, 24 Kan. 748; *Kansas, etc., R. Co. v. McAfee*, 42 Kan. 239.

*In Kentucky.*—Though lot owners have a peculiar interest in the adjacent street, which neither the local nor general public have, in the nature of an incorporeal hereditament—a franchise which is as inviolable as the property in the lots themselves—yet no compensation is allowed. *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289; 33 Am. Dec. 497; *Wolfe v. Covington, etc., R. Co.*, 15 B. Mon. (Ky.) 404; *Louisville, etc., R. Co. v. Brown*, 17 B. Mon. (Ky.) 763, unless an injury is suffered distinct from that suffered by the general public, and unless the injury is one that the public in promotion of the general interest has not the right to in-

flict without compensation. *Cosby v. Owensboro, etc., R. Co.*, 10 Bush (Ky.) 288; or unless the owner of the abutting property has been deprived of the means of ingress and egress to and from his lot with ordinary vehicles on either side of the street when trains are passing or standing therein. *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382; *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667.

In *Elizabethtown, etc., R. Co. v. Thompson*, 79 Ky. 52; 14 Am. & Eng. R. Cas. 111, it was held that the occupation and use of streets by a steam railroad did not entitle the owners of the fee to the center of the street to compensation as for property taken for public uses.

The rule as enunciated in *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640; 3 Am. & Eng. R. Cas. 259; 7 Am. St. Rep. 619, is that where the legislature has exercised its constitutional right to authorize the construction of a steam railroad along a city street, owners of abutting property, whether they have the fee of the street or not, have no claim to compensation, unless the road is so constructed as to deprive them of the reasonable use of the street.

*In Louisiana.*—The doctrine in this state seems to be that the owner of abutting land has no claim to compensation unless he is the owner of the fee, or can show an excessive or unlawful exercise of authority on the part of the railroad company. In *Harrison v. New Orleans Pac. R. Co.*, 34 La. Ann. 462; 44 Am. Rep. 441, it is said by *Levy, J.*, speaking for the court, that "if the fee in the streets is in the public, or in the municipality in trust for public use, the doctrine is settled that the legislature may authorize them to be used by a railroad company, without compensation to adjoining owners, or to the municipality, and without the consent and against the wishes of either." Citing as authority 2 *Dillon Mun. Corp.*, § 556; *Clinton v. Cedar Rapids, etc., R. Co.*, 24 Iowa 455; *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.) 222. It will be observed that the first authority cited has in the latest (4th) edition of his work declared his own statement to be an incorrect exposition of the law as it now is. See 2 *Dillon Mun. Corp.* (4th ed.), § 704. In *Iowa* a doctrine different from that of the case just cited is established by statute, and in reference to the third authority the court falls into the error of quoting as au-

thority the language of the lower court in *New York* in a case which was reversed by the court of appeals of that state. See *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651, reversing 18 Barb. (N. Y.) 222.

The doctrine of *Harrison v. New Orleans Pac. R. Co.*, 34 La. Ann. 462, however, seems to be the settled doctrine of the *Louisiana* court. *Merges v. St. Louis, etc.*, R. Co., 35 La. Ann. 641. But if, in the construction of the road, serious and unequal damage be thereby inflicted upon private property contiguous to the street, the owners may by suit, demand a reconstruction of the track, and under conditions, its ultimate removal. *Hepting v. New Orleans Pac. R. Co.*, 36 La. Ann. 898; *Louisiana* acts 1876, ch. 14, § 6.

Where an embankment for the road-bed was constructed in the street the effect of which was seriously to obstruct the lot owner's access to his property and to impair its value, he was allowed to recover in damages the amount of the diminution in the value of his property. *Griffin v. Shreveport, etc.*, R. Co., 41 La. Ann. 808; 40 Am. & Eng. R. Cas. 296. It may be questioned whether this last case does not establish a new doctrine for that court. In the opinion by Fenner, J., the previous decisions of the court are not mentioned and the provision of art. 156 of the constitution providing against the "taking or damaging" of private property without just compensation, was stated as the ground of the holding. The cases of *Chicago, etc.*, R. Co. v. *Ayers*, 106 Ill. 518; 14 Am. & Eng. R. Cas. 152; *Chicago v. Taylor*, 125 U. S. 161; 22 Am. & Eng. R. Cas. 384; *Rigney v. Chicago*, 102 Ill. 64, were referred to (on page 810) with the comment that their "doctrine seems to us clearly correct, and we adopt it," adding that "under such constitutional provisions a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of a public improvement, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in diminution of its market-value."

In *Maryland* compensation is denied. *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363.

In *Michigan*.—In *Grand Rapids, etc.*, R. Co. v. *Heisel*, 38 Mich. 62; 31 Am.

Rep. 306, *Cooley, J.*, said, that when the owner of abutting property has not the fee, "his freehold is not appropriated, and the mere laying of the track in the street in the absence of any statute giving him redress therefor, is no wrong to him whatever. He is not wronged until the use of the street becomes a nuisance to him or specially incommodes him in the enjoyment of the public easement. He is entitled to no assessment of damages, because none of his land is taken, and he has no action at the common law, unless upon such ground as would enable one land proprietor to sue an adjoining proprietor for failing to observe the maxim that every one must use his own property as not unreasonably to incommode his neighbor. The damage establishes the wrong and must be shown in every case."

In *Minnesota*.—In *Harrington v. St. Paul, etc.*, R. Co., 17 Minn. 215, the rule was distinctly laid down by *Ripley, C. J.*, in delivering the opinion of the court, that in all cases the owners of property adjoining a street own the fee to the center thereof subject to the public easement, and that the legislature could not appropriate the street to any other use, or subject it to any additional servitude without compensation to the owner of the fee, and that the occupation of a street by a railroad would be such additional servitude. See also *Schurmeier v. St. Paul, etc.*, R. Co., 10 Minn. 82, affirmed 7 Wall. (U. S.) 272; 88 Am. Dec. 59; *Gray v. First Div. St. Paul, etc.*, R. Co., 13 Minn. 315; *Adams v. Hastings, etc.*, R. Co., 18 Minn. 260; *Kaiser v. St. Paul, etc.*, R. Co., 22 Minn. 149; *Lamm v. Chicago, etc.*, R. Co., 45 Minn. 71; 46 Am. & Eng. R. Cas. 42.

In *Mississippi*.—Compensation allowed. See *Theobald v. Louisville, etc.*, R. Co., 66 Miss. 279; 38 Am. & Eng. R. Cas. 465; 14 Am. St. Rep. 564, quoted from *supra*, this title, *Distinction Dependent Upon Ownership of Fee and Character of Highway*, note 2.

In *Missouri*.—In this state there seems to be no distinction based on the ownership of the fee, and no damages can be recovered if the railroad was legally constructed and properly operated. *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Porter v. North Missouri R. Co.*, 33 Mo. 128; *Lackland v. North Missouri, etc.*, R. Co., 34 Mo. 259; *Randle v. Pacific R. Co.*, 65 Mo. 325; *Cross v. St. Louis, etc.*, R. Co., 77

Mo. 318; 14 Am. & Eng. R. Cas. 123; Dubach v. Hannibal, etc., R. Co., 89 Mo. 485; 26 Am. & Eng. R. Cas. 609; Botto v. Missouri Pac. R. Co., 11 Mo. App. 589.

Where the grade is changed damages are allowed. Sheehy v. Kansas City Cable R. Co., 94 Mo. 574; 32 Am. & Eng. R. Cas. 235; 4 Am. St. Rep. 396; Smith v. Kansas City, etc., R. Co., 98 Mo. 20.

Where the legislature authorizes a company to occupy a street, "the track to be so constructed as not to hinder or prevent the public from using the street," if it cannot be so constructed it may not be laid at all, and an abutter sustaining special damage may have an injunction. Dubach v. Hannibal, etc., R. Co., 89 Mo. 483; 29 Am. & Eng. R. Cas. 609.

*In Nebraska.*—In this state compensation must be made to the owner of abutting property, though the fee is in the public. Burlington, etc., R. Co. v. Reinhackle, 15 Neb. 279; 14 Am. & Eng. R. Cas. 172; 48 Am. Rep. 342; Omaha, etc., R. Co. v. Rogers, 16 Neb. 117; 20 Am. & Eng. R. Cas. 79.

*In Nevada.*—In Fogg v. Nevada, etc., R. Co., 20 Nev. 429; 43 Am. & Eng. R. Cas. 105, it was held that the construction of a railroad track on wooden ties imbedded in the soil, the rails being raised to a height of six or eight inches above the general level of the street, gave no right of action for damages to owners of abutting property; it appearing that the street was eighty feet wide; that the track was in the center thereof, and that ample room was left on both sides for foot passengers and vehicles to pass each other. This doctrine was laid down, though it appeared that the abutting owners had the fee of the street.

*In New Jersey.*—In Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 78, the chancellor said: "The real question is whether the charter of the defendants authorizing them to lay a railroad track through the streets of the city over the land of the complainants is a violation of that provision of the constitution which prohibits the taking of private property for public use without just compensation. I take it to be the settled law of this state that a railroad company authorized to acquire lands for the use of their road by condemnation, and required to make payment or tender of compensation to the owners before occupying the land, cannot construct their road across or upon a highway without making compensation to

the owner of the soil occupied by the highway." See also Starr v. Camden, etc., R. Co., 24 N. J. L. 592; Central R. Co. v. Hetfield, 29 N. J. L. 206; Mayor, etc., of Jersey City v. Central R. Co., 40 N. J. Eq. 417; 23 Am. & Eng. R. Cas. 138; Morris, etc., R. Co. v. Hudson Tunnel R. Co., 25 N. J. Eq. 384; Chamberlain v. Elizabeth Steam Cordage Co., 41 N. J. Eq. 43; State v. Laverack, 34 N. J. L. 201; Cooley's Const. Lim. (5th ed.), p. 689 (557), note. See also Beseman v. Pennsylvania R. Co., 50 N. J. L. 235; 33 Am. & Eng. R. Cas. 107, where recovery was denied on the ground that the damages were consequential merely. In an early case, Morris, etc., R. Co. v. Newark, 10 N. J. Eq. 358, Chancellor Williamson used the following language: "The legislature does not, therefore, by permitting a railroad company to use the highway in common with the rest of the public take away from the landowner anything that belongs to him. It is not a misappropriation of the way." This language is quoted by Van Fleet, V. C., in Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 79, but he is careful to add that "this exposition of the law, so far as it concerns horse railroads, has been approved in all subsequent cases." See also Dodge v. Pennsylvania R. Co., 43 N. J. Eq. 351; 36 Am. & Eng. R. Cas. 180.

*In Oregon.*—In this state, while it is recognized that the owners of abutting property have the fee of the streets, it is held that such ownership gives no right to compensation where the occupation of a street by a railroad company is under authority of law. McQuaid v. Portland, etc., R. Co., 18 Oregon 237; 40 Am. & Eng. R. Cas. 308; Paquet v. Mount Tabor St. R. Co. (Oregon, 1889), 40 Am. & Eng. R. Cas. 320. In the former case, Thayer, C. J., said: "The railway corporation is permitted by the statute to appropriate so much of the highway as may be necessary or convenient in the location and construction of its road; but the use thereof by the public is not abridged. It is simply extended to the railway corporation and the latter admitted to its enjoyment in common with the former. The corporation is allowed under the statute to build and operate its railway within the bounds of the highway; but it has no authority to change the grade thereof or to use it to the exclusion of the public; nor has it any right to use the highway which will



cut off access to it by the adjoining lot owner. The latter will doubtless be obliged to submit to the ordinary inconveniences and consequences which the construction of a railroad track and the moving of a locomotive and cars thereon occasion—be compelled to endure the smoke, noise, and screeching which naturally result from the use of that character of vehicle, but they cannot be deprived of the rights of ingress and egress to and from their premises without compensation."

*In Pennsylvania.*—Under the last constitution of this state, which provides against the "taking, injuring, or damaging" of private property without compensation, it seems that the owner of abutting land is entitled to compensation for all damages to his property caused by the construction of a railroad in the street. *Pennsylvania, etc., R. Co. v. Walsh*, 124 Pa. St. 544; 38 Am. & Eng. R. Cas. 466; 10 Am. St. Rep. 611; *Pittsburgh Junction R. Co. v. McCutcheon* (Pa. 1886), 7 Atl. Rep. 146; *Pusey v. Allegheny*, 98 Pa. St. 522; *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352; 29 Am. & Eng. R. Cas. 354; *Edmundson v. Pittsburgh, etc., R. Co.*, 111 Pa. St. 320; 23 Am. & Eng. R. Cas. 423; *Minig v. New York, etc., R. Co.*, 11 W. N. C. (Pa.) 297. See also *Danville, etc., R. Co. v. Com.*, 73 Pa. St. 29; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. St. 282; 7 Cent. L. J. 213; *Appeal of Beidler* (Pa. 1889), 17 Atl. Rep. 244. Before 1874, however, it had been held that where the legislature granted to a railway company the right to occupy a street or highway, no compensation need be made owners of abutting property, though they owned the fee. *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84; *In re Philadelphia, etc., R. Co.*, 6 Whart. (Pa.) 25; 36 Am. Dec. 202; *Mifflin v. Railroad Co.*, 16 Pa. St. 182; *Snyder v. Pennsylvania R. Co.*, 55 Pa. St. 340; *Mercer v. Pittsburgh R. Co.*, 36 Pa. St. 99; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471. See also *EMINENT DOMAIN*, vol. 6, p. 553.

*In Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541; 33 Am. & Eng. R. Cas. 116; 4 Am. St. Rep. 659; and *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472; 30 Am. & Eng. R. Cas. 399; 2 Am. St. Rep. 618, the railroad was not constructed on the street but on abutting property owned by the railroad company, and the rulings were that

owners of abutting property on the opposite side of the street had no right to claim consequential damages arising from the operation of the road.

A statute in this state requires railroads changing the site of turnpikes or public roads to cause the same to be reconstructed on the most favorable location and in as perfect a manner as the original road. In one case it appeared that the railroad was duly located on a county road but construction was not begun until eight years later; in the meantime the road had become a city street and the construction of a new highway became impracticable. It was held that the railroad corporation was liable to indictment, under this act, for not reconstructing the street after constructing its track upon it; that, however, the sentence could not compel the removal of the obstruction or the construction of a new street, but could only punish for the offense committed. *Pittsburgh, etc., R. Co. v. Com.*, 101 Pa. St. 192; 10 Am. & Eng. R. Cas. 321.

*In South Carolina.*—*In McLauchlin v. Charlotte, etc., R. Co.*, 5 Rich. (S. Car.) 593, it was said by Wardlaw, J.: "If the streets are ordinary highways, and their obstruction has been authorized by law, no right remains for an individual to complain, by action at law, of peculiar damage done to him by an act detrimental to the public, which public authority has sanctioned. If an unauthorized obstruction of a highway has been made, then whether the company is without charter, or has exceeded its chartered powers; whether the right to enter the town is not conferred by the charter, or a condition required before it shall occupy a street has not been complied with, still there exists only the case which is alleged in the declaration—a nuisance done of which an individual complains; and an action cannot be sustained without proof of direct damage already sustained, contradistinguished from contingent and probable loss apprehended, and such is the case wheresoever the fee of the highway may be."

*In Tennessee.*—*In Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522; 38 Am. & Eng. R. Cas. 444, it was held that the owners of property adjoining a city street, who do not own the fee of the street, cannot recover for injuries resulting from the lawful and reasonable use thereof by a railway company with the city's permission, the right of ingress and egress being left reasonably suffi-

c. STATUTORY PROVISIONS GIVING RIGHT TO RECOVER.—In some jurisdictions statutes have been passed which provide specifically that wherever a railroad is constructed along and upon a street or highway the company shall be responsible to owners of abutting property for all injuries sustained by them in relation to their property by reason of the construction and operation of the railroad. In some instances these statutes are merely an affirmance of the rule previously established in the state by judicial construction, while in others they set up a new rule.<sup>1</sup> Such statutes operate to give abutting landowners a right to re-

cient. It was also decided that for damages resulting from an unlawful and improper use of the street by a railway company, such owners could recover.

*In Texas.*—The *Texas* constitution of 1876 provides that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation." Accordingly in *Gulf, etc., R. Co. v. Edkins*, 60 Tex. 664, it was held that where the use of a street by an owner of adjoining land is greatly impaired by the occupation thereof by a railroad company "and the injury in this respect is one special in its character and not one common to the entire community at large, an action to recover such special damage will lie."

*In Vermont.*—In this state it seems that no compensation will be allowed where the owner of the abutting property has not the fee of the street. See *Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142; *Wead v. St. Johnsbury, etc., R. Co.* (Vt. 1892), 24 Atl. Rep. 361.

*In West Virginia.*—In this state the owners of abutting property may not enjoin the construction and operation of a railroad in the street unless such road results in an entire destruction of the value of their property. But such owners, whether they own the fee of the street or not, may recover at law such damages as result from the impairment of their easements, notwithstanding the construction of the road has been authorized by the city council. *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406; 20 Am. & Eng. R. Cas. 125; *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1; 40 Am. & Eng. R. Cas. 284; *Yates v. West Grafton*, 34 W. Va. 783.

1. Thus Rev. Stat. *Ohio*, § 3283, provides that "every company which lays a track upon any such street, alley, road, or ground (*i. e.*, within the municipality and by its consent)

shall be responsible for injuries done thereby to private or public property lying upon or near such ground, which may be recovered in a civil action." *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200. Under this it is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the property. *Columbus, etc., R. Co. v. Gardner*, 45 Ohio St. 309; 33 Am. & Eng. R. Cas. 243. This statute it seems is merely an affirmance of the rule already established. See *Cincinnati, etc., St. R. Co. v. Cummins*, 14 Ohio St. 523. Under this statute the abutting owner, if he has the fee of the street, may institute proceedings to compel the railroad company to condemn a right of way over the street. *Lawrence R. Co. v. Williams*, 35 Ohio St. 168. See also *Taylor v. Bay City St. R. Co.*, 80 Mich. 77; 43 Am. & Eng. R. Cas. 335.

Under section 464 of the *Iowa* code, abutting owners have the right to recover of the railroad company damages sustained by them. The right does not exist independently of the statute and its character and extent therefore depends entirely on the statute and must be exercised as its terms prescribe. The landowner has no right to recover for the use and occupation of the street by the company, but has simply a claim for damages, which may be waived or assigned by parol. *Pratt v. Des Moines, etc., R. Co.*, 72 Iowa 249; 32 Am. & Eng. R. Cas. 236. And where the railroad fails to have the damages to abutting lot owners ascertained and paid it is guilty of a continuing trespass and a nuisance and is liable in damages for such. *Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa

cover, though at the time of their passage the railroad company had completed the construction of the road-bed except the laying of the tracks.<sup>1</sup> It seems, however, that the recovery must be limited strictly to the cases provided for by the statute.<sup>2</sup> And in *Iowa* the statute forbidding the laying down of railway tracks in streets or alleys until after compensation has been made to abutting landowners is considered to apply only where the tracks occupy the road or street longitudinally, and does not authorize recovery of damages where the railroad merely crosses the street.<sup>3</sup> But this statute has been construed to give to the landowner a right to damages for the use of the street where the railroad is constructed partly on his land and partly on the street.<sup>4</sup> Where the right to recover damages is derived solely from the statute, a cause of action exists only for substantial and not for nominal damages.<sup>5</sup>

*d. WHERE THE GRADE OF THE STREET IS CHANGED.*—Whenever the railroad company, in constructing its road, changes the grade of the street, or erects embankments thereon, or makes cuts therein, it interferes with the abutting owner's easement of access and becomes liable as for a taking of private property.<sup>6</sup> It has been

105; 43 Am. & Eng. R. Cas. 121. See also *Mulholland v. Des Moines, etc.*, R. Co., 60 Iowa 740; 10 Am. & Eng. R. Cas. 99.

Under this section landowners are not barred from their right to recover by the fact that they did not institute their action until after the railroad had been constructed. *Stough v. Chicago, etc.*, R. Co., 71 Iowa 641; 30 Am. & Eng. R. Cas. 396.

**1. Track Partially Constructed Before Passage of Statute.**—It is the laying of the track and the running of trains thereon which is the basis of recovery, and the company by partially constructing the road-bed does not acquire vested rights which preclude the operation of the statute passed after such partial construction. *Mulholland v. Des Moines, etc.*, R. Co., 60 Iowa 740; 10 Am. & Eng. R. Cas. 99; *Hanson v. Chicago, etc.*, R. Co., 61 Iowa 588 (railroad enjoined until compensation should be made); *Stough v. Chicago, etc.*, R. Co., 71 Iowa 641; 30 Am. & Eng. R. Cas. 396; *Taylor v. Bay City St. R. Co.*, 80 Mich. 77; 43 Am. & Eng. R. Cas. 335; *Drady v. Des Moines, etc.*, R. Co., 57 Iowa 393; 14 Am. & Eng. R. Cas. 131. Compare *First Congregational Church v. Milwaukee, etc.*, R. Co., 77 Wis. 158; 43 Am. & Eng. R. Cas. 185.

**2.** Thus where the charter of the company provides that "whenever any estate abutting upon a street or highway upon which the rails of the corporation

shall be laid, shall be injured thereby, the said corporation shall be liable to pay to the owner thereof the damages thereby occasioned to said estate," the owner is entitled to recover only damages for injuries resulting from the laying of the rails as distinguished from those resulting from the use of them as laid. *Vose v. Newport St. R. Co.* (R. I. 1890), 46 Am. & Eng. R. Cas. 91.

**3. Where Railroad Merely Crosses Street.**—*Morgan v. Des Moines, etc.*, R. Co., 64 Iowa 589; 20 Am. & Eng. R. Cas. 67; 52 Am. Rep. 462; *Code of Iowa* (1873), § 464.

**4. Railroad Constructed Partly on Street and Partly on Plaintiff's Land.**—*McClellan v. Chicago, etc.*, R. Co., 67 Iowa 568.

But where in such a case damages for the occupation must be deemed to have been included in the award for the condemnation of the premises taken, the landowner cannot maintain a suit for an injunction. *Phipps v. Western Maryland R. Co.*, 66 Md. 319.

**5. Nominal Damages.**—The rule is held to apply even where there is a change of grade. *Burkam v. Ohio, etc.*, R. Co., 122 Ind. 344; 43 Am. & Eng. R. Cas. 453; *Anderson v. Bain*, 120 Ind. 254; 28 Am. & Eng. Corp. Cas. 223; *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415; 46 Am. & Eng. R. Cas. 66; 21 Am. St. Rep. 57.

**6.** *Buchner v. Chicago, etc.*, R. Co., 60 Wis. 264; 14 Am. & Eng. R. Cas.

urged that since a municipality has the right to change the grade of a street without making compensation for injuries sustained by abutting owners in consequence of the change,<sup>1</sup> it may delegate the right to a railroad company so that the company would enjoy the same immunity from liability.<sup>2</sup> But this contention cannot be sustained; in the one case the damage is suffered for the public benefit entirely, while in the other it is made use of for the advancement of the interests of a private corporation.<sup>3</sup> The right to occupy the streets conveys no authority to alter the grade, unless such authority is clearly and specifically granted.<sup>4</sup>

447 (company liable though track does not encroach on highway); *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Chicago, etc., R. Co. v. Jefferson*, 14 Ill. App. 615 (company has no right to construct ditch along highway); *Cross v. St. Louis, etc., R. Co.*, 77 Mo. 318; 14 Am. & Eng. R. Cas. 123; *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 511; 14 Am. & Eng. R. Cas. 152; *Mayor, etc., of Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; 23 Am. & Eng. R. Cas. 138; *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 624; *Kaiser v. St. Paul, etc., R. Co.*, 22 Minn. 149; *Stone v. Fairbury, etc., R. Co.*, 68 Ill. 394; 18 Am. Rep. 556; *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496; 14 Am. & Eng. R. Cas. 126; *Corey v. Buffalo, etc., R. Co.*, 23 Barb. (N. Y.) 482; *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505; 43 Am. & Eng. R. Cas. 137; *Alabama Midland R. Co. v. Williams*, 92 Ala. 277; *Alabama Midland R. Co. v. Coskry*, 92 Ala. 254; *Mason v. Kennebec, etc., R. Co.*, 31 Me. 215; *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479; 10 Ind. 174; 71 Am. Dec. 309; *Griffin v. Shreveport, etc., R. Co.*, 41 La. Ann. 808; 40 Am. & Eng. R. Cas. 296; *Central Branch, etc., R. Co. v. Twine*, 23 Kan. 585; 33 Am. Rep. 203; *Chicago, etc., R. Co. v. McGinnis*, 79 Ill. 269 (high trestle work erected).

See also *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289; 33 Am. Dec. 497; *Slatten v. Des Moines, Valley R. Co.*, 29 Iowa 149; 4 Am. Rep. 205.

It is not essential that the petition in the suit to recover damages should allege that erection of the embankment was unnecessary or unlawful. *Cross v. St. Louis, etc., R. Co.*, 77 Mo. 318; 14 Am. & Eng. R. Cas. 123.

Evidence that the city afterwards repaired the damage caused by the excavations of the railroad company is admissible in mitigation of damages in an action against the company. *Ala-*

*bama Midland R. Co. v. Coskry*, 92 Ala. 254.

1. See *EMINENT DOMAIN*, vol. 6, p. 548; *MUNICIPAL CORPORATIONS*, vol. 15, p. 949.

2. See *Ottenot v. New York, etc., R. Co.*, 119 N. Y. 603; 43 Am. & Eng. R. Cas. 129; *Barr v. Oskaloosa*, 45 Iowa 275; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98; 23 Am. & Eng. R. Cas. 3; 54 Am. Rep. 661. In this last case it was held that where a railroad had been located in a street for forty years it must be presumed to have acquired a legal right to be there; and having this right together with the express consent of the city it might change the grade of the street without becoming liable for damages to owners of abutting property. See also *Jackson v. Chicago, etc., R. Co.*, 41 Fed. Rep. 656; 43 Am. & Eng. R. Cas. 145.

3. *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465; *Buchner v. Chicago, etc., R. Co.*, 60 Wis. 264; 14 Am. & Eng. R. Cas. 447; *Mayor, etc., of Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; 23 Am. & Eng. R. Cas. 138; *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 511; 14 Am. & Eng. R. Cas. 152; *Smith v. Kansas City, etc., R. Co.*, 98 Mo. 20; *Lafayette v. Wortman*, 107 Ind. 404; 15 Am. & Eng. Corp. Cas. 88.

Where a railroad crosses a highway considerably below the level thereof, the company is bound to provide proper cuts and grades on the highway, and if making them is a damage to an adjoining proprietor, the company is liable. *Sioux City, etc., R. Co. v. Weimer*, 16 Neb. 272; 20 Am. & Eng. R. Cas. 184.

4. *Cross v. St. Louis, etc., R. Co.*, 77 Mo. 318; 14 Am. & Eng. R. Cas. 123; *Kaiser v. St. Paul, etc., R. Co.*, 22 Minn. 149; *Tate v. Missouri, etc., R. Co.*, 64 Mo. 158; *Porter v. North Missouri R. Co.*, 33 Mo. 128.

*e. MEASURE OF DAMAGES.*—The measure of damages or of compensation to be made to the landowner is the actual diminution in the market value of the premises for any use to which they may reasonably be put, occasioned by the construction and operation of the railway through the street adjacent.<sup>1</sup> Inconveniences and dangers necessarily incident to the operation of a railroad along a street, and which annoy and damage the plaintiff only in common with the rest of the public, are not to be considered, unless the occupation of the street is wrongful and without authority of law. The injury sustained by the abutting owner must

And where the authority is specifically granted it may be exercised only after payment of damages. *Mayor, etc., of Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; 23 Am. & Eng. R. Cas. 138; *Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574; 32 Am. & Eng. R. Cas. 233; 4 Am. St. Rep. 396.

**What Constitutes Change of Grade.**—The placing of six inches of gravel upon a street occupied by a railroad where an alley intersects, in order to enable teams and wagons more conveniently to pass over the track, does not amount to the construction of an embankment within the meaning of the rule entitling abutting owners to compensation where the street is obstructed with an embankment. *First Congregational Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158; 43 Am. & Eng. R. Cas. 182.

1. *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465; *Jackson v. Kiel*, 13 Colo. 378; 40 Am. & Eng. R. Cas. 297; *Denver, etc., R. Co. v. Bourne*, 11 Colo. 59; 32 Am. & Eng. R. Cas. 228; *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200; *Henderson v. New York Cent. R. Co.*, 17 Hun (N. Y.) 344; 78 N. Y. 423; *Central Branch, etc., R. Co. v. Andrews*, 26 Kan. 702; 5 Am. & Eng. R. Cas. 370 (injury at time of obstruction and not at time of trial to be considered); *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466 (evidence of rental value and of offer to purchase admitted); *Guess v. Stone Mountain Granite, etc., R. Co.*, 72 Ga. 320; 28 Am. & Eng. R. Cas. 236; *Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574; 32 Am. & Eng. R. Cas. 233; 4 Am. St. Rep. 396; *In re Prospect Park, etc., R. Co.*, 13 Hun (N. Y.) 345; *McQuaid v. Portland, etc., R. Co.*, 18 Oregon 237; 40 Am. & Eng. R. Cas. 309.

In another case it is said that the measure of damages is the actual damage sustained by the building and opera-

tion of the road less the increase in the value of the property by the company's improvements. The danger of possible collision or fright to animals and persons, is not an element of damage. *Guess v. Stone Mountain Granite, etc., Co.*, 72 Ga. 320; 28 Am. & Eng. R. Cas. 236.

"No personal inconvenience or annoyance, no interference with his trade or business, no decrease in the rental value of his premises occasioned by the construction or operating of the railroad, and no temporary interruption or damage thereby, constitute the test. None of these things can enter into the question, except as they may appropriately aid in determining the actual depreciation in the market value of the realty and improvements." *Helm, J.*, in *Denver v. Bayer*, 7 Colo. 128; 2 Am. & Eng. Corp. Cas. 465.

Where the occupant is a tenant from year to year, and he is obliged to move, the difference between the value of his machinery as it stands and its value after removal, is an element of damage, and evidence of the expense of removing it to its new location is admissible. *Philadelphia, etc., R. Co. v. Getz*, 113 Pa. St. 214; 28 Am. & Eng. R. Cas. 244.

The measure of damages is the difference between the fair rental value of the property when the road is obstructed by the railway tracks and that when it is free from obstruction. *Brakken v. Minneapolis, etc., R. Co.*, 31 Minn. 45; *Blesch v. Chicago, etc., R. Co.*, 43 Wis. 183. In *Kucheman v. Chicago, etc., R. Co.*, 46 Iowa 366, it is said that the lot owner is entitled to have the damages assessed as in case of ordinary proceedings for the condemnation of a right of way. See *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200.

In *Columbus, etc., R. Co. v. Gardner*, 45 Ohio St. 309; 32 Am. & Eng. R. Cas. 249, the court, by Owen, C. J.,

differ in character, and not in degree only, from that suffered by the public generally.<sup>1</sup> In arriving at the value of the property injured its capabilities and the uses for which it is adapted are to be considered, and the same considerations otherwise are to be regarded as in a sale of such property between private parties.<sup>2</sup>

Where the action is instituted by lessees under a lease executed prior to the construction of the road, the only damages recoverable is the difference between the value of the use of the premises before and after the construction of the road.<sup>3</sup>

In those jurisdictions where the abutting owner has no right of recovery except in cases where there has been an abuse or unlawful exercise of authority, the measure of damages is the compensation for the injury suffered, and does not embrace the diminution in the value of the property.<sup>4</sup> In such a

laid down the rule of damages as follows: "It is too well settled in this state to admit of controversy that the rule of damages in such cases is the difference in the value of the property affected before and the value after the location of the railroad, and this is to be determined by the jury in the light of the facts established by the evidence, and not upon the mere opinions of witnesses, except in so far as opinions may be received upon questions of value. *Atlantic, etc., R. Co. v. Campbell*, 4 Ohio St. 583; 64 Am. Dec. 607; *Cleveland, etc., R. Co. v. Ball*, 5 Ohio St. 573. In each of these cases the witnesses were allowed to testify to their opinions concerning the amount of damages sustained, and in each case this was held to be error, and the judgment reversed. But the jury is entitled to be informed by witnesses concerning the value of the land before, and the value of it after, the location of the road. These are the primary facts which enable the jury to determine the extent of the injury."

In *Chapman v. Oshkosh, etc., R. Co.*, 33 Wis. 629, the plaintiffs owned certain city lots, upon which was situated a saw mill, and also owned certain other lots fronting on P street which were accessible from the mill by means of public streets, and were used by them in connection with their mill for storing lumber thereby manufactured. The railroad company took for its road a strip of said P street lots which was included in said street. It was held that the plaintiff's damages for the taking of the said strip included not only any diminution in the market value of the P street lots, but also the depreciation in the value of the mill property in consequence of such property being rendered unsafe for the

storage of lumber by the building of the railroad thereon. *Following Welch v. Milwaukee, etc., R. Co.*, 27 Wis. 108.

In *Muller v. Southern Pac. R. Co.*, 83 Cal. 240, two elements of damage were considered. The fee of one-half the street being in the plaintiff the measure of damages for the taking of the street by the company was said to be the value of plaintiff's interest in the land taken when the company entered it, subject to the public easement of a street; the measure of damages to the abutting lot was held to be the difference between its value at the time the company began the construction of its road and its value with the road completed. If there is no depreciation in value, then there can be no recovery.

1. See *infra*, this title, *Special and Consequential Damages*; *Guess v. Stone Mountain Granite, etc., Co.*, 72 Ga. 320; 28 Am. & Eng. R. Cas. 236; *Crowley v. Davis*, 63 Cal. 460; *Flechman v. Cleveland C. C. & St. L. R. Co.*, 27 W. L. B. (Ohio) 302; *Forbes v. Rome W. & C. R. Co. (N. Y.)*, 24 N. E. 919.

2. *Muller v. Southern Pac. R. Co.*, 83 Cal. 240. Loss of trade, or a decrease in the number of pupils, if the building be a store or a schoolhouse respectively, is a proper element of damage. *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

3. *Action by Lessee.* — *Renwick v. Davenport, etc., R. Co.*, 49 Iowa 664.

If the lease is executed subsequently to the construction of the road, the lessee has no right of action. See *supra*, this title, *Elevated Railroads; Landlord and Tenant*.

4. *Where Road Is Improperly Constructed.* — *Cadle v. Muscatine Western*

case it is not presumed that the wrong will continue, and, therefore, in an action at law only damages which have accrued up to the time of the commencement of the action are recoverable.<sup>1</sup> In any case where there is evidence of damage the finding of the trial court will not be reversed on appeal as being an award of excessive damages, unless it clearly appears that it was the result of passion, prejudice, or corruption.<sup>2</sup> For speculative or contingent damages there can be no recovery, and evidence as to the amount and extent of such damages is inadmissible.<sup>3</sup>

(1) *Deduction of Benefits.*—The consideration of benefits to the part of a tract not taken, in determining the compensation to be made in ordinary condemnation proceedings, is prohibited by

R. Co., 44 Iowa 11; *O'Connor v. St. Louis, etc., R. Co.*, 46 Iowa 735; 5 Am. & Eng. R. Cas. 325; *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41; 7 Am. & Eng. R. Cas. 593; *Central Branch, etc., R. Co. v. Twine*, 23 Kan. 585; 33 Am. Rep. 203.

The difference between the rental value of the property with the road properly constructed and that with the road constructed as it affords a proper measure of damages in such cases. *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41; 7 Am. & Eng. R. Cas. 595; *Cadle v. Muscatine Western R. Co.*, 44 Iowa 11. Compare *Florida Southern R. Co. v. Brown*, 23 Fla. 104.

When a view of the premises in such a case is allowed to the jury, it is not for the purpose of furnishing evidence upon which a verdict is found, but to enable the jury better to understand and apply the evidence in court.

It is error therefore to instruct the jury that they might use their own examination and judgment as well as that of witnesses in estimating the damages.

*Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41; 7 Am. & Eng. R. Cas. 593; *Chute v. State*, 19 Minn. 281.

1. *Baugh v. Texas, etc., R. Co.*, 80 Tex. 56; 46 Am. & Eng. R. Cas. 105. In this case the court said: "When a nuisance is created by the construction of works in their nature permanent and are not subject to be abated, the rule is that all damages resulting therefrom to property may be recovered in an action, and the proper measure of damages is the depreciation in the value of the property. *Gainesville, etc., R. Co. v. Hall*, 78 Tex. 169; 44 Am. & Eng. R. Cas. 51; 22 Am. St. Rep. 42. That rule also applies where the injury is of a permanent character. But when the

nuisances are of a temporary character . . . only such damages as have accrued up to the institution of the suit can be recovered. For such damages depreciation in the value of the property affected by the injury is not a measure, and the amount of such depreciation cannot be recovered." See also *DAMAGES*, vol. 5, p. 2; *Adams v. Hastings, etc., R. Co.*, 18 Minn. 263.

2. *Excessive Damages.*—*Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574; 32 Am. & Eng. R. Cas. 233; 4 Am. St. Rep. 396; *Denver, etc., R. Co. v. Bourne*, 11 Colo. 59; 32 Am. & Eng. R. Cas. 228; *Texas, etc., R. Co. v. Goldberg*, 68 Tex. 685; 32 Am. & Eng. R. Cas. 242; *Fuller v. Chicago, etc., R. Co.*, 61 Iowa 125; 14 Am. & Eng. R. Cas. 149. See also *Gulf, etc., R. Co. v. Necco (Tex. 1891)*, 15 S. W. Rep. 1102.

3. *Speculative or Contingent Damages.*—*Muller v. Southern Pac. R. Co.*, 83 Cal. 240; *Jacksonville, etc., R. Co. v. Walsh*, 106 Ill. 253; 14 Am. & Eng. R. Cas. 246; *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Whitman v. Boston, etc., R. Co.*, 3 Allen (Mass.) 133; 7 Allen (Mass.) 313; *Driver v. Western Union R. Co.*, 32 Wis. 569; 14 Am. Rep. 726. See also *supra*, this title, *Elevated Railroads; In New York; Lafayette, etc., R. Co. v. Murdock*, 68 Ind. 137. Thus evidence as to what the value of the lot would have been had the railroad been built upon another street, is not admissible to show the damage to the lot. The damage to be recovered does not extend to a failure to realize a profit which, under another state of affairs, might have been realized, but is limited to the loss or injury actually suffered, and it is error to admit evidence of such speculative injury.

statute or constitutional provisions in several of the states.<sup>1</sup> But in the cases arising in connection with the occupation of streets by railroad companies these provisions have no application. There is merely an appropriation of easements appurtenant to the land, and the value of these easements can only be determined by estimating the value of the land with and without them. If the appropriation of such easements has resulted in an increased value of the land to which they were appurtenant, or has not affected the value at all, the abutting owner has no right to anything more than nominal damages. The rule may therefore be stated to be that in the cases under consideration benefits to the abutting land arising from the existence of the railroad are to be considered in estimating the damages recoverable by the owner.<sup>2</sup>

*f.* SPECIAL AND CONSEQUENTIAL DAMAGES.—The rule is well settled that the plaintiff must show that he has suffered special injury from the occupation of the street. Where there is no appropriation of property involved, but his only injury is the danger, annoyance, and inconvenience which the rest of the public using the street suffer in an equal degree, he has no cause of action.<sup>3</sup> This rule, however, is not to be misapplied; it relates to the right of the plaintiff as one of the general public having a right of pas-

Muller v. Southern Pac. R. Co., 83 Cal. 240.

1. See EMINENT DOMAIN, vol. 6, p. 583; Pacific Coast R. Co. v. Porter, 74 Cal. 261; 33 Am. & Eng. R. Cas. 167; Newman v. Metropolitan El. R. Co., 118 N. Y. 618; 43 Am. & Eng. R. Cas. 418, note; Reiser v. Atchison Union Depot, etc., Co., 27 Kan. 382; 10 Am. & Eng. R. Cas. 155; Doud v. Mason City, etc., R. Co., 76 Iowa 438; 36 Am. & Eng. R. Cas. 633.

2. See the general subject discussed at length in note to Newman v. Metropolitan El. R. Co., 118 N. Y. 618; 43 Am. & Eng. R. Cas. 418 *et seq.*; EMINENT DOMAIN, vol. 6, p. 581 *et seq.*; where the doctrine of the text is upheld and numerous authorities cited.

The rule of the text is practically that adopted in the *New York* Elevated Railway cases as set out in a previous section, and has received general recognition. *Supra*, this title, *Elevated Railroads*; Newman v. Metropolitan El. R. Co., 118 N. Y. 618; 43 Am. & Eng. R. Cas. 416; 41 Alb. L. J. 237; Livermore v. Jamacia, 23 Vt. 362; Cleveland v. Wick, 18 Ohio St. 303; Sullivan v. North Hudson County R. Co., 51 N. J. L. 518; 40 Am. & Eng. R. Cas. 324 (distinction made between general and special benefits; only latter

allowed to be considered); Guess v. Stone Mountain Granite, etc., Co., 72 Ga. 320; 28 Am. & Eng. R. Cas. 236; Pittsburgh, etc., R. Co. v. Reich, 101 Ill. 157; Chapman v. Oshkosh, 33 Wis. 629; Gulf, etc., R. Co. v. Fuller, 63 Tex. 467; 22 Am. & Eng. R. Cas. 155.

The measure of damages is the diminution in the market value of the property caused by the existence of the road, and if there is no diminution there can, of course, be no recovery beyond nominal damages. *Supra*, this title, *Measure of Damages*; Chapman v. Oshkosh, etc., R. Co., 33 Wis. 629; Carl v. Sheboygan, etc., R. Co., 46 Wis. 625.

3. See EMINENT DOMAIN, vol. 6, p. 545; Indiana, etc., R. Co. v. Eberle, 110 Ind. 542; 32 Am. & Eng. R. Cas. 225; 59 Am. Rep. 225; Rochette v. Chicago, etc., R. Co., 32 Minn. 201; 17 Am. & Eng. R. Cas. 192; Shaubert v. St. Paul, etc., R. Co., 21 Minn. 502; Proprietors, etc., v. Nashua, etc., R. Co., 10 Cush. (Mass.) 385; Rigney v. Chicago, 102 Ill. 64; Chicago, etc., R. Co. v. Ayres, 106 Ill. 512; 14 Am. & Eng. R. Cas. 152; Crowley v. Davis, 63 Cal. 460; Chicago, etc., R. Co. v. Berg, 10 Ill. App. 607; Central Branch, etc., R. Co. v. Andrews, 30 Kan. 593; 14 Am. & Eng. R. Cas. 248; Fogg v. Nevada, etc., R. Co., 20 Nev. 429; 43 Am. &



sage over the street, and not to his right as owner of the fee of the street or of easements therein.<sup>1</sup> To constitute special damage within the meaning of this rule of law, the damage suffered by the abutting owner must differ from that sustained by the general public, not only in degree but in kind; the plaintiff must estab-

Eng. R. Cas. 105; *Jackson v. Chicago*, etc., R. Co., 41 Fed. Rep. 656; 43 Am. & Eng. R. Cas. 145; *Boston v. Old Colony R. Co.*, 12 Cush. (Mass.) 605; *Beckett v. Midland R. Co.*, L. R., 3 C. P. 82; *Slatery v. Des Moines, etc.*, R. Co., 29 Iowa 148; 40 Am. Rep. 205; *Davenport v. Stevenson*, 34 Iowa 225; *Grand Rapids, etc.*, R. Co. v. Heisel, 38 Mich. 62; 31 Am. Rep. 306; *Central Branch, etc.*, R. Co. v. Andrews, 30 Kan. 590; 14 Am. & Eng. R. Cas. 248; *Atchison, etc.*, R. Co. v. Garside, 10 Kan. 552; *Kansas, etc.*, R. Co. v. Cuykendall, 42 Kan. 234; 16 Am. St. Rep. 479; *Pierce on Railroads*, p. 240; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Northern Transp. Co. v. Chicago*, 99 U. S. 635.

1. **Application of the Rule.**—The application of this rule is properly to be confined to one of the three relations which an abutting owner sustains to the street. Such owner sustains a three-fold relation to the street; first, as one of the general public; second, as the owner of property abutting thereon and possessing an easement of light, air and access; and, third, as [ordinarily] the owner of the fee or reversionary interest in the land covered by the street. See *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608.

It is in connection with the first of these relations that the rule of the text has an application. Thus in *Gilbert v. Greeley, etc.*, R. Co., 13 Colo. 501; 40 Am. & Eng. R. Cas. 305, the railroad crossed the street on which the plaintiff's property abutted at a distance of two hundred feet from such property. The plaintiff claimed damages on the ground that because of such crossing his property had diminished in value. It was held that he had no special property in the street, but a mere right of passage in common with the rest of the public, and that he could not recover in the absence of proof of special injury. The court said: "Every railroad company running its trains across a street or highway causes damage or inconvenience in a greater or less degree to every traveler having occasion to use the street or highway at the point of such crossing, as well as to every person

owning or occupying real estate anywhere in the vicinity of such crossing; and yet there is no remedy for such damage under ordinary circumstances, for the reason that, as a general rule, no one has any special private property or interest in the highway other than or different from the general public, and the damage thus suffered is common to all having occasion to use the street or highway. In such case private property cannot be said to be taken or damaged for public use within the meaning of the constitution." See *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465. See also the explanations in the opinion of Mitchell, J., in *Indiana, etc.*, R. Co. v. Eberle, 110 Ind. 542; 32 Am. & Eng. R. Cas. 224; 59 Am. Rep. 225.

Thus, one whose special easement of right of way in an alley is destroyed by the appropriation of the alley for railroad purposes is entitled to compensation, but not to compensation for the destruction of such general right of way as he enjoyed in common with the rest of the public generally. *Central Branch, etc.*, R. Co. v. Andrews, 30 Kan. 590; 14 Am. & Eng. R. Cas. 248.

**Railroad Not Adjoining Plaintiff's Property.**—So where the railroad does not occupy that part of the street running in front of the plaintiff's property there is no taking of property, and the plaintiff, in order to recover, must show that he has suffered some special damage, differing in kind and degree from that suffered by the rest of the public. *Rochette v. Chicago, etc.*, R. Co., 32 Minn. 201; 17 Am. & Eng. R. Cas. 192; *In re New York, etc.*, R. Co., 39 Hun (N. Y.) 338; *Demueles v. St. Paul, etc.*, R. Co., 44 Minn. 436; *Lakkie v. Chicago, etc.*, R. Co., 44 Minn. 438. But if access is obstructed, the landowner has a cause of action, though the railroad does not run in front of his property. *Brakken v. Minneapolis, etc.*, R. Co., 29 Minn. 41; 7 Am. & Eng. R. Cas. 593.

In an action brought by an abutting property owner to recover special damages for the construction of a railway along the street in front of his property impairing the use of the street, the plaintiff is not barred from recovering by the

lish the existence of an injury different in its legal characteristics from that sustained by the public generally.<sup>1</sup>

fact that other property owners in the same locality have also been injured in the same manner. *Texas, etc., R. Co. v. Goldberg*, 68 Tex. 685; 32 Am. & Eng. R. Cas. 240. See also *Gulf, etc., R. Co. v. Fuller*, 63 Tex. 467; 22 Am. & Eng. R. Cas. 154.

**1. Damage Must Differ in Character Not in Degree Merely.**—*Guess v. Stone Mountain Granite, etc., Co.*, 72 Ga. 320; 28 Am. & Eng. R. Cas. 236; *Crowley v. Davis*, 63 Cal. 460; *Chicago, etc., R. Co. v. Eisert*, 127 Ind. 156; *Matlock v. Hawkins*, 92 Ind. 225. See also *McDonald v. English*, 85 Ill. 232; *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379; 40 Am. Rep. 598; *Crook v. Pitcher*, 61 Md. 510; *Fairchild v. St. Louis*, 97 Mo. 85.

The subject was considered in *Gilbert v. Greeley, etc., R. Co.*, 13 Colo. 501; 40 Am. & Eng. R. Cas. 300, when the court, after reconciling the case of *Rigney v. Chicago*, 102 Ill. 80, went on to say: "To hold that damage may be recovered when the difference is in degree merely, would lead to difficulties practically insurmountable. It would necessitate determining the damage sustained by the public generally as a basis upon which to calculate the excess sustained by the plaintiff. This in turn would involve a variety of troublesome questions. For example, who are to be considered the 'general public' in such cases? Are they the people who own real property in the vicinity, or those who do not? Are they those who live near or those who live remote from the crossing? Or are they those who have neither residence nor property in the vicinity? None of these difficulties can arise under the rule as expressed in this opinion."

**What Constitutes Special Damage.**—See the following cases for instances of special damage. *Gulf, etc., R. Co. v. Fuller*, 63 Tex. 467; 22 Am. & Eng. R. Cas. 154; *Gottschalk v. Chicago, etc., R. Co.*, 14 Neb. 550; 14 Am. & Eng. R. Cas. 157; *Ford v. Santa Cruz R. Co.*, 59 Cal. 290; *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200; *Burlington, etc., R. Co. v. Reinhackle*, 15 Neb. 279; 14 Am. & Eng. R. Cas. 169; 48 Am. Rep. 342. The legislative grant is always made subject to the rights of adjacent property owners. See *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; 46 Am.

& Eng. R. Cas. 42. Thus, where the operation of a railroad along the street causes injury to abutting property by shaking down the plastering in the houses, and by constant noise, and by filling the air with smoke and cinders, it is said that legislative authority to construct and operate the road will be no defense to an action by the owner of the property. *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

Where the company, with the permission of the city, erected a trestle-work along one of the streets opposite plaintiff's land, only about thirteen feet from his fence, narrowing the street more than one-half, and so that sparks from the passing engines were thrown on plaintiff's land, it was held that there was special damage for which plaintiff might recover. *Gulf, etc., R. Co. v. Eddins*, 60 Tex. 656. See *Dubach v. Hannibal, etc., R. Co.*, 89 Mo. 483; 29 Am. & Eng. R. Cas. 611.

**Deprivation of Access.**—It has frequently been held that the owner of land abutting on a street has the right of ingress and egress to and from his land distinct from his rights in the street as a member of the public, and that when he is deprived of this right he is entitled to recover such damages as he has thereby sustained. *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 392; *Cosby v. Owensboro, etc., R. Co.*, 10 Bush (Ky.) 288; *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467; 68 Am. Dec. 650; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Hanlin v. Chicago, etc., R. Co.*, 61 Wis. 515; 20 Am. & Eng. R. Cas. 70; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; 60 Am. Dec. 683. See also *Denver v. Bayer*, 7 Colo. 113; 20 Am. & Eng. Corp. Cas. 467; *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41; 7 Am. & Eng. R. Cas. 593; *Rigney v. Chicago*, 102 Ill. 64; *McQuaid v. Portland, etc., R. Co.*, 18 Oregon 237; 40 Am. & Eng. R. Cas. 308; *Central Branch, etc., R. Co. v. Twine*, 23 Kan. 585; *Griffin v. Shreveport, etc., R. Co.*, 41 La. Ann. 808; 40 Am. & Eng. R. Cas. 295; *Kansas, etc., R. Co. v. Mahler*, 45 Kan. 565; *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. St. 544; 10 Am. St. Rep. 611; *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. St. 560; *Wead v. St. Johnsbury, etc., R. Co.* (Vt. 1892), 24 Atl. Rep. 361; *Herndon v. Kansas, etc.,*

The familiar principle that no liability arises from a proper exercise of a lawful authority<sup>1</sup> affords immunity to the railroad company from liability for consequential damages or injuries which necessarily attend the operation of the road, but which do not involve an appropriation of private property. Such injuries are *damnum absque injuria* and afford no cause of action to the party injured. Injuries of this class are such as result from the smoke, noise and vibration of passing trains, the danger of frightening horses, and similar causes.<sup>2</sup> This rule of exemption

R. Co., 46 Kan. 560; Fort Scott, etc., R. Co. v. Fox, 42 Kan. 490; 40 Am. & Eng. R. Cas. 331. See Louisville, etc., R. Co. v. Orr, 91 Ky. 109; Rummel v. New York, etc., R. Co., 9 N. Y. Supp. 404.

The case of Jackson v. Kiel, 13 Colo. 378; 40 Am. & Eng. R. Cas. 297, is to be distinguished in this connection. In that case the landowner was allowed to recover though the railroad was one hundred and thirty-two feet distant and merely crossed the highway. The highway however was a *cul de sac* and afforded the only means of access to plaintiff's premises; the railroad completely obstructed it, thus shutting off all access. The landowner's claim for damages was sustained, but the court was careful to say that he "could not recover for any general inconvenience thus occasioned which he might have suffered in common with the general public; but for the special and peculiar injury shown in this case he was doubtless entitled to compensation."

In Chicago, etc., R. Co. v. Eisert, 127 Ind. 156, the complaint alleged that the company was proceeding to lay a track within eight feet of the curb stone in the street adjoining complainant's premises, while the ordinance authorizing the use of the street directed the road to be located fifteen feet from the curb, and that it was also raising the established grade, which it had no right to do, thereby obstructing the street, cutting off access to and from the lot, and interfering with the proper flow of water. It was held that this stated a case of special damage for which recovery should be had.

Compare Fogg v. Nevada, etc., R. Co., 20 Nev. 429; 43 Am. & Eng. R. Cas. 105, holding that the construction of a track raised eight inches above the surface of the street did not constitute a special injury to an abutting lotowner. Jackson v. Chicago, etc., R. Co., 41 Fed. Rep. 656; 43 Am. & Eng. R. Cas. 145, holding that the ordinary obstruc-

tion of a street by a railroad thereon, and the consequent loss of trade arising from the diversion of travel and traffic to another street, is damage which is common to the public and not peculiar to the abutting owner, so that he could not recover therefor. This last case was decided in *Missouri*, and in determining the weight of these two cases as authority, the particular doctrines prevailing in these jurisdictions are to be considered.

1. See NUISANCES, vol. 16, p. 1000; RAILROADS, vol. 19, pp. 862, 923; Cooley's Const. Lim. (5th ed.), p. 475 (384).

2. **Consequential Damages.**—See generally EMINENT DOMAIN, vol. 6, p. 597; *supra*, this title, *Elevated Railroads—In New York*; Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472; Pennsylvania R. Co. v. Marchant, 119 Pa. St. 541; Dooner v. Pennsylvania R. Co., 142 Pa. St. 36; 33 Am. & Eng. R. Cas. 116; 4 Am. St. Rep. 659; 30 Am. & Eng. R. Cas. 399, 406, n; 2 Am. St. Rep. 618; Hatch v. Cincinnati, etc., R. Co., 18 Ohio St. 92.

The term consequential damages is used ordinarily to indicate such damages as arise not from the immediate act of the party, but in consequence of such act. See Bouv. L. Dict.; Eaton v. Boston, etc., R. Co., 51 N. H. 504; 12 Am. Rep. 147.

**Noise, Vibration, etc.**—In Atchison, etc., R. Co. v. Garside, 10 Kan. 552, the plaintiff asked for consequential damages arising from noise, smoke, offensive vapors, sparks, fires, shaking of the ground and other inconveniences and annoyances arising from the construction and operation of the railroad. The court having found that the occupation of the street by the railroad company was lawful held that there could be no recovery for the damages claimed. Valentine, J., said: "They are the consequential results of the exercise of a lawful business, and however annoying or injurious they may be to the plaintiff,

they form no foundation for a cause of action. They are in fact *damnum absque injuria*." See *Ottawa, etc., R. Co. v. Larson*, 40 Kan. 301.

So in *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 630, it was held that "in respect to the noise, smoke, and other discomforts arising from the ordinary use of the railroad by the company, the plaintiff has no more right to recover than any citizen who resides or may have occasion to pass so near the street as to be subjected to like discomforts." See also as sustaining the same principle, *Stone v. Fairbury, etc., R. Co.*, 68 Ill. 394; 18 Am. Rep. 556 (detention of trains, frightening of horses, danger to persons crossing the track, etc., classed as consequential damages); *Mix v. Lafayette, etc., R. Co.*, 67 Ill. 319 (same); *Porter v. North Missouri, R. Co.*, 33 Mo. 138; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 140; 4 Am. Rep. 205; *Hahn v. Southern Pac. R. Co.*, 51 Cal. 605. These cases, however, were decided in jurisdictions which state a doctrine not entirely in consonance with that stated as being the general doctrine.

One in front of whose property over a public street an elevated railroad is built under authority, is entitled to damages for loss of light and air, but not for noise, smoke, vibration, ashes, or dust, or the unsightly character of the structure. *In re New York El. R. Co.*, 36 Hun (N. Y.) 427.

"Undoubtedly a railway over the public highways of the district including the streets of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that they are incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation." Field, J., in *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 332; 11 Am. & Eng. R. Cas. 15. Compare *Hot Springs R. Co. v. Williamson*, 136 U. S. 121; 46 Am. & Eng. R. Cas. 59; *aff'g* 45 Ark. 429.

In *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472; 30 Am. & Eng. R.

Cas. 399; 2 Am. St. Rep. 618, and *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541; 33 Am. & Eng. R. Cas. 116; 4 Am. St. Rep. 659, often cited upon the subject of consequential damages, the railroad was not constructed in the street but on land belonging to the railroad company and abutting on the same street with plaintiff's property. Recovery was denied on the ground that the company was not *in delicto*.

"Exposure to noise and smoke, to danger and detention in crossing, the frightening of horses and similar inconveniences and discomforts, not amounting to a practical obstruction, are, however, not a taking of property, nor are such injuries, when not caused by negligence, actionable." Pierce on Railroads, p. 241. See also Cooley's Const. Lim. (5th ed.), p. 686 [553].

#### Contrary Views—Statutory Provisions.

—In construing the statute providing that the railroad company shall be responsible for injuries caused to private property, the *Ohio* court holds that damages may be recovered for injuries caused from noise, smoke, etc. The question is discussed at length in *Columbus, etc., R. Co. v. Gardner*, 45 Ohio St. 309; 32 Am. & Eng. R. Cas. 248. In *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200, Matthews, J., said: "In an action by the owners of abutting lots, they are entitled to recover full compensation for the depreciation in value of their property caused thereby. . . . The statute must be taken to mean what it plainly says; and there being no sufficient reason to the contrary, must be so construed that the railroad company, in the case contemplated, shall be held responsible for all injuries of every description done by its work to the plaintiff."

In *Gulf, etc., R. Co. v. Eddins*, 60 Tex. 656, it is said that "injuries resulting from sparks of fire, from engines, smoke, cinders, unusual noises, from bells and steam whistles and other annoyances of like character, are proper elements of damage." So in *Ham v. R. Co.*, 61 Iowa 716, the court, after stating the rule of damages to be the difference in the value of the property before and after the construction of the road said: "In estimating such damages the obstruction of the owner's view, interfering with his privacy, and the noises of operating trains, were proper to be considered." See also *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich.

from liability for consequential damages is not to be extended, however, to protect the company, where, by the exercise of proper care, the injury might have been prevented or greatly lessened, or where the company has been guilty of an unlawful or excessive exercise of the authority granted it.<sup>1</sup>

g. REMEDIES, CHARACTER OF ACTION, ETC.—(See also EMINENT DOMAIN, vol. 6, p. 591, *et seq.*).—The abutting owner must exercise his right to object to the occupation of the street without

62; 31 Am. Rep. 306; *Adden v. White Mountain, etc.*, R. Co., 55 N. H. 413; 20 Am. Rep. 220; EMINENT DOMAIN, vol. 6, p. 546-7; *Chapman v. Oshkosh, etc.*, R. Co., 33 Wis. 629; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 335; 11 Am. & Eng. R. Cas. 115; *Omaha, etc., R. Co. v. Janacek*, 30 Neb. 276; *Gainesville, etc., R. Co. v. Hall*, 78 Tex. 169; 44 Am. & Eng. R. Cas. 51; 22 Am. St. Rep. 42.

In *Fort Worth, etc., R. Co. v. Pearce*, 75 Tex. 281, it is held that any depreciation in the value of residence property occasioned by the probability that the railroad company, in operating and using its road in the street, will make unusual and loud noises, and emit from its engines smoke and cinders, and cause other like annoyances naturally incident to the operation of cars, is a proper element to be considered in estimating damages to such property by the location and operation of the road.

In *Pennsylvania* damages purely consequential are allowed by statute. *Hoffer v. Pennsylvania Canal Co.*, 87 Pa. St. 221.

In *Adams v. Chicago, etc., R. Co.*, 39 Minn. 296; 36 Am. & Eng. R. Cas. 7; 12 Am. St. Rep. 644, it was held that where, without the consent of the owner of abutting property and without compensation to him, a railroad is laid and operated along a portion of the street in front of his lot so as to cause smoke, dust, cinders, etc., to darken or pollute the air coming over that part of the street upon his lot, he may recover whatever damage is caused to his lot by so laying and operating the railroad on that part of the street.

Consult in this connection the rule applied in the elevated railway cases, *supra*, this title, *Elevated Railroads*. It seems that the doctrine there presented affords a means of reconciling the conflict of the authorities.

1. **Unlawful or Negligent Exercise of Authority.**—*Dubach v. Hannibal, etc., R. Co.*, 89 Mo. 483; 29 Am. & Eng. R.

Cas. 609 (injunction allowed to restrain unlawful use of street); *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433; 43 Am. & Eng. R. Cas. 219; 11 Am. St. Rep. 679; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; 14 Am. & Eng. R. Cas. 145; 43 Am. Rep. 661; *Louisville, etc., R. Co. v. Orr*, 91 Ky. 109; *Cadle v. Muscatine Western R. Co.*, 44 Iowa 11; *Chicago, etc. R. Co. v. McGinnis*, 79 Ill. 269; *Pierce on Railroads*, p. 241; *Delaware, etc., Canal Co. v. Wright*, 21 N. J. L. 469; *Hatfield v. Central R. Co.*, 33 N. J. L. 251.

Thus in *Cain v. Chicago, etc., R. Co.*, 54 Iowa 255, the railroad company, authorized to construct its track in the street, but as near the center of the street as possible, and not nearer than eighteen feet to the line of the street, placed its road within six feet of such line. It was held that the track in such a place constituted a nuisance, for which the owner of adjacent land might recover damages. As to the exact meaning of the words "line of the street," see *Chicago, etc., R. Co. v. Eisert*, 127 Ind. 156. So where the company is authorized to construct a single track in the street, an additional track is a nuisance. *Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa 105; 43 Am. & Eng. R. Cas. 121. Such unauthorized use of the street is a continuous wrong to abutting owners who may recover the amount of damages accruing from year to year. *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393; 10 Am. & Eng. R. Cas. 260.

In *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433; 43 Am. & Eng. R. Cas. 219; 11 Am. St. Rep. 679, the railroad company was authorized to run cars by steam motors between the city line and a certain street. It did not stop its cars so propelled at the specified street, but passed into and along it for some distance, and thence into an avenue in front of the plaintiff's premises. It was held that, omitting the question of the ownership of the fee of the street,

unreasonable delay; if he stands by without objection until the rights of third parties or of the public have intervened, he cannot maintain ejectment or insist upon an injunction,<sup>1</sup> though it seems he may still maintain an action for damages,<sup>2</sup> his recovery being limited to such damages as have accrued prior to the institution of

the plaintiff was entitled to recover for all injuries resulting from the operation of the road, including smoke, noise, etc., as the use of steam on the avenue was unauthorized and unlawful and in the nature of a nuisance. See also *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268.

1. **Delay in Instituting Suit.**—*Porter v. Midland R. Co.*, 125 Ind. 476; 46 Am. & Eng. R. Cas. 70; *Strickler v. Midland R. Co.*, 125 Ind. 412; *Midland R. Co. v. Smith*, 113 Ind. 233; 125 Ind. 509; 44 Am. & Eng. R. Cas. 222; *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491; 38 Am. & Eng. R. Cas. 453; *Hanlin v. Chicago, etc., R. Co.*, 61 Wis. 515; 20 Am. & Eng. R. Cas. 70 (landowner must pursue the statutory remedy in such case); *Pembroke v. Canada Cent. R. Co.*, 3 Ont. Rep. 503; 14 Am. & Eng. R. Cas. 117; *Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa 105; 43 Am. & Eng. R. Cas. 121; *Paul v. Connersville, etc., R. Co.*, 51 Ind. 527; *Goodin v. Cincinnati R. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *EMINENT DOMAIN*, vol. 6, p. 633.

The landowner may establish his title in an action against the railroad by adverse possession. *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.

Where the road is operated by a company, which has purchased it, the trespass by such purchasing company begins only from the date when it entered upon possession of the road, and the Statute of Limitations begins to run from that date against a suit to enjoin it from continuing such trespass. *Harbach v. Des Moines, etc., R. Co.*, 80 Iowa 593; 43 Am. & Eng. R. Cas. 115.

Where for a period of twenty years a railroad company has been permitted to occupy the street of a city in front of the complainants' premises for the purposes of a railroad track, under a claim of right, without remonstrance or complaint by the complainants, or those under whom they claim, and the railroad company, by such acquiescence, is induced to enter into a lease with the city, binding itself to build a depot and platform, of a width that could add but little to the inconvenience to which the complainants were subjected by the oc-

cupation of the street by the track, and from which the company cannot be released, equity will not interfere to prevent the erection. *Higbee v. Camden, etc., R., etc., Co.*, 20 N. J. Eq. 435.

But the grant to a company of the right to a joint and mutual use of a highway with the public cannot be set up under the Statute of Limitations as a bar, since in such case the use is not adverse. *Pittsburgh, etc., R. Co. v. Relch*, 101 Ill. 157.

**Ejectment Against Railroad Company.**—In *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491; 38 Am. & Eng. R. Cas. 457, it was held that ejectment was the proper remedy, but that the landowner had lost his right to exercise such a remedy by his delay in bringing the action. See also as to right to maintain ejectment, *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202. But in *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377, it is said that ejectment cannot be maintained where the occupation is authorized by the municipality having control of the street. In *Carpenter v. Oswego, etc., R. Co.*, 24 N. Y. 655, it is held, however, that where the proceedings for the establishment of a street had proved to be defective, ejectment would lie at the suit of the owner of the land against a railroad company constructing its road there by authority of the city. See also *Redfield v. Utica, etc., R. Co.*, 25 Barb. (N. Y.) 54.

2. See *Osborne v. Missouri Pac. R. Co.*, 37 Fed. Rep. 830; *Louisville, etc., R. Co. v. Soltwedde*, 116 Ind. 257; 36 Am. & Eng. R. Cas. 577; 9 Am. St. Rep. 852; *Gulf, etc., R. Co. v. Necco* (Tex. 1891), 15 S. W. Rep. 1102.

"It does not follow that because appellant cannot sue for an injunction or maintain an action of ejectment, he is remediless; on the contrary, as is clearly indicated in several cases, and directly decided in one case at least, he may maintain an action for damages." *Elliot, J.*, in *Porter v. Midland R. Co.*, 125 Ind. 476; 46 Am. & Eng. R. Cas. 72, referring to *Indiana, etc., R. Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650. See also *Rusch v. Milwaukee,*

the action, and within the statutory period of limitation, if the injury is of a temporary character; but if the trespass is a permanent one all damages may be recovered in a single action.<sup>1</sup> The remedy of the abutting owner lies in an action for damages, and equity will not interpose to enjoin the occupation of the street, except in extraordinary cases, as where such occupation is without authority.<sup>2</sup> And it seems that the right of action for such damages is in the party owning the abutting lot at the time of the occupation of the street, and does not pass to subsequent pur-

etc., R. Co., 54 Wis. 136; 6 Am. & Eng. R. Cas. 609; *Evans v. Missouri*, etc., R. Co., 64 Mo. 453; *State v. St. Louis*, etc., R. Co., 86 Mo. 288; 29 Am. & Eng. R. Cas. 607. Compare, however, *Whittier v. Portland*, etc., R. Co., 38 Me. 26.

**Priority of Landowner's Claim for Damages.**—A landowner's claim for damages for a trestle work in front of his lot, is paramount to that of the company's mortgage creditors, and is not waived by having allowed the construction without compensation or security first given. *Mercantile Trust Co. v. Pittsburgh*, etc., R. Co., 29 Fed. Rep. 732.

**1. Extent of Recovery in Single Action.**—In *New York* the doctrine is well established that in actions against railroad companies for the occupation of streets, only such damages are recoverable as have accrued up to the time of the institution of the action. See *Uline v. New York Cent.*, etc., R. Co., 101 N. Y. 109; 23 Am. & Eng. R. Cas. 3; 54 Am. Rep. 661; *supra*, this title, *Elevated Railroads; In New York*.

It seems, however, that a distinction is to be made between cases in which the trespass is a permanent one and those in which the injury is of a temporary character. Thus, where the action is for the unlawful or negligent construction or operation of the road, it is not presumed that such illegality or negligence will continue, and only damages are recoverable which have accrued up to the commencement of the action. *Brakken v. Minneapolis*, etc., R. Co., 29 Minn. 44; 37 Am. & Eng. R. Cas. 596; *Central Branch*, etc., R. Co. v. *Twine*, 23 Kan. 585; 33 Am. Rep. 203; *Baugh v. Texas*, etc., R. Co., 80 Tex. 56; 46 Am. & Eng. R. Cas. 105; *Blesch v. Chicago*, etc., R. Co., 43 Wis. 183; *Holmes v. Wilson*, 10 A. & E. 503; 37 E. C. L. 161. But where the trespass or injury is permanent, as is the case where an embankment is constructed in the street, or in many juris-

dictions where the company merely occupies the street with its road without tendering compensation, damages for the permanent injury to property may be recovered in an action. The *Indiana* courts refuse to allow successive actions in such a case. *Central Branch*, etc., R. Co. v. *Twine*, 23 Kan. 585; 33 Am. Rep. 203; *Strickler v. Midland R. Co.*, 125 Ind. 412; *Porter v. Midland R. Co.*, 125 Ind. 476; 46 Am. & Eng. R. Cas. 70; *White v. Chicago*, etc., R. Co., 122 Ind. 317; 43 Am. & Eng. R. Cas. 156; *Lafayette v. Nagle*, 113 Ind. 425; 22 Am. & Eng. Corp. Cas. 411; *Fox v. Baltimore*, etc., R. Co., 34 W. Va. 466; *Elliott on Roads and Streets*, p. 199 and cases cited. See also in this connection *Adams v. Hastings*, etc., R. Co., 18 Minn. 260; *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190; *Sherman v. Milwaukee*, etc., R. Co., 40 Wis. 645; *DAMAGES*, vol. 5, p. 17 *et seq.*

When the right of the company to acquire title as a result of the suit is recognized, damages for permanent depreciation of property may be recovered; but where the action is in trespass and denies defendant's right to continue the obstruction or to acquire title, only such damages as had accrued at the time the action was commenced are recoverable. *Indiana*, etc., R. Co. v. *Eberle*, 110 Ind. 542; 32 Am. & Eng. R. Cas. 220.

**2. Remedy Is Not by Injunction.**—*Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; 5 Am. & Eng. R. Cas. 248; *Mills v. Parlin*, 106 Ill. 60; *Stetson v. Chicago*, etc., R. Co., 75 Ill. 74; *Osborne v. Missouri Pac. R. Co.*, 37 Fed. Rep. 830; *Heath v. Des Moines*, etc., R. Co., 61 Iowa 11; 10 Am. & Eng. R. Cas. 313; *Norfolk*, etc., R. Co. v. *Smoot*, 81 Va. 504; *Tuckahoe Canal Co. v. Tuckahoe*, etc., R. Co., 11 Leigh (Va.) 42. Compare *supra*, this title, *Elevated Railroads; In New York*.

Where the injunction is allowed the court will usually dissolve it upon the

chasers; those purchasing after the construction of the road take with notice of the rights acquired by the company and of the injury to the property.<sup>1</sup> As to other parties to the action, general rules of law prevail.<sup>2</sup>

If the plaintiff is the owner of two contiguous lots abutting on the street occupied, it is proper to assess the damages to both lots

company's executing a proper bond conditioned to pay all damages awarded against it. *Fouche v. Rome St. R. Co.*, 84 Ga. 233; *McMahon v. St. Louis, etc.*, R. Co., 41 La. Ann. 827. See also *Kavanagh v. Mobile, etc.*, R. Co., 78 Ga. 271; 32 Am. & Eng. R. Cas. 267; *Patterson v. Chicago, etc.*, R. Co., 75 Ill. 588; *Cairo, etc.*, R. Co. v. *People*, 92 Ill. 170; *Georgia Southern, etc.*, R. Co. v. *Ray*, 84 Ga. 376; 43 Am. & Eng. R. Cas. 95 (injunction granted until performance of condition requiring compensation); *Ross v. Georgia, etc.*, R. Co., 33 S. Car. 477; 46 Am. & Eng. R. Cas. 34. In *Iowa* the abutting owner may always enjoin the company, unless it has paid the compensation provided by statute, and this right to enjoin is not merged in an unpaid judgment for damages against the company. *Harbach v. Des Moines, etc.*, R. Co., 80 Iowa 593; 43 Am. & Eng. R. Cas. 115.

1. **Right of Subsequent Purchaser to Damages.**—*Dixon v. Baltimore, etc.*, R. Co., 1 Mackey (D. C.) 78; 3 Am. & Eng. R. Cas. 201; *Merchants' Union Barb Wire Co. v. Chicago, etc.*, R. Co., 70 Iowa 105; 43 Am. & Eng. R. Cas. 121; *Pratt v. Des Moines, etc.*, R. Co., 72 Iowa 249; 32 Am. & Eng. R. Cas. 236 (subsequent purchasers are charged with notice of rights of the railroad company); *Lewis v. Wilmington, etc.*, R. Co., 11 Rich. (S. Car.) 91; *Rand v. Townshend*, 26 Vt. 670; *Mills on Em. Dom.*, § 66; *Redfield on Railroads* 350. Compare the doctrine in *New York*, *supra*, this title, *Elevated Railroads*; *In New York*.

There is no reason, however, to prevent the landowner from making a valid assignment of his claim for damages. *Pratt v. Des Moines, etc.*, R. Co., 72 Iowa 249; 32 Am. & Eng. R. Cas. 236.

The abutting owner's right to maintain the action is not affected by the fact that he parted with the title to the land after the institution of the action. *Carl v. Sheboygan, etc.*, R. Co., 46 Wis. 629.

**Future Damage.**—In *Merchants' Union Barb Wire Co. Chicago, etc.*, R. Co., 70 Iowa 109, the occupation of a

street by a railway company without making compensation to owners of abutting property, as provided by statute, was declared to be a continuing trespass and nuisance, for which any owner of a lot might recover; and if no recovery was had by the lot owner for the trespass and nuisance which would compensate for the future and continuous occupancy of the street by the railroad, his grantee could maintain an action for any injury he sustained thereby. But see *Pratt v. Des Moines, etc.*, Ry. Co., 72 Iowa 249; 32 Am. & Eng. R. Cas. 236.

2. See generally, **PARTIES TO ACTIONS**, vol. 17, p. 470; **EMINENT DOMAIN**, vol. 6, p. 608.

**Heirs or devisees as Parties.**—The cause of action lies in favor of the party owning the property at the time the injury is committed. See generally *supra*, this title, *Elevated Railroads*; *In New York*. Therefore where a company sets stakes for the construction of its road in a street and the abutting owner dies before any further steps are taken, an action for consequential damages is properly brought in the name of the widow and heirs of the deceased proprietor and not in the name of the personal representatives, the mere setting of the construction stakes not being an injury to the abutting property. *Pennsylvania, etc.*, R. Co. v. *Ziemer*, 124 Pa. St. 560. See also *Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102.

**Misjoinder of Parties—Application for Injunction.**—Where the fee of the street to the center is in the owners of abutting property, the interest of each owner in the same is separate and individual, and a complaint in which several proprietors are joined as parties' plaintiff and which seeks to enjoin the construction of the railroad on the street on the ground that it has not legally acquired the right to do so nor made compensation therefor, is demurrable for misjoinder of parties' plaintiff. *Fogg v. Nevada, etc.*, R. Co., 20 Nev. 429; 43 Am. & Eng. R. Cas. 105. The better doctrine seems to be, however, that proprietors of lands abutting on the street



together, although they may not have been so used by the owner in connection with each other that they would be considered one tract in ordinary condemnation proceedings.<sup>1</sup> In one jurisdiction this rule has been carried so far as to make a recovery for damages to one lot abutting on the street a bar to an action for similar damages to another lot on the same street, when the lots were the property of the same party but not contiguous.<sup>2</sup>

Where a railroad obstructs a private way the owner has a cause of action against the company. It seems, however, where the statute prescribes a specific penalty for the obstruction of a road or private way by a railroad, the owner cannot maintain an ordinary action of trespass, but must pursue the statutory remedy.<sup>3</sup>

The fact that the abutting owner was a member of the city council and voted for the grant to the company of the right to use the streets, does not estop him from maintaining his action for damages to his property.<sup>4</sup> So, where the plaintiff contracted with the company to procure for it a right of way through the city streets, his contract must be construed as relating to the securing of the consent of the local authorities and not of immunity from liability for damages to property holders.<sup>5</sup>

may be joined as parties' plaintiff in a suit to restrain a railroad company from laying its tracks in the street without first making compensation. *Taylor v. Bay City*, St. R. Co., 80 Mich. 77; 43 Am. & Eng. R. Cas. 335.

**Action by Holder of Equitable Title.**—In an action for damages the holder of the legal title should always be joined as a party plaintiff; if, however, no objection is made for non-joinder the holder of the equitable title may recover damages to his estate. *Hastings*, etc., R. Co. v. *Ingalls*, 15 Neb. 123; 20 Am. & Eng. R. Cas. 60.

**1. Where Plaintiff Owns Two Lots—Damages for Both Recoverable in a Single Action.**—*Lamm v. Chicago*, etc., R. Co., 45 Minn. 71; 46 Am. & Eng. R. Cas. 42; *Atchison*, etc., R. Co. v. *Boerner* (Neb.), 51 N. W. 842; *EMINENT DOMAIN*, vol. 6, p. 577.

**2.** *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415; 46 Am. & Eng. R. Cas. 66; 21 Am. St. Rep. 57. In this case it was said: "The fact that it (the railroad) damaged two lots belonging to the same man at the same time, and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive." See also *Brammenburgh v. Indianapolis*, etc., R. Co., 13 Ind. 103; 74 Am. Dec. 250. And in such case the lot owner cannot recover

for the continued operation of the railroad after the judgment in the former action, if the evidence shows no damage accruing after that date. *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415; 46 Am. & Eng. R. Cas. 66; 21 Am. St. Rep. 57.

**3. Obstruction of Private Ways.**—*Ross v. Georgia*, etc., R. Co., 33 S. Car. 477; 46 Am. & Eng. R. Cas. 34; *Railroad Com'rs v. Columbia*, etc., R. Co., 26 S. Car. 353; 30 Am. & Eng. R. Cas. 177; *Kansas City*, etc., R. Co. v. *Farrell*, 76 Mo. 183. See also *Presbrey v. Old Colony R. Co.*, 103 Mass. 1 (one cannot have private way over his own land); *Clark v. Boston*, etc., R. Co., 24 N. H. 114; *Kimball v. Cochecho R. Co.*, 27 N. H. 448; 59 Am. Dec. 387; *Greenwood v. Wilton R. Co.*, 23 N. H. 261.

Where the plaintiff's allegation is that the way is so entirely obstructed that he cannot pass, and the proof shows only a partial obstruction, so that he had still ample room for passage, there is a fatal variance and a non-suit should be ordered on motion by defendant. *Ross v. Georgia*, etc., R. Co., 33 S. Car. 477; 46 Am. & Eng. R. Cas. 34.

See generally, *PRIVATE WAYS*, vol. 19, p. 95.

**4. Estoppel.**—*Lamm v. Chicago*, etc., R. Co., 45 Minn. 71; 46 Am. & Eng. R. Cas. 42.

**5.** *Rosenthal v. Taylor*, etc., R. Co.,

The abutting owner cannot be required to initiate the proceedings to assess the value of the easements or other property to be appropriated; it is the duty of the railroad company to ascertain the values and to pay over compensation for all property rights appropriated by it, and the landowner may compel it to have such assessment made before it commences the construction of its road upon the street.<sup>1</sup> Nor can he be required or allowed to enter upon the street and make repairs or changes in order to lessen the injury to his property and so decrease the amount of damage.<sup>2</sup>

Where the statute provides a rule of compensation, its provisions are to be followed as to the method of assessing the damages.<sup>3</sup> The abutting owner may, however, maintain an ordinary action at law for damages sustained from trespass or other illegal acts committed prior to the assessment.<sup>4</sup>

Where the railroad company occupies a street or highway without due authority, or exercises its rights in respect thereto in a negligent or improper manner, so as to amount to a public nuisance, the remedy is by indictment as in the case of nuisances by private individuals.<sup>5</sup>

79 Tex. 325; 46 Am. & Eng. R. Cas. 52, note.

**1. Company's Duty to Have Damages Assessed.**—Cox v. Louisville, etc., R. Co., 48 Ind. 178; Dickson v. Baltimore, etc., R. Co., 3 MacArthur (D. C.) 862; Parker v. East Tennessee, etc., R. Co., 13 Lea (Tenn.) 669; Mulholland v. Des Moines, etc., R. Co., 60 Iowa 640. Compare, however, Spencer v. Point Pleasant R. Co., 23 W. Va. 406; 20 Am. & Eng. R. Cas. 125.

**2. Central Branch, etc., R. Co. v. Andrews,** 26 Kan. 702; 5 Am. & Eng. R. Cas. 370.

**3. Statutory Method Must be Pursued.**—Ford v. Chicago, etc., R. Co., 14 Wis. 617; 80 Am. Dec. 791. In this case it is said: "It seems that the past damages, or those occasioned by the trespass, might have been assessed by the court (Williams v. New York Cent. R. Co., 16 N. Y. 97); or the judge might perhaps have ordered a jury for that purpose; but the permanent damages, or those which would accrue to the plaintiff by the continued use of the land by the company, can only be ascertained in the manner prescribed by the statute." See also EMINENT DOMAIN, vol. 6, p. 604.

In Ohio the landowner having the fee of the street may proceed under section 12 of act of 1872 (69 Ohio Laws 95) to compel the railroad company to condemn a right of way over the street.

Lawrence R. Co. v. Williams, 35 Ohio St. 168.

The statutory method of assessing damages in condemning a right of way does not apply, however, where property is not taken, but is merely damaged. Burlington, etc., R. Co. v. Reinhackle, 15 Neb. 279; 14 Am. & Eng. R. Cas. 169; 48 Am. Rep. 342.

In Iowa, where the statute provides for compensation, the abutting owner cannot institute proceedings for the assessment of damages; the only method of having the damages assessed at his own instance is by a proceeding for judgment. Harbach v. Des Moines, etc., R. Co., 80 Iowa 593; 43 Am. & Eng. R. Cas. 117; Mulholland v. Des Moines, etc., R. Co., 60 Iowa 740; 10 Am. & Eng. R. Cas. 99; Daniels v. Chicago, etc., R. Co., 35 Iowa 135; 14 Am. Rep. 490. Compare Donald v. St. Louis, etc., R. Co., 52 Iowa 411.

The statutory method must be pursued; therefore the plaintiff cannot have a sheriff's jury to assess the damages in the mode prescribed for a condemnation of a right of way. Stough v. Chicago, etc., R. Co., 71 Iowa 641; 30 Am. & Eng. R. Cas. 397; Mulholland v. Des Moines, etc., R. Co., 60 Iowa 740; 10 Am. & Eng. R. Cas. 99.

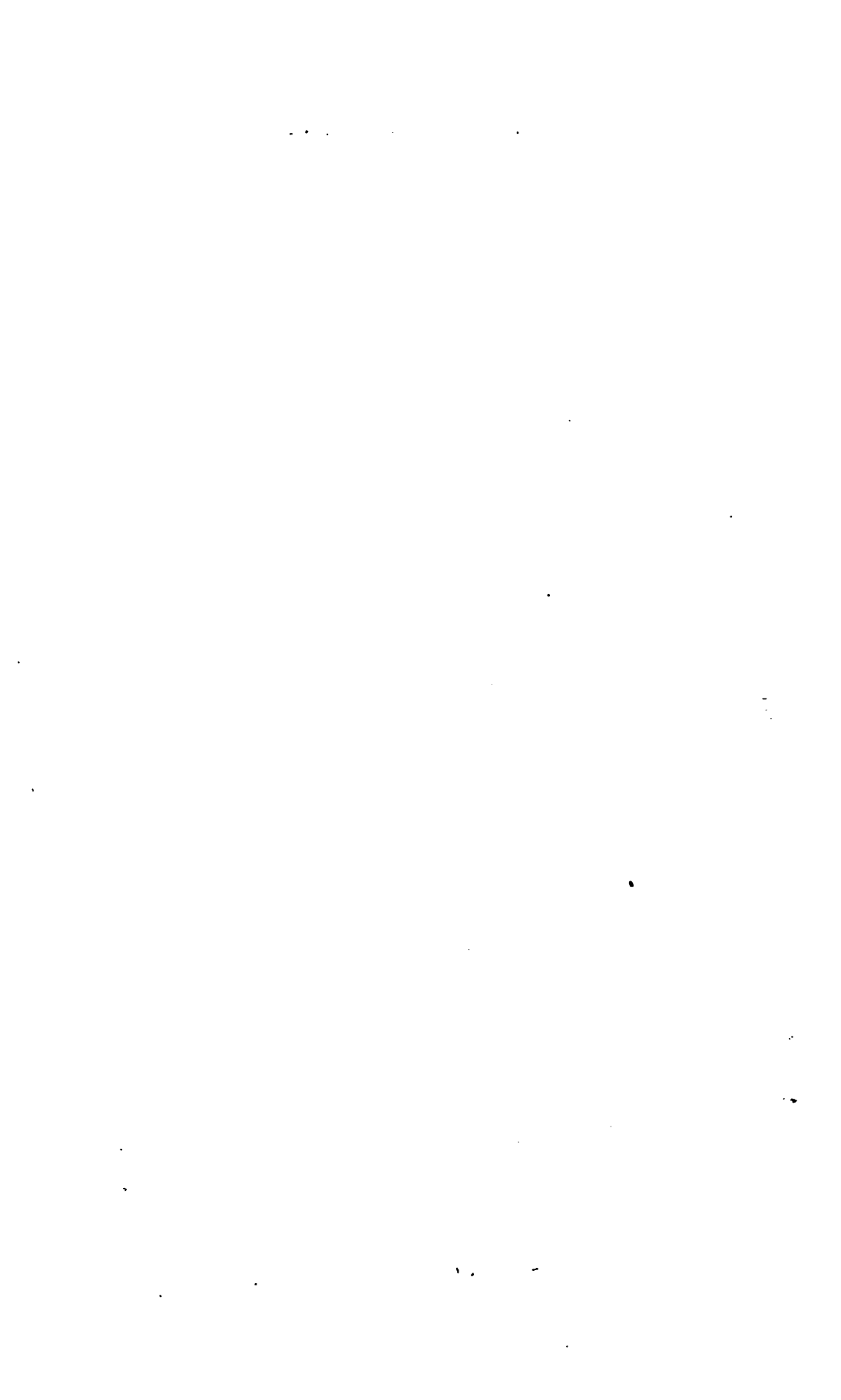
**4. Drady v. Des Moines, etc., R. Co.,** 57 Iowa 393; 14 Am. & Eng. R. Cas. 131.

**5. Remedy by Indictment.**—See generally CORPORATIONS, vol. 4, p. 267;

RAILROADS, vol. 19, p. 926. See as to the rule of the text, Northern Cent. R. Co. v. Com., 90 Pa. St. 300; 5 Am. & Eng. R. Cas. 318; Cincinnati Southern R. Co. v. Com., 80 Ky. 137; 7 Am. & Eng. R. Cas. 91; Central R. Co. v. State, 32 N. J. L. 220; Com. v. Nashua, etc., R. Co., 2 Gray (Mass.) 54; Com. v. Old Colony, etc., R. Co., 14 Gray (Mass.) 93; Salem v. Eastern R. Co., 98 Mass. 431; 96 Am. Dec. 650; Palatka, etc., R. Co. v. State, 23 Fla. 546; 32 Am. & Eng. R. Cas. 191; 11

Am. St. Rep. 395; Pittsburgh, etc., R. Co. v. Com., 101 Pa. St. 192; 10 Am. & Eng. R. Cas. 321.

**Unlawful Occupation of Streets—Continuing Trespass.**—If the use and occupation of the street is unlawful, it is a continuing trespass for which repeated actions to recover damages will lie as long as the trespass is continued until the occupancy ripens into title by prescription. Lamm v. Chicago, etc., R. Co., 45 Minn. 72; 46 Am. & Eng. R. Cas. 47.



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